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THE
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ANNOTATED

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CORRIGENDA.

[1944] 2 All E.R. 600, *Re* BAYNES. Solicitors: *Jaques & Co.* were for the first defendants.

P. 105. CUTLER *v.* WANDSWORTH STADIUM, LTD. At end of l. C.2 for "and" read "but." Beginning of l. F.3 should read "I do not say that these are not matters."

P. 183. YUILL *v.* YUILL. Date of judgment should be Dec. 20.

P. 267. AINLEY *v.* AINLEY. Solicitors: *Jaques & Co.* were agents for *Moore, Shepherd & Whitley*, for the petitioner.

P. 287. *Re* SHELTON'S WILL TRUSTS. Solicitors: *Jaques & Co.* were agents for *Watts & Son.*
FISHER *v.* RUISLIP-NORTHWOOD U.D.C. For "DU PARCQ, L.J.," read "UTHWATT, J."

P. 316, 317. AUSTIN *v.* ZURICH INSCE. CO. In the headnote and the editorial note for "s. 30," read "s. 36."

P. 428. BONHAM *v.* ZURICH INSCE. CO. In l. A.3 for "insurer" and "assured."

P. 570. B. O. MORRIS, LTD. *v.* PERROTT. Solicitors: *Page, Moore & Page* were agents for *Freeland & Passey*, for the respondent (plaintiff).

P. 660. *Re* COCHRANE. Date of judgment should be Mar. 22.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

Re BLAKE, CLUTTERBUCK *v.* BRADFORD.

[COURT OF APPEAL (Lord Greene, M.R., Finlay, L.J., and Uthwatt, J.), **November 28, 1944.**]

Solicitors—Costs—Charging order—Order for costs only " property recovered "—No distinction between order made on originating summons and any other order—Discretion of court to refuse order—Solicitors Act, 1932 (*c.* 37), *s.* 69.

The appellants were solicitors employed to act for the respondent, Colonel Blake, in proceedings by the trustees of a will for the administration of an estate. The respondent's claim as a creditor of the estate was unsuccessful and, on Apr. 14, 1943, he was ordered to pay to the residuary legatees taxed costs amounting to £39 10*s.* 5*d.* In further proceedings in which his interest under the will was held to have ceased, an order was made on July 20, 1943, under which costs taxed at £38 13*s.* 3*d.*, and payable out of residue were awarded to the respondent. On July 17, 1943, the residuary legatees obtained a garnishee order *nisi* attaching the £38 13*s.* 3*d.* to which the respondent was entitled. Before that order could be made absolute, the appellants applied for a charging order under the Solicitors Act, 1932, s. 69. The appellants contended that although the order of July 20, 1943, was only for the payment of costs to the respondent, nevertheless they were entitled under the section to a charge on those costs as being property recovered through their instrumentality. For the respondent it was contended that (i) where there was a judgment for costs alone and no judgment for the recovery of some specific property, the costs were not " property recovered " ; (ii) costs awarded on an originating summons issued for the construction of a will were to be distinguished from costs awarded in hostile litigation ; (iii) on the true construction of the Solicitors Act, 1932, s. 69, the appellants were not entitled to a charging order as of right but only as a matter of discretion :—

HELD : (i) costs were " property recovered " within the meaning of sect. 69.

Dallow v. *Garrold* (1) *applied ; Higgs* v. *Higgs* (4) *overruled.*

(ii) there was no ground for a distinction between an order for costs made on an originating summons and any other order for costs.

(iii) *prima facie* the appellants were entitled to the charging order under the Solicitors Act, 1932, s. 69, although their right to it was a matter of discretion only. Where their conduct was not involved, the court would only be justified in refusing their application in very exceptional circumstances.

[**EDITORIAL NOTE.** This decision is one of great importance to solicitors. It was decided as long ago as 1884 in *Dallow* v. *Garrold* (1) that a solicitor is entitled to a charging order on a sum representing a debt and costs as "property recovered," and it is here held that this decision applies equally where the judgment obtained through the instrumentality of the solicitor relates to costs alone.

As to Charging Order for Costs, see HALSBURY, Hailsham Edn., Vol. 31, pp. 252-261, paras. 275-282; and for Cases, see DIGEST, Vol. 42, pp. 290-304, Nos. 3250-3382.]

Cases referred to:

*(1) *Dallow* v. *Garrold, Ex p. Adams* (1884), 14 Q.B.D. 543; 42 Digest 302, *3366*; 54 L.J.Q.B. 76; 52 L.T. 240.

(2) *Johnston* v. *MacKenzie*, [1911] 2 I.R. 118; 42 Digest 286, *3197 viii*.

*(3) *Re Viney's Trust* (1868), 18 L.T. 851; 42 Digest 300, *3345*.

*(4) *Higgs* v. *Higgs*, [1934] P. 95; Digest Supp.; 103 L.J.P. 44; 150 L.T. 516.

Appeal by the applicants from a decision of Vaisey, J., dated Oct. 26, 1944, refusing an application for a charging order under the Solicitors Act, 1932, s. 69. The facts are fully set out in the judgment of Lord Greene, M.R.

V. R. Aronson for the appellants.

C. D. Myles for the respondent.

Lord Greene, M.R.: This appeal raises a question of considerable importance to solicitors. It arises in the following circumstances. In an action entitled *In the Estate of Eliza Flora Blake*, in which the executors and trustees were plaintiffs and the residuary legatees were defendants, an inquiry was ordered as to debts. Upon that inquiry one Colonel Blake attended in chambers, having been served with notice of the order, and claimed to be a creditor of the estate. In that application he was unsuccessful, and by an order of Apr. 14, 1943, he was ordered to pay to the defendants in the action, who were the parties interested in disputing his claim, their costs of the application. No order was made as to the costs of the plaintiff trustees, because in the ordinary way they would get their costs out of the estate. There, then, was a debt under that order owing by Colonel Blake to the defendants personally. Now it so happened that Colonel Blake was a legatee under the will of the testatrix, but to the legacy there was attached a stringent condition with regard to raising questions. I need not go into that, but the sequel was this: He having unsuccessfully claimed to be a creditor of the estate, the trustees then took out a summons in the proceedings in order to have determined the question whether Colonel Blake, by making that claim, had forfeited his legacy. On that application Cohen, J., on July 20, 1943, made a declaration that, on the true construction of the will and in the events which had happened, the interest of Colonel Blake in the capital sum in question had ceased, and an order was made for taxation of the costs of the plaintiffs, the trustees, the defendants, the residuary legatees and Colonel Blake himself as between solicitor and client, and for the payment of the costs when taxed out of the residuary estate.

The position, therefore, was this. Under the first order Colonel Blake was liable to the residuary legatees as individuals under the order for costs then made. Under the second order Colonel Blake was entitled to obtain his costs not against the residuary legatees as individuals, but out of the fund in the hands of the trustees. That order in fact gave Colonel Blake a charge upon the fund to the extent of his taxed costs. In both those matters the firm of solicitors now applying for the charging order acted for Colonel Blake. The costs were taxed. The costs payable by Colonel Blake under the first order were £39 10*s*. 5*d*. The costs payable to Colonel Blake out of the residue pursuant to the second order were taxed at £38 13*s*. 3*d*. so that there is less than £1 between the two figures.

On July 7, 1944, the defendants obtained a garnishee order *nisi* attaching the £38 13*s*. 3*d*. to which Colonel Blake was entitled under the second order for costs out of the fund in the hands of the plaintiffs. But before that order could be made absolute the solicitors, the present appellants, applied for a charging order. The result of that application if successful will be, of course, that the solicitors will obtain the £38 13*s*. 3*d*., while the residuary legatees, who have a personal order for costs against Colonel Blake under the first order, will have to obtain such comfort as they can by other methods of execution, which may or may not yield something, but I will assume that they will yield nothing. In that case the residuary legatees will not obtain payment of the costs to which they became entitled under the first order.

The section under which charging orders may be made is now the Solicitors Act, 1932, s. 69, which empowers the court to declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to the suit, matter or proceeding. There has been no substantial change throughout the history of legislation relating to solicitors' charging orders.

It is said on behalf of the solicitors that, although the only order which Colonel Blake obtained in the second proceedings was an order for payment of his costs out of the residuary estate, nevertheless they are entitled to a charge on those costs as being property recovered through their instrumentality. It is to be observed in the first instance, as I have already said, that the effect of the order of COHEN, J., was to give Colonel Blake a charge upon residue for his costs, and to that extent the order has resulted in his having what he had not got before, namely, a charge. But I do not wish to base my conclusion upon that narrow ground, because the question at issue raises broader considerations. It is said on behalf of the defendants in the action who have obtained the garnishee order that where there is a judgment for costs alone and no judgment for the recovery of some specific property, or the recovery of a money judgment for damages or something of that kind, the section does not apply. As an alternative argument it is said that there is a special consideration in the case of an originating summons, which is not of the same character, it is said, as what is described by counsel for the respondent as hostile litigation. Whatever one might have thought if the question had come up for the first time whether costs can be described as property recovered, the matter in my opinion is settled by authority. In the case of *Dallow* v. *Garrold* (1) a judgment had been obtained for a sum of money, and costs, and a *fi. fa.* had been issued on behalf of the successful plaintiff. The sheriff had money in his hands under the *fi. fa.* and a garnishee summons had been issued by a judgment creditor of the plaintiff with a view to attaching that money in the hands of the sheriff. The solicitor for the plaintiff then applied for a charging order against not merely the money sum recovered under the judgment, but against the sum representing the costs awarded to his successful client. The question, therefore, quite clearly arose whether he was entitled to a charging order in so far as it related to the sum recovered by the sheriff in respect of costs. In the argument at p. 545, this point was taken:

> Sixthly, the money held by the sheriff was in a great measure recovered for Dallow's costs. Therefore the sum attached by the solicitor was made up chiefly of money representing costs. Costs are not "property" such as a solicitor can attach under the Act. That which a plaintiff recovers for another and in order to pay another's work, cannot be his "property."

That was the argument, and it raised the point as neatly as could be. If that argument had been accepted the result would have been that the charging order would have been confined to the amount of the substantive judgment to the exclusion of the amount recovered in respect of costs. BRETT, M.R., at p. 545, said:

> This case has been ingeniously argued, and it has been contended that although a judgment for debt and costs has been obtained through the instrumentality of a solicitor, nevertheless he has no title to a charging order, and that the sum of money recovered for costs is not "property" within the meaning of the Solicitors Act, 1860, s. 28. But it is something which has been recovered, the debt and the costs were originally in the hands of the judgment debtor, and were recovered from him through the writ of *fi. fa.* issued to the sheriff.

That seems to me to be as clear a decision as one would want that the debt and the costs are both of them properly described as property recovered. If the true view were that costs are not property recovered I cannot see how their position can be improved or altered by the fact that in addition to costs there is a substantive money judgment. The fact that there is a substantive money judgment could not turn something else, namely, costs, into property recovered which in its nature was not property recovered.

It was argued by counsel for the respondent that the present case is distinguishable, and that the authority of *Dallow* v. *Garrold* (1) only covers a case where, in addition to the judgment for costs, there is a judgment for the recovery of some specific property or sum of money. I cannot accept any such distinction. It seems to me that once it has been decided that costs, as in *Dallow*

v. *Garrold* (1), are property recovered the principle must inevitably cover the case where costs are the only subject matter of the judgment. It is to be noticed that the language of BRETT, M.R., is specifically directed to that question. Let me read it again:

> . . . it has been contended . . . that the sum of money recovered for costs is not "property" within the meaning of [the Act]. But it is something which has been recovered.

"It" being the sum of money recovered for costs. It is as clear as possible a statement of opinion that that is the case. That authority has stood for all those years. It is true that in an Irish case of *Johnston* v. *Mackenzie* (2), LORD O'BRIEN, L.C.J., in Ireland expressed some hesitation in approving that principle, but he in fact followed *Dallow* v. *Garrold* (1). That case does not seem to me to be an authority against the solicitors in the present case, but, if anything, it is in their favour because it followed *Dallow* v. *Garrold* (1).

Those are the two cases which I think are worth referring to in this connection, but I would like to point out the remarkable results which would follow if the argument of counsel for the respondent were right. Let me take two examples. A plaintiff seeks, let me say, an injunction to restrain a threatened libel, and by the prayer of his statement of claim he asks for such an injunction and costs. He succeeds. He obtains his injunction and an order for costs. Nothing is recovered by the injunction, quite clearly, so there is no comfort for the solicitor in the way of a charging order there. If counsel for the respondent is right, the successful client, having obtained an order for costs issues a *fi. fa.*, money is recovered by the sheriff under the judgment for costs and the solicitors cannot touch it. Now let me take the other case. The plaintiff is seeking to recover quite a small sum. In many important actions the sum recovered may be a small sum in respect of wages, it may be eighteen pence, and the plaintiff recovers a judgment for eighteen pence and costs. Now, according to the argument of counsel for the respondent, the presence of that judgment for eighteen pence entitles the solicitor to obtain a charging order not merely on the eighteen pence but on the whole of the plaintiff's costs of the action, which may run in some important cases into £200 or £300. That would be the result if the distinction which counsel invites us to draw were a sound one. I cannot accept an argument which leads to such a conclusion, and, in any event, I cannot accept it when I find, as I do find, the point precisely covered by the language of BRETT, M.R.

There are two further cases to which I should refer, because VAISEY, J., in refusing the application for a charging order referred to them. The first one is a case of *Re Viney's Trust* (3), which, with all respect, does not appear to me to touch this question for this reason. On a petition by the clients an order was made directing taxation and payment of costs out of the trust estate to the London agents of the petitioner's solicitors. The solicitors, therefore, had under that order personally a right against the fund to have their costs paid. Having that adequate protection they nevertheless tried to improve their position by asking for a charging order. It was held that they were not entitled to it, because, as the learned Vice-Chancellor says, they could have no better or other security than that order which had directed the amount to be paid to the London agent. That, and that alone, was the ground for refusal of the application.

The other case is that of *Higgs* v. *Higgs* (4), where the husband respondent in proceedings for judicial separation had been ordered to pay the wife's costs. The husband eventually became entitled to a legacy and the wife had been made bankrupt. The Official Receiver, as trustee in bankruptcy of the wife, obtained a garnishee order *nisi* attaching the husband's interest under the legacy. That, of course, was merely a form of execution issued by the representative of the wife in respect of a judgment for costs which the wife had obtained in the proceedings. Under that order *nisi*, if it was made absolute, a sum of money in satisfaction of those costs was coming to the Official Receiver. The position it seems to me, was precisely analogous to money in the hands of a sheriff under a *fi. fa.* issued to recover the costs payable under a judgment. What the solicitors were trying to do was to obtain a charging order on the money so to be received by the Official Receiver. The order asked for was a charge upon the sum of £108 16*s.* 3*d.*—those were the costs with some interest added apparently—in lieu of the property recovered or to be recovered by the Official

Receiver. That was the extent of the charging order that was being asked for, and it was exactly like a charging order applied for in respect of moneys in the hands of a sheriff where a different form of execution, namely, *fi. fa.*, has been adopted. The judge refused the charging order, and his reasons on p. 100 were as follows :

> I do not think that their summons is in order. They are asking for a charge on property which they in fact have not recovered. They have not got any of this property which is in fact recovered or to be recovered by the Official Receiver. The so-called property is in the hands of the trustees of the will. It has never in any sense been recovered by the solicitors.

There it is quite clear the judge is treating the solicitor's application as an application for a charging order in respect of the legacy or part of the legacy, and he said, in effect, "The solicitors never have recovered the legacy and, therefore, are not entitled to the charging order." In my opinion the judge was under a misapprehension as to the nature of the application. The solicitors were not attempting to get a charging order on the legacy any more than solicitors who wish to attach money in the hands of a sheriff are getting a charging order on the furniture which the sheriff is proposing to seize. They are asking for a charging order on the money which will be recovered, and in that case that was all they were asking for. When the Official Receiver got that money it would have been money received in satisfaction of a judgment for costs, and the fact that it happened to come from a legacy was not of the slightest relevance to the case. In my opinion, the judgment of BATESON, J., in *Higgs* v. *Higgs* (4), in so far as it rested on that part of his reasoning, was wrong and should be overruled.

I come, therefore, to the opinion that an application for a charging order in a case where the judgment is merely a judgment for costs is perfectly competent. I may further, perhaps, point out that, if it were not so, the case of a solicitor for a successful defendant would be a very unfortunate one in such a case, as no property is recovered in the limited sense which counsel for the respondent wishes us to accept since the only thing that the successful defendant gets is a judgment for costs, and his solicitor will have no remedy.

I now turn to the case of the suggested distinction in the case of an originating summons issued for the construction of a will or document. I am not quite sure whether I appreciate the way in which the argument is put, because, with all respect to counsel for the respondent, I am quite unable to see any ground on which such a distinction can be based. An order is an order, and to draw a distinction between an order made on an originating summons and any other order for costs appears to me in principle to be quite unjustifiable. Counsel for the respondent says this is not hostile litigation. It is certainly not the fact that originating summonses are always free from hostility. They are very often extremely hostile, and I find it quite impossible to base any distinction on any such suggested differentiation.

The next, and last, point with which I have to deal is this. It is said, and rightly said, that under the language of the section the solicitor is not entitled to a charging order as of right, but only as a matter of discretion. That, no doubt, is perfectly true, but it is, I think, right to say that *prima facie* a solicitor is entitled to his charging order if he satisfies the requirements of the section, and that some good reason must be shown for depriving him of it. It has been said, and has been held in many cases, that there may be some conduct of the solicitor which will make it unjust to give him that particular form of relief. In the present case it is said this will be a grave hardship on the defendants in the action. It is said that the fact that they have no right of set-off in respect of these costs is purely accidental and has come about because in the first order they personally became entitled to their costs from Colonel Blake, whereas in the second order the fund in which they are interested, and solely interested has been charged with Colonel Blake's costs. It is perfectly true that in the end the position of the defendants will be, assuming they do not recover their costs, that their fund will have been depleted by payment of the costs now in issue, and they personally will be unable to recover from Colonel Blake their costs of the first application. That may be very unfortunate, and one can well sympathise with them, but the question we have to decide is whether their misfortune is sufficient to justify us in withholding from the solicitors the right to which *prima facie* they are entitled. I do not propose to assert as a matter of principle that the discretion should be only exercised against the solicitor in cases where some conduct of his own makes it unjust to give him the relief asked for. That, I think, would not be the proper course to take in view of the language of the section, but I think I am entitled to say that in a case where no conduct of the solicitor is involved it would require very exceptional circumstances to justify the court in refusing to the solicitor that security in respect of the fruit of his labours to which under the section he is *prima facie* entitled. In the A present case, hardship though it be to these defendants, I do not find any such circumstances, and, in my opinion, that point also fails. In the result the appeal must be allowed with costs here and below, and the appropriate charging order made.

Finlay, L.J.: I agree, and though we are differing from the decision of the judge in the court below, the matter has been fully covered in the judgment of Lord Greene, M.R., and I entirely concur, and I do not propose to say B anything.

Uthwatt, J.: I also agree.

Appeal allowed with costs.

Solicitors: *Warren & Warren* (for the appellants); *Burton, Yeates & Hart* agents for *Nye & Donne*, Brighton (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*] C

POXON *v.* WOOLATON COLLIERIES, LTD.

[Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.), **November 27, 1944.**] D

Workmen's Compensation—Industrial disease—Pneumoconiosis—Suspension due to pneumoconiosis—Workman not totally disabled—Rate of compensation payable while workman unable to obtain employment—Workmen's Compensation Act, 1925 (c. 84), *ss.* 9, 47—*Workmen's Compensation Act*, 1943 (c. 6), *Coal Mining Industry* (*Pneumoconiosis*) *Compensation Scheme*, 1943 (*S.R. & O.*, 1943, *No.* 885), *paras.* 4, 9. E

Where a workman is suffering from the industrial disease of pneumoconiosis and is suspended from work on that account but his general physical capacity for employment is not impaired, he is entitled, while unable to obtain suitable employment, to compensation as provided by the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, para. 9 (2) (*b*). By the proviso to para. 9 (2) (*b*), the amount that the arbitrator may award in such a case is limited (i) to 50 per cent. of the workman's F previous weekly earnings, and (ii) to a period of 13 weeks; it is not limited to 30*s*. per week as provided by the Workmen's Compensation Act, 1925, s. 9 (1) (*c*). Sect. 47 (2) of the 1925 Act as amended by the 1943 Act, dealing with pneumoconiosis, provides that the scale of compensation payable in the case of death or total disablement due to the disease shall be that prescribed by the Act and "in any other case shall be such as may be prescribed by the scheme." G

[**EDITORIAL NOTE.** It is here held that the limitation of weekly payments to 30*s*. contained in the proviso to sect. 9 of the Workmen's Compensation Act, 1925, does not apply to a workman suspended from employment in accordance with the Pneumoconiosis Scheme. The amount of compensation is in the discretion of the county court judge, subject to a limit of 13 weeks, and to 50 per cent. of the workman's earnings.

For the Provisions of the Workmen's Compensation Acts regarding Pneumoconiosis, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 36, H pp. 185, 186; and for the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, see *ibid*. pp. 198-203. See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn.]

Appeal by the workman from an award of His Honour Judge Tucker, made at the Nottingham County Court, and dated June 22, 1944. The facts are fully stated in the judgment of Scott, L.J.

F. W. Beney, K.C., and *W. H. Duckworth* for the appellant.

Gilbert Paull, K.C., and *R. H. Norris* for the respondents.

SCOTT, L.J. : This is an appeal from the county court judge by the workman under the Workmen's Compensation Acts, as applied by the Act of 1943 to the industrial disease known as pneumoconiosis. Sect. 47 of the Act of 1925, as amended by that Act, provides :

> (1) The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen in any specified industry or process . . . involving exposure to silica dust . . . or other dust . . . (2) The scale of compensation fixed by the scheme in the case of death or total disablement . . . shall be that prescribed by this Act and in any other case shall be such as may be prescribed by the scheme.

"Any other case" obviously is partial disablement. That provision, be it observed, *prima facie* on its language provides for a different kind or basis of compensation for partial disablement due to the industrial disease from that ordinarily applicable under sect. 9 of the Act. That section of the Act gives statutory force to the Pneumoconiosis Compensation Scheme, with which the present case is concerned. It is printed in WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., beginning at p. 1064. Para. 4 of the Scheme provides that where the medical board certify that (1) death, or (2) total disablement is caused by this illness, or :

> (3) that a workman, though not totally disabled, is suffering from [the disease] to such a degree as to make it dangerous for him to continue work in the industry . . . and is for that reason suspended from employment ; and where the disease is due to employment in the industry [compensation shall be payable as if the disease were an injury by accident within the Act] subject to the modifications hereinafter contained.

Para. 9 (1) provides for death and total disablement and para. 9 (2) provides :

> In cases of suspension due to [the disease] where the workman is not totally disabled : (*a*) if the medical board certify that the workman's general physical capacity for employment is impaired by reason of the disease, the workman shall be entitled, while impairment continues, to a weekly payment fixed in accordance with the provisions of the Acts for fixing the compensation in cases of partial incapacity ; [but] (*b*) if the medical board certify that the workman's general physical capacity for employment is not impaired by reason of the disease, the workman, if unable immediately to obtain suitable employment at a rate of remuneration not less than he was earning in the industry . . . shall be entitled while he remains out of such employment, to such weekly payment as, in the absence of agreement, the county court judge or other arbitrator may direct.

Then follows an important proviso :

> Provided that such compensation shall not be payable for more than 13 weeks in all, and shall in no case exceed 50 per cent. of the workman's average weekly earnings computed in accordance with the provisions of the Acts.

I pause to interpose one word of construction : the word "computed," in my view, quite clearly applies to the words "average weekly earnings."

The facts of the case are that this workman was certified by the medical board under para. 9 (2) (*b*). He was fit to return to his own employment in the mine from every point of view except for this disease, which made it impossible for him to return to it, and for some time caused him to be out of employment altogether. He asked for compensation, therefore, under that particular provision which authorises the county court judge to give him "such weekly payment as" he "may direct." In my view, the plan of this legislation is to allow the man in that position a reasonable time in which to adjust his life to the necessities of his new position, and it assumes that he may have difficulty in getting any other employment ; but during that time the legislature, through the delegated legislation, has given the county court judge absolute discretion to do what he thinks fit, subject to two limitations and to two only. He can give the compensation in respect of a period of not more than 13 weeks, and not more in amount than half the workman's average weekly earnings computed in accordance with the ordinary provisions of the Act. In this case the man's earnings were £5 12*s*. ; half that would be £2 16*s*. The judge under the persuasive argument of counsel for the employer came to the conclusion that on the true interpretation of the Act he was not entitled to give anything different from what is provided by sect. 9 (3) (i) of the Act of 1925, and that, consequently (taking into account the supplementary allowance) he was limited to 30*s*., and this is what he gave. In my view he was not so limited. By consent of the parties he fixed what he would have given for the period of 13 weeks allowed by the Act at £2 plus x, describing x as "supplementary allowances." At present I shall treat it as meaning that $\frac{x}{2}$ was to be equal to what the man would have got under the system of the Acts subsequent to the Act of 1925 by way of supplementary allowances. We do not know what that figure is precisely, as we have not been informed; but, in my view, his award should be treated as giving the workman the total so calculated, on the assumption that he only used the "supplementary allowances" phrase for the purpose of quantifying the amount. The reason why I think he did that is that, assuming he had the jurisdiction which he thought he did not possess, he evidently thought it fair to give the man something more than the rate mentioned in the Act of 1925. In my opinion, the Scheme authorised him to do that, and no question of *ultra vires* can be raised, because sect. 47 (2) of the Act as amended by the subsequent Acts said in terms that in case of partial disablement the workman might be given whatever the scheme authorised. The Scheme did provide that, and in my view the appeal must succeed.

MACKINNON, L.J.: I agree.

DU PARCQ, L.J.: I also agree. Sect. 47 (2) of the Act of 1925 says that, where there is a scheme:

> The scale of compensation fixed by the scheme in the case of death or total disablement . . . shall be that prescribed by this Act.

That sends one to sect. 9, and the scale prescribed by the Act is contained partly in the rules in subsect. (2) and partly in the proviso in subsect. (1). You have to look at both; they give you the scale. Now we are not dealing with a case of death or total disablement, so that the second limb of sect. 47 (2) is what we must look at:

> . . . and in any other case shall be such as may be prescribed by the scheme.

Now what scale of compensation is prescribed by the Scheme? It is perhaps hardly correct to say, in one sense, that it is a scale of compensation, but that would be a pedantic criticism, no doubt. What the Scheme does is to leave the amount of compensation in the case before us to the county court judge; it is to be such weekly payment as he may direct. Then comes a proviso which is:

> . . . that such compensation shall not be payable for more than 13 weeks in all, and shall in no case exceed 50 per cent. of the workman's average weekly earnings . . .

That seems to me to make the matter quite plain. The county court judge dealing with this case was not bound, or indeed entitled, to look at what sect. 9 laid down at all. He was perfectly free to give such compensation as he thought right subject to the proviso in para. 9 (2) (*b*) of the Scheme.

We were asked to say that there was an overriding rule contained in the proviso in sect. 9 of the Act of 1925, but in my opinion that argument is quite misconceived. Sect. 9 of the Act is dealing with a case where a man's compensation goes on as long as his incapacity continues and during the whole of that time he is to be paid. That, of course, may be a very heavy burden on an employer and the Act has provided that the weekly payment shall in no case exceed 30*s*. It seems to me that it would be unfair on the face of it, and not warranted by any language either in the Act or the Scheme, to transplant those words "the weekly payment shall in no case exceed 30*s*." and graft them on to provisions to which they are entirely inappropriate; because here one is dealing with the case of a man who is only to get the compensation for 13 weeks, and the provision we have to look at is the proviso in the Scheme itself. It is to be noted that whereas in the Act the words are "the weekly payment shall in no case exceed 30*s*.," here, where the Scheme provides its own scale or method of compensation, the words are:

> . . . shall in no case exceed 50 per cent. of the workman's average weekly earnings. . .

I agree with my Lord that this appeal should be allowed and that the judge took an erroneous view of the words of the Scheme and the Act.

Appeal allowed.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Son*, Mansfield (for the appellant); *Peacock & Goddard*, agents for *Elliot Smith & Co.*, Mansfield (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Considered. INLAND REVENUE COMRS. *v.* GORDON. [1952] 1 All E.R. 866.

THE TRINIDAD LAKE ASPHALT OPERATING CO., LTD. *v.* THE COMMISSIONERS OF INCOME TAX FOR THE COLONY OF TRINIDAD AND TOBAGO.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Wright, Lord Porter, Lord Simonds and Lord Goddard), **October 17, 1944.**]

Trinidad and Tobago—Revenue—Income tax—Dividend paid by cancellation of credit due to company from foreign company—Liability of company to tax as statutory agent of foreign company—"Transmission" of revenue—Income Tax Ordinance, 1940 (*c.* 33, *No.* 1), *ss.* 5, 30.

The appellant company was resident in and carried on business in the colony of Trinidad and Tobago. The Barber Asphalt Corporation was a company resident in U.S.A., and did not carry on business in the colony. The Asphalt Corporation was the holder of a large majority of the issued share capital of the appellant company and also a debtor of the company. The appellant company declared a cash dividend in favour of the Asphalt Corporation equal to the amount owed by the corporation to the company and payable by a book cancellation of the company's claim against the corporation. The dividend was income of the corporation derived from the colony within the meaning of the Income Tax Ordinance, 1940, s. 5, and the company was assessed to income tax on the dividend, as a statutory agent of the corporation, under s. 30 of the Ordinance. It was argued on behalf of the corporation that the arrangements for the payment of the dividend did not amount to a "transmission" of the dividend within the meaning of s. 30 :—

HELD : the transaction amounted to the "transmission" of revenue within the meaning of s. 30 of the Ordinance. Upon its true construction s. 30 included a transmission outside the colony, and, therefore, the appellant company was liable under that section as statutory agent of the corporation for the amount of the tax.

[**EDITORIAL NOTE.** The main point of interest here is the interpretation of the word "transmission" in a colonial income tax Ordinance. It is held that the payment of a dividend to a shareholder resident outside the colony by means of a book cancellation of a claim against the shareholder amounts to a transmission of revenue. The transaction is equivalent to a receipt of money and a receipt of anything by a person who is at a distance from the sender involves a transmission, which connotes an intermediate space, but does not depend on the extent of the space.

AS TO CONSTRUCTIVE REMITTANCE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 192, 193, para. 394 ; and FOR CASES, see DIGEST, Vol. 28, pp. 77-79, Nos. 422-432.]

Cases referred to :

(1) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493 ; 28 Digest 79, *433* ; 59 L.J.Q.B. 53 ; 61 L.T. 518.

(2) *Whitney* v. *Inland Revenue Comrs.*, [1926] A.C. 37 ; 28 Digest 105, *649* ; 95 L.J.K.B. 165 ; 134 L.T. 98 ; *affg.*, [1924] 2 K.B. 602.

(3) *London and South American Investment Trust, Ltd.* v. *British Tobacco Co. (Australia), Ltd.*, [1927] 1 Ch. 107 ; Digest Supp. ; 96 L.J.Ch. 58 ; 136 L.T. 436 ; *sub nom. Pass* v. *British Tobacco Co. (Australia), Ltd.*, 42 T.L.R. 771.

(4) *British Coal Corpn.* v. *R.*, [1935] A.C. 500 ; Digest Supp. ; 104 L.J.P.C. 58 ; 153 L.T. 283.

(5) *Peninsular and Oriental Steam Navigation Co.* v. *Kingston*, [1903] A.C. 471 ; 17 Digest 446, *182* ; 72 L.J.P.C. 123 ; 89 L.T. 222.

*(6) *Re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* (1873), L.R. 8 Ch.App. 407 ; 17 Digest 92, *379* ; 42 L.J.Ch. 488 ; 28 L.T. 153.

*(7) *Gresham Life Assurance Society* v. *Bishop*, [1902] A.C. 287 ; 28 Digest 78, *422* 71 L.J.K.B. 618 ; 86 L.T. 693 ; 4 Tax Cas. 464 ; *revsg.*, [1901] 1 K.B. 153

(8) *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (1886), 14 R. 98 ; 28 Digest 77, *422 i* ; 2 Tax Cas. 165.

APPEAL by way of case stated from a decision of the full court of the Supreme Court of Trinidad and Tobago, dated Apr. 1, 1942. The facts are fully set out in the judgment of the Board, delivered by LORD WRIGHT.

J. M. Tucker, K.C., and *N. E. Mustoe* for the appellant company.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald Hills* for the respondents.

LORD WRIGHT [delivering the judgment of the Board]: This is an appeal from an order made on Apr. 1, 1942, by the full court of the Supreme Court of Trinidad and Tobago, upon a case stated for the opinion of the full court by PEREZ, J., whereby he dismissed an appeal by the appellant against an assessment to income tax made by the Income Tax Commissioners for the colony on the appellant under the Income Tax Ordinance, 1940, s. 30, then in force in the colony. It is also an appeal against the order of PEREZ, J., whereby in accordance with the judgment of the full court he formally dismissed A the appeal of the appellant against the assessment. The assessment was on the sum of $1,394,227.00, and was for the year 1940, the tax chargeable being $336,424.75. If the appellant company fails in its objections in law to the assessment it does not now dispute that the amount is correct.

The assessment was made in respect of a dividend amounting to $1,207,817.06 declared by the appellant in favour of the Barber Asphalt Corporation of New Jersey, U.S.A. (hereinafter called " Barber ") as the holder of 499,992 shares B out of 500,000 shares constituting the issued capital of the appellant. The business of the appellant was to win and refine asphalt in the colony and sell and deliver it to purchasers, including Barber. The dividend was declared in accordance with a resolution of the appellant's directors dated Nov. 24, 1939, on which date Barber owed to the appellant $1,207,817 for asphalt purchased by it from the appellant. The resolution was in the following terms : C

> Resolved that a dividend in the amount of $1,207,817 be declared payable by cancellation of the Trinidad Lake Asphalt Company's claim in a like amount against Barber Asphalt Corporation and that in addition a cash dividend of equal proportion amounting to $12.10 be paid to local shareholders making a total of $1,207,829.16.

It was not in question that the resolution ought properly to be construed as compendiously embodying two items, (i) the declaration of a cash dividend of $1,207,817.06 in favour of Barber, (ii) an agreement between Barber and the D appellant that the dividend was payable by cancellation of the appellant's claim against Barber for asphalt sold and delivered to him.

Barber was at all material times non-resident in the colony. It carried on business at its head office in Barber, New Jersey, in the United States. It had no place of business in the colony and has never exercised or carried on any trade or business in the colony. PEREZ, J., held that the dividend was income of Barber accruing in, or derived from, the colony within the meaning of sect. 5 E of the Ordinance and that Barber was accordingly liable to tax on the dividend. The appellant does not dispute that part of the judgment. It is clearly right and is in accordance with principles laid down by the House of Lords in regard to the territorial limits within which the imposition of income tax is permissible. To quote one statement, it was said by LORD HERSCHELL in the leading case of *Colquhoun* v. *Brooks* (1), at p. 504 : F

> The Income Tax Acts . . . themselves impose a territorial limit ; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.

These words of LORD HERSCHELL were quoted and applied by LORD WRENBURY in *Whitney* v. *Inland Revenue Comrs.* (2), at p. 55, where the question was the chargeability to supertax of a non-resident alien—an American subject residing G in the United States. He was not in England but he drew a large income from property situated here. It was held that, though a non-resident alien, he was chargeable in respect both of income tax and of the additional duty of income tax called supertax. So it was decided by all their Lordships. Other authorities to the same effect need not be quoted. Though the usual ground on which competency to tax is based, namely residence, did not exist in that case, the alternative ground, namely that the income was derived from property in the country H which imposed the tax was sufficient. These principles apply to the Ordinance of 1940 which by sect. 5 expressly provides for the imposition of tax upon the income of any person accruing in or derived from or received in the colony in respect of (*inter alia*) dividends, interest or discounts. The authorities referred to show that there is no general rule of international comity which renders such taxation on non-residents incompetent. Equally in their Lordships' judgment it is not incompetent by reason of the circumstance that the colony cannot pass extra-territorial legislation. A tax in this form is not extra-territorial, so long as it does not affect to tax property not situate in the colony. On the ground that this rule was infringed it was held in *London and South American Investment Trust* v. *British Tobacco Co. (Australia)* (3) that the legislation there in question was extra-territorial inasmuch as it sought to impose or enforce taxation on a non-resident shareholder in respect of property not situate in the colony, namely, dividends which were an English debt due in respect of shares locally situate in England. This decision was prior to the Statute of Westminster, 1931, the effect of which was discussed in *British Coal Corpn.* v. *R.* (4), at p. 516. The principle however still applies to a colony like Trinidad.

Sect. 30 of the Ordinance, it was also said, if construed as the full court has done, might be regarded as extra-territorial in effect. But sect. 30, under which the assessment is made, seeks legitimately to meet the difficulty that, as Barber is in New Jersey and not in Trinidad, the tax cannot be enforced against him since the courts of one country will not enforce the revenue laws of another. The section is in the following terms :

> Any resident agent, trustee, mortgagor or other person, who transmits rent, interest, or income derived from any other source within the colony, to a non-resident person, shall be deemed to be the agent of such non-resident person and shall be assessed and pay the tax accordingly.

There is in their Lordships' judgment no ground for treating this section as extra-territorial in effect or requiring it to be construed otherwise than in accordance with the ordinary meaning of the words used. It is not extra-territorial merely because its purpose is indirectly to secure payment from the non-resident alien of the tax which is validly imposed upon him. The person directly affected is the statutory agent, in this case the appellant, who is within the colony. The obligation is imposed directly on him. His liability is complete when within the colony he does the act which transmits the income to the non-resident. The transmission begins in the colony, though it continues until delivery to the non-resident alien. Similarly in *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (5) the penalty was imposed on the steamer when she came back to an Australian port with the seals upon the bonded stores broken, though they had been broken outside territorial waters. The breaking of the seals and the use of the bonded stores were what it was intended to prevent or punish. But the condition of enforcing the law was the vessel's entering the territorial limits with the seals broken. So here the condition of the liability of the statutory agent was the transmitting of the income to the non-resident. Sect. 30 was accordingly not open to objection as exceeding the territorial limitations. Indeed counsel for the appellants did not contend that the ordinance was invalid but he sought to impose a narrow construction which he said was necessary to avoid the objection. In their Lordships' opinion the whole objection is baseless and the section must be construed according to its natural meaning whenever it applied. That left the substantial question whether it did apply on the facts in this case. It will now, in order to decide the question, be necessary to examine the facts more closely, with particular reference to the question whether the appellant transmitted the dividend to Barber in New Jersey. That is the second question of law stated for the opinion of the court, and is in their Lordships' view the only one now material.

The dividend declared in the resolution of the appellant's Board created a debt due from the appellant to Barber. It was, so far as local situation may be attributed to a debt, a debt which was locally situated in Trinidad. It was a debt due from a Trinidad company created and payable in Trinidad. The shareholder, Barber, was, it is true, resident in New Jersey, and the debt to him might in normal course have been paid by sending a dividend warrant or similar credit instrument by mail. In this particular case, the arrangement between the parties made previously to the resolution had the effect that instead of this method of payment being adopted the debt should be paid by cancellation of Barber's indebtedness to the appellant. The main contention on behalf of the appellant is that this does not involve a " transmission " of the dividend to Barber and that the conditions of sect. 30 are not fulfilled, even if the word transmission is construed contrary to the appellant's submission as meaning in its context a transmission beyond the borders of the colony. This is the gravamen of the argument ; certain minor aspects may be left to be discussed later. The appellant's argument does not necessarily involve denying that there was payment of the dividend, though a subsidiary argument was put forward at one stage that the settlement by way of cancelling the debt for goods supplied and setting it against the dividend, was not payment but the antithesis of payment. It was, however, in their Lordships' opinion, payment.

Their Lordships at this stage accept that the word "transmit" means in the context "transmit" to a non-resident outside the limits of the colony. It is true that "transmit" is in itself not decisive on this point. A dividend may be transmitted by the warrant being sent by post or by messenger to Tobago or any other place in the colony and it may be so transmitted to a non-resident if he happened at the moment to be temporarily in passage through the colony. That however would be a somewhat fanciful application of the word in this connection. The object of sect. 30 is clearly to create a statutory agent from whom the tax may be collected. He is made as it were vicariously liable for the tax in place of the non-resident recipient of the revenue with a right of indemnity over against the person primarily liable for the tax. The company is not bound to deduct the tax, though it is entitled to do so. Such a method is not unknown in modern systems of taxation and can be paralleled from other systems. Sect. 30 does not expressly in words qualify "transmission" as meaning "from the colony." But the normal case of transmission to a non-resident alien would be transmission out of the colony, and that case must at least be covered. Was there then such a transmission? No actual money passed. If the dividend had been transmitted by a banker's draft sent by the appellant to Barber, it could not have been questioned that the dividend had been transmitted. But the two companies might do their own banking transactions between themselves and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant, and receipt by Barber from the appellant, of the dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books. These were not merely bookkeeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently the actual receipt by the appellant from Barber of payment of his debt for goods supplied. The composite and joint transaction in principle satisfies the description of a payment given by MELLISH, L.J., in *Spargo's* case (6), at p. 414:

> Nothing is clearer than that if the parties account with each other, and sums are stated to be due on one side and sums of an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form or ceremony of handing the money backwards and forwards.

This statement gives a description of what is often called a settlement in account or a set off, the word not being there used in the technical sense of the statutes of set off. There is actual, not merely notional or constructive payment of the indebtedness on either side. There is thus a "transmission" of funds whether the transmission is only across the table or is across the ocean. Transmission involves indeed an intermediate space, but does not depend on the extent of the space. Each party receives payment from the other; each party having received payment in this way makes in his turn the corresponding payment to the other. The transaction is necessarily bilateral. In *Spargo's* case (6) the transaction was capable of being completed within narrow limits of space, for instance, across a table or in a room or by letters sent from one street to another. But the mere space involved is not material. LORD LINDLEY, in *Gresham Life Assurance Society* v. *Bishop* (7), at p. 296, made some pertinent observations on the topic. He said:

> First, let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e.g.*, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business

> men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth.

In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men. Since 1902, the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean, may orally agree over the wireless telephone that the one's debt may be set against a debt of the other, and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement. But what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of "revenue" within the meaning of sect. 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax.

A little later in the same case Lord Lindley goes on to develop the same point. It may be noted that he was dealing with a somewhat different subject matter, namely, the liability of a resident taxpayer in respect of foreign revenue. That liability is in England limited to revenue "received in the United Kingdom." In the *Gresham* case (7) the revenue was received by the company's office abroad and was employed abroad and no part was remitted to this country. It was held that there was in that case no receipt in the United Kingdom. Lord Lindley, however, distinguishing the case before him, referred with approval to *New Mexico Co.'s* case (8) in which it had been held that there had been a receipt in the United Kingdom from the office abroad and thus described the position in the latter case at p. 298 :

> Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry ; but that entry was the business mode of carrying out cross remittances which it would have been unbusinesslike and even childish to have effected in any other way.

Though the application of the principle was different in certain ways from that in question here the difference was not pertinent to the crucial matter of principle now to be decided, namely, whether the mode of operation adopted was a transmission of revenue by the appellant to Barber. Lord Lindley referred to other decisions to the like effect and others have been cited to their Lordships.

Their Lordships accordingly agree with the courts below in holding that the dividend was transmitted by the appellant to Barber, and that sect. 30 applies.

The same result would hold if sect. 30 were construed as applicable to transmissions within the colonies, as it might well be so far as the actual words go. And the same would be true if the settlement in account were treated as taking place within the colony, as involving the cancellation of a debt, namely, the dividend, locally situate in the colony, in return for the cancellation of another debt also so situate, the debt for goods supplied. The difficulty which their Lordships feel about applying this view to the facts is that Barber, a necessary party to the transaction, was outside the colony. They, however, construe sect. 30 as at least including transmission outside the colony.

Sect. 30 was treated throughout the proceedings below as a self-contained section, defining the complete scope of its own operation. Before this Board, however, the appellant sought to raise the further points that sect. 30 only authorised an assessment on a person who can be deemed to be an agent within the meaning of sect. 26 (1) and only if an assessment on that footing is otherwise competent. It was further contended that sect. 30 must also be read as qualified by sect. 26 (4), which prohibits the making of an assessment on any person who is not an authorised person carrying on the regular agency of a non-resident person.

Their Lordships find themselves unable in this appeal to deal with these contentions. They raise important questions of law on the construction of the ordinance which their Lordships feel they could not properly decide without the benefit of the opinion of the colonial judges who have not been asked to pass upon them. In addition the contentions seemed likely to involve questions of fact on which evidence might have been, but had not been, given. Their Lordships, therefore, do not express any opinion on these topics.

It was also suggested that sect. 30 required for its operation three parties, the debtor, the creditor and an intermediary agent separate from either to transmit. Their Lordships see no ground for this embroidery of the simple and appropriate language of the section. A debtor may be treated as assuming in addition the functions of a statutory agent to transmit the money to the creditor. This, for instance, would obviously be true of a mortgagor, a class specifically mentioned in sect. 30. The general words "income derived from any other source" are clearly sufficient to include dividends which are particularly mentioned in sect. 5 (D), though not in sect. 30 in express terms.

Their Lordships are of opinion that the appeal fails on all points and should be dismissed and that the order appealed from should be affirmed. The appellant will pay the costs of the appeal.

They will humbly so advise His Majesty.

Appeal dismissed with costs.

Solicitors: *Lawrance, Messer & Co.* (for the appellant company); *Burchells* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

R. *v.* LEON.

[Court of Criminal Appeal (Viscount Caldecote, L.C.J., Singleton and Birkett, JJ.), **November 28, 1944.**]

Criminal Law—Gaming and wagering—Betting transactions with bookmaker—Non-payment of losses—Intention to defraud—Obtaining credit by false pretences or fraud—Actionable debt—Winning money by fraud in wagering—"In the course of the game"—Gaming Act, 1845 (*c.* 109), *ss.* 17, 18—*Debtors Act,* 1869 (*c.* 62), *s.* 13 (1).

The appellant was charged and convicted under the Debtors Act, 1869, s. 13, and the Gaming Act, 1845, s. 17, with fraud arising out of certain betting transactions. The appellant was the client of a turf commission agent who had agreed to accept his bets up to a limit of £500 in any week. Settlement was to be made each week. The appellant made bets on horses engaged at various meetings and, during the first three weeks he won altogether £465 which was duly paid by the bookmaker. Thereafter the appellant incurred betting losses amounting to £452 which he failed to settle. In fact, the appellant's banking account was heavily overdrawn at all material times, and he was not in a position to meet a loss of £500 a week. He had also failed to settle prior losses incurred in respect of similar transactions with other bookmakers. It was contended that no offence under the Debtors Act had been committed, for the reference to a debt in sect. 13 had to be taken to mean an actionable debt or a debt enforceable in law, and by the Gaming Act, s. 18, all contracts by way of gaming or wagering were made null and void. It was further contended that there was no fraud in wagering within the meaning of the Gaming Act, s. 17, since an intention not to repay money lost did not amount to a fraud or unlawful device in respect to the actual making of the wager:—

Held: (i) on the true interpretation of the Debtors Act, 1869, and its scope, betting losses incurred were not debts within the meaning of sect. 13 of the Act.

(ii) the finding of the jury that the appellant's conduct was fraudulent throughout meant that at the time the appellant made each of the bets with the bookmaker, he intended to cheat, which amounted to fraud in wagering within the meaning of the Gaming Act, s. 17.

[**EDITORIAL NOTE.** This case decides an interesting point under the Debtors Act, 1869, s. 13, upon which there is apparently no previous direct authority, the question being whether " debt " in that section includes debts of honour. The court holds that on examination of the whole Act, passed within 24 years of the Gaming Act, 1845, which made gambling debts null and void, leads to the conclusion that " debt " in sect. 13 means a debt enforceable at law.

The second point decided deals with the meaning of " fraud in wagering " in the Gaming Act, 1845, s. 17. The decided cases relate to card games, which continue over A a period of time and the difficulty is the application of the phrase " in wagering " to the making of a bet. However, in view of the finding by the jury that the appellant was fraudulent throughout, the offence is held to come within the section.

As to Obtaining Credit by Fraud, see HALSBURY, Hailsham Edn., Vol. 2, pp. 465, 466, para. 636 ; and for Cases, see DIGEST, Vol. 5, pp. 1050-1052, Nos. 8558-8584.

As to Cheating at Games, see HALSBURY, Hailsham Edn., Vol. 15, p. 499, para. 901 ; and for Cases, see DIGEST, Vol. 15, pp. 1010, 1011, Nos. 11350-11359.]

B Cases referred to :

*(1) *Rawley* v. *Rawley*, (1876) 1 Q.B.D. 460 ; 1 Digest 8, *45* ; 45 L.J.Q.B. 675 ; 35 L.T. 191.

(2) *Luckett* v. *Wood*, (1908) 24 T.L.R. 617 ; 25 Digest 409, *126*.

(3) *Haigh* v. *Sheffield Town Council*, (1874) L.R. 10 Q.B. 102 ; 25 Digest 443, *369* ; 44 L.J.M.C. 17 ; 31 L.T. 536.

(4) *R.* v. *Brixton Prison (Governor), ex parte Sjoland and Metzler*, [1912] 3 K.B. 568 ; C 15 Digest 1010, *11351* ; 82 L.J.K.B. 5.

(5) *R.* v. *Moore*, (1914) 10 Cr. App. Rep. 54 ; 15 Digest 1010, *11352*.

Appeal of Salomon Leon, convicted at the Central Criminal Court, by Oliver, J., on Oct. 25, 1944, on two counts of an indictment which charged him with obtaining credit by fraud contrary to the Debtors Act, 1869, s. 13, and on three counts which charged him with fraud in wagering contrary to the Gaming Act, 1845, s. 17. On the counts upon which he was convicted he received a D sentence of nine months imprisonment such terms to run concurrently. The facts and arguments are fully set out in the judgment of Singleton, J.

S. Lincoln for the appellant.

G. O. Slade, K.C., and *L. A. Byrne* for the respondent.

Singleton, J. : The appellant, Salomon Leon, was convicted at the Central Criminal Court on Oct. 25, 1944, on two counts of an indictment which charged E him with obtaining credit by fraud contrary to the Debtors Act, 1869, s. 13, and on three counts which charged him with fraud in wagering contrary to the Gaming Act, 1845, s. 17. He was acquitted on the first three counts of the indictment which charged him with obtaining money by false pretences. He was so acquitted by direction of the judge before whom the case was tried. On the counts upon which he was convicted he received a sentence of nine F months imprisonment, such terms to run concurrently.

He now appeals against conviction and sentence, and by his notice of appeal he alleges, first, that the judge wrongfully refused to withdraw the case from the jury at the close of the case for the prosecution on a submission that the evidence then adduced did not in law prove the offences as charged within the Debtors Act, 1869, s. 13 (1), and within the Gaming Act, 1845, s. 17. Secondly, that there was no evidence before the jury that the offences as charged in the G indictment had been made out. Thirdly, that the judge misdirected himself as to the law applicable to the case. Fourthly, that the judge omitted to direct the jury sufficiently and that he did not put the case for the defence adequately to them. Fifthly, that the verdict of the jury was against the weight of the evidence, and, sixthly, that the sentence is harsh in the circumstances.

The prosecutor is a turf commission agent who in May, 1944, received the H name of the appellant as a customer or client, and he accordingly sent to the appellant a book of his rules. One of the bookmaker's rules was that settlement must be made weekly, which is a common provision. About May 25, the appellant called at the office of the bookmaker and there was an interview at which the bookmaker asked the appellant why he was changing his bookmakers, and he was told that the reason was that his bookmakers were talking and that it was damaging to his business in Hatton Garden, whatever that business was. After the discussion it was arranged that the bookmaker would accept the appellant's bets up to £500 a week, and, according to the bookmaker's evidence, which it would appear the jury accepted, he, the bookmaker, asked the appellant or said to the appellant: "Very well. Are you sure you can meet that obligation," and the appellant answered: "Perfectly." Accordingly the bookmaker accepted bets from the appellant. He said he gave him credit, though it is perhaps questionable as to whether that is the proper description of the arrangement, which was in fact that the bookmaker agreed to accept bets from the appellant up to a limit of £500 in any week, and it was further agreed that settlement should be made each week.

The appellant made certain bets with the bookmaker on horses engaged at various meetings. In the week ending June 3, the appellant won £140. In the following week he won £100, and in the week ending June 17 the appellant won £225. He was paid those sums by the bookmaker's cheques, and those sums are the sums charged in the counts alleging offences under the Gaming Act, 1845, s. 17. Thereafter fortune changed, and in the following two weeks the appellant lost £147 19*s.* 1*d.*, and £305 respectively. He did not pay either of those sums, and it is a fair inference that he was not only unable to do so, but unwilling to do so: it is a fair inference having regard to the verdict of the jury. These two items are the items included in the counts alleging offences under the Debtors Act, 1869, s. 13.

Evidence was given at the trial to show that the appellant was not in a position to meet a loss of £500 a week; indeed, at all material times his account at the bank was considerably overdrawn. Very many of his cheques were returned. Considerable sums of money did pass through the banking account but there was at all material times a heavy overdraft. Furthermore, evidence was given by three other bookmakers, with whom the appellant was having betting transactions about the same time, to show that the unfortunate result of transactions with the prosecutor could not be due to accident or mistake or to any belief that the bank would meet his cheques. The bookmakers were first a man named Dion who said that in June the appellant lost to him a sum of £40 on June 14, another sum of £20 shortly afterwards, and the following week the sum of £55, making £115 altogether, of which nothing was ever paid. A cheque was sent in respect of the first week, which no doubt induced the bookmaker to allow a bet or bets in the following week, but the cheque was never met. The second bookmaker was a man named Lee, who about May 6, or during the month of May, paid to the appellant bets which the appellant won, and in June or thereabouts the appellant lost a sum of £57 10*s.* 0*d.*, which was never paid. The third bookmaker was a man named Lotine and about June 10 the appellant lost to him the sum of £249 5*s.* 8*d.* in the week. The appellant's cheque was not met; it was presented and re-presented at the appellant's request, and the appellant was allowed to bet further and it so happened that he won the sum of £94; there is, therefore, £151 13*s.* 8*d.* still owing.

The case for the prosecution was that the appellant was fraudulent throughout; that he never intended to pay if he lost but was bent on obtaining money, in other words, that he was determined to cheat the bookmaker by pretending to be betting on the ordinary terms, and thus representing himself as willing to meet his obligations, whereas he never intended to do so. Obviously, this is a matter which it is not easy to prove, but the jury were satisfied on the evidence of the bookmaker and of the appellant's bank manager, who was an unsatisfactory witness, and of the bookmakers, and after hearing the evidence for the appellant, that the appellant was in fact fraudulent throughout his dealings with the bookmaker. The issue was put quite clearly by OLIVER, J., who presided at the trial, in this way:

> The question you must pose to yourselves right through this matter is this: from the moment this man went to Wilson, from the moment he left him, did he intend to cheat, to see what he could get out of him, and if he lost not to pay.

The jury's verdict, after that direction, was arrived at on its being proved to their satisfaction that the appellant was acting fraudulently throughout. There was evidence on which they could so find, and this court is not further concerned with that part of the case.

It was somewhat faintly suggested by counsel for the appellant that there was misdirection by the judge in that he did not sufficiently put or stress the appellant's case. There is no substance in that submission.

The matters to which our attention has been chiefly directed are difficult questions of law, and it remains to consider the submissions which were made as to what is the true position in law. As to the counts under the Debtors Act, s. 13, it was argued by counsel for the appellant that no offence had been committed, for the section, said he, in referring to a debt must be taken to mean an actionable debt or a debt enforceable in law. The section, in so far as material, is :

> Any person shall in each of the cases following be deemed guilty of a misdemeanour . . . (1) if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud.

The two counts under the Debtors Act, were under that section, and the charge was in count 4 :

> . . . that the appellant on June 24 in incurring a debt or liability to Jack Wilson obtained credit to the amount of £147 19*s.* 1*d.* from the said Jack Wilson by means of fraud.

And the fifth count is in similar terms in relation to the sum of £305.

Counsel for the appellant in support of his argument referred us to several authorities. In the first place he referred us to *Rawley* v. *Rawley* (1), and in particular he cited the words of SIR ALEXANDER COCKBURN, C.J., at p. 463 :

> The right of set-off depends, I think, upon there being an actionable debt. The statute, no doubt, speaks of " debt," but that, unless a very narrow construction be adopted, means actionable debt.

Counsel for the Crown, in reply, referred to other judgments, judgments in the Court of Appeal in that case, and particularly to a passage in the judgment of JESSEL, M.R., where he said, at p. 466 :

> . . . and it has always been accordingly held, that a set off can only be successfully pleaded when an action could have been maintained for the same debt.

The words of KELLY, C.B., at p. 467 :

> But are these mutual debts here, when one of them is a debt for which an action cannot be brought ?

And the words of MELLISH, L.J., on pp. 467, 468, quoting WILDE, C.J. :

> The judicial construction of this section has been that no debts can be used by way of set off except such as are recoverable by action.

The object of counsel for the Crown in citing those passages to us was to make his point that there were two kinds of debts, actionable debts or debts enforceable in law, and other debts such as debts of honour.

We were also referred to *Luckett* v. *Wood* (2), and *Haigh* v. *Town Council of Sheffield* (3), and further to the words of the Gaming Act, 1845, s. 18. That section is as follows :

> All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void ;

It was pointed out to us by counsel for the appellant that the judge appeared in his direction to the jury to treat gaming debts as voidable, whereas by the 1845 Act, s. 18, they were declared to be null and void. It does not appear to us that the authorities which were cited are of great help on this part of the case, but it is right to say that there is some authority for saying that the word " debt " in a statute means an actionable debt, and *a fortiori* it would appear to be so in a penal section such as the Debtors Act, 1869, s. 13.

We think, however, that more help is to be obtained by an examination of the Act itself. The Debtors Act of 1869 is entitled :

> An Act for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes.

Part I deals with the abolition of imprisonment for debt, and Part II, which includes sect. 13, deals with the punishment of fraudulent debtors and is mostly concerned with bankruptcy offences. It is difficult to think that betting transactions were contemplated by the legislature within the framework of the Debtors Act, 1869. One cannot envisage imprisonment for a gambling debt or bankruptcy arising directly from such a debt, for the legislature 24 years earlier had said in the Gaming Act, 1845, s. 18, that any such contract was null and void. It is to be remembered that no credit was given when the arrangement was made ; it was no more than an agreement to accept bets if made up to a certain limit, and again no credit was given when a bet was placed and accepted; it was only when the fancied horse lost that a so-called debt arose and the credit was given. In our view losses so incurred are not debts within the meaning of the Debtors Act, 1869, s. 13, and we have come to this conclusion upon an examination of the Act itself and of its scope. The direction of Oliver, J., on this matter was in these terms:

> Well, of course, it [that is a betting debt] is not enforceable in law, but as a matter of law I direct you that a man who loses money to a bookmaker by making a losing bet does incur a debt, even although it is not enforceable.

A little later he says:

> But I tell you that up to the time that he repudiates he has incurred a debt.

Unfortunately the judge's attention was not drawn to the wording of the Gaming Act, 1845, s. 18. We think the direction was not an accurate statement of this somewhat difficult branch of the law, which is one upon which there does not appear to be any direct authority. Consequently, the convictions on counts 4 and 5 of the indictment must be quashed. It is perhaps not inappropriate to remark that the magistrate before whom the case came did not commit upon those charges. They were put before him but he did not commit upon them, being of opinion, apparently, that there was no case upon which he ought to commit.

As to the charges under the Gaming Act of 1845, s. 17; that section, as far as material, reads as follows:

> Every person who shall, by any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same . . .

Leaving out some of the words, one reaches this:

> Every person who shall by any fraud in wagering on the event of any sport win from any other person a sum of money shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence.

It is to be observed that something more than what is commonly known as obtaining money by false pretences is contemplated by the legislature. The counts in the indictment are framed in the statement of offence as obtaining a valuable thing by false pretences contrary to the Gaming Act, 1845, s. 17, and then in the particulars it said: the appellant on such and such a day by fraud in wagering on the events of horse races won from Jack Wilson a valuable thing, to wit, a cheque for £140, and there are the other sums in the other counts.

Counsel for the appellant submitted to this court that it was necessary to show fraud in wagering, and that is quite right. The difficulty is to see what "in wagering" means. For the purposes of this appeal it must be taken that the jury, who had this case before them for some time, were all satisfied that the appellant was fraudulent throughout. Counsel for the appellant cited to us authorities under this section which were all dealing with games of cards. They were *R.* v. *Governor of Brixton Prison* (4) and *R.* v. *John Moore* (5). In those cases it was said that in a game of cards or a game such as a three card trick, it was not sufficient to show that there was fraud before the game started, but there must be shown fraud in the course of the game itself. Of course, a game of cards is not quite the same thing as wagering. The act of making a wager is done by a word or a few words, an offer and an acceptance. Counsel for the respondent submitted that unless in the circumstances of this case the offence of fraud in wagering was committed, it was difficult to see when it could be, and, as he remarked, wagering is instantaneous, and he submitted that the circumstances of this case showed that there was evidence on which it was open to the jury to find fraud in wagering.

Reference has already been made to the direction of the judge on the case generally, and it is right to point out again that in the course of his summing up the judge, dealing with the 1845 Act, said:

> The other three charges are for a different matter. They are framed under a very old statute some 100 years old, the Gaming Act, 1845, and that deals with conduct which is described as "obtaining money by fraud in wagering." It is rather quaint

language—"fraud in wagering," but that undoubtedly, I tell you as a matter of law, would include obtaining money by fraud in backing horses. Again you have to answer the question and I think it is exactly the same question. The facts of these cases are not quite the same as the last two, because they are earlier in date and I will point out the dates to you. On his three weeks of betting with Wilson he won, the first week £140, the second week £100, the third week £225. Do you regard that as money that he had won by cheating in the circumstances of this case, and before you came to that conclusion, it seems to me you would have to come to the conclusion that you are satisfied upon the evidence and upon the facts that when he entered into those three sets of transactions he never intended to pay if he lost; that he intended to put the money in his pocket if he won, but he never intended to pay if he lost.

The real question which was put to the jury was: Was the appellant fraudulent throughout, and they said: Yes, he was. That seems to us to mean, and necessarily to mean, that at the time that the appellant made each of these bets with the bookmaker, he intended to cheat; he was fraudulent and at the moment of making the bet, he intended to cheat and defraud the bookmaker. In those circumstances it seems to us that there was, as OLIVER, J., held, evidence on which the jury could come to the conclusion that this offence was proved and they so found. It follows that the appeal against conviction on counts 6, 7 and 8 fails. At the same time we think it right to point out this. This is a set of circumstances which can very seldom happen. There was evidence in this case which satisfied the jury that the appellant was fraudulent throughout. It is perhaps as well to remark that that set of circumstances can seldom recur by way of proof.

The result of the appellant's appeal is that he succeeds on one part of the case and fails upon the other. The sentence which was passed upon him was one of nine months' imprisonment. He appeals also against his sentence. As this court has found some part of the case against him not proved, we think it right that there should be some alteration in his sentence, and the sentence accordingly is reduced from nine months to three months' imprisonment.

Convictions under the Debtors Act, s. 13, *quashed. Appeal against convictions under the Gaming Act, s.* 17, *dismissed. Sentence reduced to three months' imprisonment.*

Solicitors: *Burnett L. Ellman* (for the appellant); *Samuel Coleman* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

JONES *v.* EVANS.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Atkinson and Oliver, JJ.), **April 26, 27, 1944.**]

Bastardy—Wife of soldier serving overseas—De facto separation—Adultery—Birth of child—Husband not father of child—" Forgive you to a certain extent "—No condonation—" Single woman "—Bastardy Laws Amendment Act, 1872 (*c.* 65), *s.* 3.

The appellant was the wife of a soldier serving in H.M. Forces who had embarked for service overseas in March, 1942, and had since not returned to England. The appellant herself did not leave this country after that date. In May, 1943, the appellant was delivered of a child of which child her husband was not the father. Her husband, though knowing of her condition, did not stop the separation allowance she was drawing for herself, nor the army allowance she drew for a short while for the bastard child, and he wrote to her a letter saying: "I have decided to forgive you to a certain extent, until I get the luck to get home." In July, 1943, the appellant preferred a complaint under the Bastardy Laws Amendment Act, 1872, against the respondent as the putative father. The justices found that the appellant and her husband were not living separate and apart at the date of the complaint, since the husband's service overseas did not amount to a determination of the consortium between husband and wife and that, therefore, the appellant had not the status of a "single woman." It was contended that for the purposes of the affiliation order applied for, the appellant ought to be considered a "single woman," since there was a *de facto* separation of husband and wife, the wife had committed adultery forfeiting thereby her right to the consortium of the husband, and mere forgiveness of the husband did not amount to condonation :—

Held : since there was a *de facto* separation of considerable length and an uncondoned matrimonial offence which had lost for the appellant her title to maintenance by her husband and her right to live with him, the appellant had to be considered a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3.

R. v. *Luffe* (2) *and R.* v. *Pilkington* (4) *applied. Marshall* v. *Malcolm* (8) A *distinguished.*

[**EDITORIAL NOTE.** This case, which is of particular interest during the war, when many men are absent overseas, reviews the conditions under which a married woman may be regarded as a "single woman" for the purpose of bastardy proceedings. The following points emerge : (*a*) the husband and wife must be living apart in fact ; (*b*) mere absence on a journey, or on active service, is not sufficient ; (*c*) separation need not be the result of decree, order, agreement or desertion ; (*d*) a colourable separation B for the purpose of the proceedings, as in *Jones* v. *Davies* (7) is not sufficient ; (*e*) the wife must have committed a matrimonial offence sufficient to render her "unworthy of her husband's protection" in the words of Littledale, J., in *R.* v. *Flintan* (1) ; (*f*) such offence must be uncondoned.

As to a Married Woman taking Affiliation Proceedings, see HALSBURY, Hailsham Edn., Vol. 2, pp. 582-586, paras. 802-806 ; and for Cases, see DIGEST, Vol. 3, pp. 387, 388, Nos. 253-269.]

Cases referred to : C

*(1) *R.* v. *Flintan,* (1830) 1 B. & Ad. 227 ; 37 Digest 233, *255.*
*(2) *R.* v. *Luffe,* (1807) 8 East, 193 ; 3 Digest 388, *263.*
*(3) *R.* v. *Collingwood,* (1848) 12 Q.B. 681 ; 3 Digest 388, *264* ; 3 New Mag. Cas 53 ; 3 New Sess. Cas. 252 ; 17 L.J.M.C. 168 ; 12 L.T.O.S. 105.
*(4) *R.* v. *Pilkington, ex parte Grimes,* (1853) 2 E. & B. 546 ; 3 Digest 388, *265* ; 21 L.T.O.S. 165 ; *sub nom. ex parte Grimes,* 22 L.J.M.C. 153.
(5) *Stacey* v. *Lintell,* (1879) 4 Q.B.D. 291 ; 3 Digest 387, *259* ; 48 L.J.M.C. 108 ; D 40 L.T. 553.
(6) *Tozer* v. *Lake,* (1879) 4 C.P.D. 322 ; 3 Digest 387, *260* ; 41 L.T. 280.
*(7) *Jones* v. *Davies* [1901], 1 K.B. 118 ; 3 Digest 388, *266* ; 70 L.J.Q.B. 38 ; 83 L.T. 412.
*(8) *Marshall* v. *Malcolm,* (1917) 87 L.J.K.B. 491 ; 3 Digest 388, *267* ; 117 L.T. 752.
(9) *Keats* v. *Keats and Montezuma,* (1859) 1 Sw. & Tr. 334 ; 27 Digest 336, *3166* ; 28 L.J.P. & M. 57 ; 32 L.T.O.S. 321.
*(10) *R.* v. *Creamer* [1919], 1 K.B. 564 ; 15 Digest 974, *10898* ; 88 L.J.K.B. 594 ; E 120 L.T. 575.

Appeal by the complainant by way of case stated from a decision of the justices for the Borough of Flint, dated July 17, 1943, dismissing a complaint preferred by her against the respondent, one Emlyn Evans, under the Bastardy Laws Amendment Act, 1872. The complainant was the wife of Joseph Thomas Jones, a soldier who embarked for service overseas on March 21, 1942, and F had since not returned to this country. On May 18, 1943, the complainant gave birth to a male child. Jones, knowing of his wife's pregnancy, wrote to her a letter stating "I have decided to forgive you to a certain extent, until I get the luck to get home." The justices were of opinion that an enforced separation due to war service did not amount to a break in the relations between husband and wife, and that, therefore, the complainant could not be considered a "single woman" within the meaning of the Bastardy Laws Amendment G Act, 1872.

Graham Brooks for the appellant.

Herbert Malone for the respondent.

Atkinson, J. [delivering the judgment of the court] : There is no doubt that there are circumstances in which a married woman is a "single woman" for the purpose of the Bastardy Laws Amendment Act, 1872, s. 3. Two pro- H positions are well established. A married woman who is living with her husband at the date of an application for an order of affiliation is not a "single woman." A married woman who is not living with her husband at the date of the application may be a "single woman." The contest here is as to what is meant by a wife living or not living with her husband. The complainant contends that if, in fact, the husband and wife are not living together, whatever the reason may be, the wife is a single woman, at any rate if she has been guilty of adultery which has not been condoned and has thereby lost her legal right to maintenance and the consortium of her husband. The respondent contends that it is only a separation resulting from a decree, or order, or agreement, or desertion which amounts to "not living together" within the meaning of the cases. It is, of course, not suggested that it can be said that a husband and wife are not in fact living together merely because of some short temporary absence from home of one of them, but in the present case it is clear that the complainant was not in fact living with her husband on July 17, 1943, the date on which she preferred her application, that she had not lived with him for sixteen months and had no prospect of living with him in the near future, that she was drawing army allowances on the basis of separation, and that she had committed a matrimonial offence, uncondoned, which entitled her husband to refuse to resume cohabitation and further to maintain her. The importance of this point was emphasised by LITTLEDALE, J., when he said in *R.* v. *Flintan* (1), at p. 230:

> Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married.

There are a number of relevant cases. In *R.* v. *Luffe* (2) the application was made under 6 Geo. II (c. 31), art. 1:

> An Act for the relief of parishes and other places from such charges as may arise from bastard children born within the same.

The Act was confined to cases where "any single woman shall be delivered of a bastard child." In that case an order had been made affiliating the child of a married woman. The facts were that the woman gave birth to a child on July 13, 1806. Her husband had been beyond the seas since Apr. 9, 1804, and she did not see him or have access to him from that date to June 29, 1806, when he returned home. The order on the application was made on Aug. 20, 1806 when, although it is not so stated, presumably the husband was again at sea or at any rate not living again with his wife. It was not there suggested that the woman could not be considered as a single woman because her husband was beyond the sea by reason only of his calling which is the contention put forward in this case by the respondent. The court upheld the order. In *R.* v. *Collingwood* (3) the facts are not fully stated. A rule has been obtained to remove into the Court of the Queen's Bench an order made on a bastardy summons under the Poor Law Amendment Act, 1844, and the Bastardy Act, 1845, against the putative father to pay to the mother of the bastard child the sum of 1*s.* 6*d.* a week:

> . . . until the said child shall attain the age of 13 years or shall die or the said George Rance [the husband of the mother] shall again live and cohabit with his said wife.

The Poor Law Amendment Act, 1844, s. 2, upon which the Bastardy Act, 1845, was founded, speaks only of:

> . . . any single woman who may be with child, or who may be delivered of a bastard child, . . .

And the rule was discharged although the mother of the bastard child was a married woman. LORD DENMAN, C.J., said at p. 686:

> The single question is whether a *married woman* becoming the mother of an illegitimate child is within the Poor Law Amendment Act, 1844, which authorised the justices to make an order of bastardy. The language of the statute applies in terms only to single women: so did the language of statute 6 Geo. II (c. 31); yet LORD ELLENBOROUGH and the whole court in *R.* v. *Luffe* (2) held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose. The Act last named is repealed, indeed by that now in force; but the authority and the reason of the decision remains unimpaired; and the law, differently interpreted, would fail to reach a very large proportion of illegitimate children. We therefore think that we must hold this order good.

Beyond the fact of separation it is not clear from the report what were the circumstances of the mother of the child as regards her husband. In *R.* v. *Pilkington* (4) an order of maintenance was upheld, which had been made by justices on the putative father of a bastard child born of a married woman, whose husband had been absent under sentence of transportation in Van Diemen's Land for several years. There was no separation here between husband and wife by operation of law—that is, by decree, or by agreement—the husband was away from his wife not voluntarily but by reason of his sentence. Lord

Campbell, C.J., in giving judgment, referred to *R.* v. *Luffe* (2), saying at p. 552:

> The question seems to me to turn on the question whether the mother here can be called a single woman . . . this question has been solemnly decided in the affirmative . . . We are not, it is true, absolutely bound by that decision, but we should adhere to it unless very strong reasons were adduced against it. In *R.* v. *Luffe* (2) the same interpretation was put by this court on the word [single] as used in the earlier statute; and it was held that a married woman may, under such circumstances as these, be considered "single" in the sense intended by a statute which provides for the maintenance of bastards.

Justices had refused to grant a distress warrant under the bastardy order on the ground that the husband had returned from his sentence about 5 years after the date of the bastardy order and cohabitated again with his wife, but had left her after about six weeks and was never heard of again. Lord Campbell said, at p. 553:

> As to the husband's return, in *R.* v. *Collingwood* (3) the decision was on general grounds: it did not appear that the husband was suffering transportation; he might have been in Scotland, or in England indeed, if he had not access to his wife. The liability of the putative father in this case cannot, therefore, be affected by the return of the husband from transportation.

In *Stacey* v. *Lintell* (5) and *Tozer* v. *Lake* (6) it was held that an application for a bastardy order under the Bastardy Laws Amendment Act, 1872, ss. 3, 4, could not be made when the mother had married since the birth of the bastard child and was living with her husband at the time of the application.

In *Jones* v. *Davies* (7) Hannah Jones was a married woman living with her husband, a seafaring man. He was away from home from Feb. 23, 1899, to July 6, 1899, and on his return became aware of his wife's pregnancy. He continued to cohabit with her for three weeks, when he again went to sea, returning in Sept., 1899, for a short period, when he again cohabited with her. He returned again on Jan. 27, 1900, after the birth of the child, on Dec. 3, 1899, and cohabited with his wife until Feb. 7, 1900, when, being advised by a solicitor acting for his wife that she should be living apart from her husband so that she might obtain an affiliation order, he separated from her and went to reside in another part of the country. The wife then applied for a summons against Davies. The justices found that the separation was colourable and for the purpose of the proceedings only, and that the husband intended to cohabit with his wife when the proceedings were over and they dismissed the information but stated a case. Their view was upheld by a Divisional Court. Lawrance, J., said, at p. 120:

> . . . I base my judgment on the short and simple ground that in no case has it been shown that a married woman, who is living with her husband at the time the application is made, can be treated as being a single woman. No doubt the expression "single woman" in the Bastardy Acts caused some difficulty at first, but the courts got over that difficulty by deciding that a married woman who was living apart from her husband might be treated as a single woman, but there is no case where she has been so treated whilst she is living with her husband . . . The magistrates found as a fact that this separation was only colourable, and I think that they came to a right conclusion.

Kennedy, J., said, at p. 121:

> The point that we have to decide is whether, the magistrates having found conclusively—and as I think rightly—that the husband and wife were in fact living together, the woman can, under such circumstances, obtain an affiliation order against another man, assuming, of course, that that man is proved to be the father of the child. The section under which the application was made in terms relates to a "single woman," and *prima facie*, therefore, this woman could not make such an application because she was not within that category; but there are a number of authorities, by which we are bound, which show that the word "single" may be so far neglected as to warrant an application by a woman who has in fact been married and who, therefore, has the status of a married woman, but who at the time the application is made is not living with her husband. . . . So far as the decisions to which I have alluded are concerned, they are all cases in which at the time of the application the woman making it was in fact living separate from her husband, and in which the husband might have said that she had rendered herself unworthy of her husband's protection, and had lost her title to maintenance in his home, and, therefore, as was said by Littledale, J., in *R.* v. *Flintan* (1), "she returns to the same state as if she were not married." The case of *R.* v. *Luffe* (2) is a case of that character, since I understand from the report that the applicant in that case was not living with her husband at the time of the application.

KENNEDY, J., then referred to *R.* v. *Collingwood* (3) and *R.* v. *Pilkington, ex parte Grimes* (4). It is clear that LAWRANCE and KENNEDY, JJ., when speaking of a wife living apart from her husband, meant in fact living apart from her husband and were not intending to limit the rule to be derived from the earlier cases. In our opinion, *Jones* v. *Davies* (7) is not in conflict with the earlier authorities, as urged for the defendant, but in line with them.

The only case which creates any difficulty is that of *Marshall* v. *Malcolm* (8). There the wife was married in 1914 and lived with her husband till December of that year, when he had to join the Navy, as he was in the naval reserve. Between that date and Aug., 1916, he never had access to his wife. In Mar., 1916, the wife gave birth to a child. On learning of this occurrence the husband stopped payment of his allotment, but in Aug., 1916, he came home for a week on leave, forgave his wife and lived with her. He then returned to his ship and payment of his allotment was resumed. In July, 1917, the wife summoned the appellant as being the father of the child and the justices made an order on him for its maintenance. It was held that the respondent was not living separate and apart from her husband while he was at sea, and that she could not therefore, be deemed to be a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3, and the order was set aside. The respondent did not appear and, therefore, the case was not argued, nor was the attention of the court called to *R.* v. *Luffe* (2), and *R.* v. *Collingwood* (3). DARLING, J., said, at p. 493:

> In deciding whether she was to be deemed a single woman within the meaning of the Act, the material date is the date of the application . . . Although in fact married she might be treated as a single woman under certain circumstances . . . It is a complete misuse of language to say that the respondent was living apart from her husband. A wife is not living separate and apart from her husband merely because he is absent on a journey . . . The magistrates have decided this case in a manner contrary to authority. They have decided that a woman who was living with her husband as much as the wife of a soldier or sailor can live with him when he is on active service, was living separate and apart from her husband.

As I have stated, that case was not argued. It is enough to say that there had been clear condonation, and that is sufficient to distinguish it from the present case. The letter written by the husband in the present case did not amount to condonation: see *Keats* v. *Keats and Montezuma* (9). The importance of that distinction receives support from a passage in *R.* v. *Creamer* (10), where the question whether the accused could be guilty of receiving property stolen by a wife from her husband, depended on whether the husband and wife were living together. DARLING, J., said, at p. 569:

> In determining whether a husband and wife are living together the law has regard to what is called the consortium of husband and wife, which is a kind of association only possible between husband and wife. A husband and wife are living together, not only when they are residing together in the same house, but also when they are living in different places, even if they are separated by the high seas, provided the consortium has not been determined. In this case it cannot be said that at the time the wife took the money the consortium had been determined, because the wife had not at the time committed adultery, and, therefore, it is little to the purpose to point to the fact that the wife was living at Folkestone and the husband was in France on service with the army. In the legal sense they were still living together.

In our view, the facts in the present case constituted the appellant a "single woman." There was a *de facto* separation of considerable length and an uncondoned matrimonial offence which had lost for the appellant her title to maintenance by her husband and her right to live with him. The appeal, therefore, succeeds. In our judgment, the justices have taken a wrong view of the law and the case must go back to them that they may consider whether it is proved that the respondent is the father of the appellant's child.

Appeal allowed. Case remitted to the justices.

Solicitors: *G. Thatcher & Son*, agents for *J. Kerfoot Roberts & Son*, Holywell (for the appellant); *Field, Roscoe & Co.*, agents for *Isaac Edwards and Owens*, Rhyl (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LITTMAN *v.* GOORWITCH LTD.

[Kings Bench Division (Oliver, J.), **October 17, 1944.**]

Emergency Legislation—Landlord and tenant—War damage—Notice of disclaimer—Notice to avoid disclaimer— Extent of repairs required to make premises "reasonably fit"—Use of premises in particular neighbourhood—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 11.

In 1938, the plaintiff leased to the defendants certain premises in Oxford Street for a term of 23 years and at a rent of £8,250 per annum. The defendants converted the frontage on the ground floor into an arcade with glass showcases for the display of their goods. As a result of enemy action on Apr. 16, 1941, a large quantity of glass plates in the showcases were destroyed. On June 16, 1941, the defendants served the plaintiffs with a notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939. On July 16, 1941, the plaintiff served a notice to avoid disclaimer and replaced the glass plates with an amalgamation of board and glass. The plaintiff then brought an action for the full rent for the premises. At the trial before Croom-Johnson, J., it was held that two-thirds of the arcade having been abolished, the plaintiff had not rendered the premises fit for the resumption of business therein. On application to the county court for apportionment of rent, the plaintiff was awarded a rent of £5,200. The plaintiff then proceeded to do further repairs, the result being that half the total area consisting once of plate glass was now board and opaque illuminated by large pieces of ordinary glass fitted into the board. The question for determination was whether the additional repairs rendered the premises now reasonably fit for the defendants' business :—

Held : in view of the locality of the premises and the nature of the trade, the repairs effected did not render the premises reasonably fit for the purposes for which they had been let.

[**EDITORIAL NOTE.** In order to sustain a notice avoiding disclaimer the landlord must repair the premises so that, in the case of business premises, they are " fit " for trading. This decision shows that the standard of fitness is not absolute, but varies with the locality of the premises and the nature of the goods dealt with. The premises have not got to be made as good as before, but made reasonably fit for carrying on that particular business at that particular place.

For the Landlord and Tenant (War Damage) Act, 1939, s. 11, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 993, 994.

Case referred to :

*(1) *Boudou* v. *Thornton Smith,* [1941] 1 K.B. 561 ; [1941] 1 All E.R. 454 ; 164 L.T. 294.

Action for the recovery of arrears of rent. The case deals with the interpretation of the Landlord and Tenant (War Damage) Act, 1939, s. 11. The facts are fully set out in the judgment.

I. J. Lindner for the plaintiff.

H. H. Edmunds for the defendants.

Oliver, J. : This is an action brought by Joseph Aaron Littman against Goorwitch, Ltd., claiming £1,425 for arrears of rent. The following are the circumstances leading up to the action.

In 1938, Nos. 175, 177 and 179, Oxford Street, were let by the plaintiff to the defendant company for a term of 23 years at a rent of £8,250. Nothing except a peppercorn was payable for the first year and a quarter, in order to give the new tenant an opportunity of remodelling the premises and getting ready for business ; and what he did was to spend some £4,000 in converting the ground floor front of this rather imposing building into a kind of arcade, in which intending customers or hoped-for customers could walk and inspect the goods of the defendant company, which were in the nature of suits of clothes and clothing generally. This arcade was fitted entirely round with show cases, and in the centre of this place were two island show cases. It was quite apparent from the evidence that the defendants' business was very largely based upon the anticipated result of displaying his goods to the crowds who throng Oxford Street.

At the end of December, 1939, the defendants gave up the idea of trading at that place altogether during the war, and they got rid of the stock, but left the premises in a condition in which at any time they could have resumed trading had they so desired, or no doubt they could have sub-let to someone else. Whether or not they intended to trade, of course, does not matter ; they had a contract ; they were to pay a rent of £8,000 odd for the premises, and they were entitled to have those premises whether they chose to trade in them or not. On Apr. 16, 1941, came a German visitation which resulted in considerable damage to this and other neighbouring property. Substantially, so far as this action is concerned, the only thing we have to consider is the condition of this arcade and frontage. The whole of the glass or a very large quantity of the glass of the show cases and the frontage were, of course, smashed ; therefore, it was quite manifest that, in that condition the premises were not, within the meaning of the Landlord and Tenant (War Damage) Act, 1939, fit for trading. "Fit" is the word in the Act and the word I have to consider in this case.

On June 16, 1941, the defendants served, as they were entitled to do under the Act, a notice of disclaimer of the lease, and within the allotted time, namely, a month, on July 16, the landlord (the plaintiff) served, as he was entitled to do, a notice avoiding disclaimer, again under the Act. Having regard to the view I have come to in this case, I do not think it is necessary for me to discuss at length the sections of the Act or what they mean. I am very glad to think that I have not to do so, because I have grave doubt as to the meaning of some of the phrases in the Act. But this much is clear, it seems to me : that in order to sustain this notice avoiding disclaimer, the landlord's duty (and here I will use the precise language of MACKINNON, L.J., in *Boudou* v. *Thornton-Smith* (1), at p. 567), is this :

> The tenant is under no obligation to do such repairs, and the machinery of the Act puts that obligation, not as a direct obligation, but indirectly, on the landlord, if he is to reap thereby the benefit of being able to serve a counter-notice to negative the result of the tenant's notice of disclaimer.

In other words, a tenant having disclaimed, if the landlord says, "I will put this property into a condition that, within the meaning of the Act, is fit for you to trade in, taking into account all the circumstances," that is a thing which he (the landlord, the plaintiff) has got to do himself ; and I have equally no doubt that the onus of satisfying me that he has done it is upon him. That is the plain meaning of the Act, and the plain meaning of that statement of the law by MACKINNON, L.J., and it appears in terms upon the pleadings, the statement of claim on the writ, which is a perfectly properly drawn document.

Before I leave the case of *Boudou* v. *Thornton-Smith* (1), I will just refer to what it is the landlord has to do, according to the judgment of the court, which was delivered by GODDARD, L.J. The other two Lords Justices added something, but his certainly was the judgment of the court. GODDARD, L.J., at p. 565, says :

> I do not think that sect. 11 imposes on the landlord a higher obligation than to make the premises reasonably fit for the purpose of carrying on the business.

I do not take that as saying, nor do I believe that the Act intended, as counsel for the defendants contends, that the premises had got to be made as good as before. In my view—and I take it to be the view of the Court of Appeal, and certainly the view of CROOM-JOHNSON, J., expressed on another occasion to which I shall refer in a moment—all they have got to do is to make the premises reasonably fit for the purposes of carrying on that business at that place. Then GODDARD, L.J., goes on :

> If a plate glass window is blown out and the class of premises is one for which a window is essential (as would be the case in most shops at any rate), then the plate glass window will have to be put back.

I do not read that as meaning any more than this : if it is a shop whose business depends upon having a window, and its only window has gone, it must have another window, otherwise it is not fit to be used as a shop. I do not think it means that, if it has got 20 windows, and one of the 20 is broken, it is necessary to replace that with glass. It is a question of fact in every particular case: Are the premises rendered fit for the class of business by what has been done, or are they not ? Then GODDARD, L.J., proceeds :

> It does not follow that every scar or every scratch that has been caused in the shop by reason of flying glass has to be repaired ; the premises have to be placed in such a condition that business can reasonably be carried on there.

CROOM-JOHNSON, J., in another matter to which I shall refer presently, pointed out that the Act does not use the word "reasonably," and that is perfectly true, but that is the way in which the Court of Appeal has construed it, and it appears to me to be the sensible and practical way of interpreting it.

In 1941, the plaintiff, in pursuance of his notice to avoid disclaimer, had certain repairs done. The big plates of glass in the extreme front of the premises were replaced by an amalgamation of board (called beaver board) and glass. One of the two passage-ways into the arcade was blocked up altogether; the other was left open; and with regard to the show cases inside of the arcade, the only one that was partially restored or repaired was the right hand island show case inside, and the show cases along the right hand side of the arcade as you went in from the street. Partitions were put up cutting off the other side of that island site. The whole of the other island site and the whole of the show cases on the left of the arcade and the big show case at the back of the arcade were all cut off completely from any access from the street. In those circumstances a writ was issued by the plaintiff in this division claiming the full rent; in other words, claiming that he had rendered the premises fit for the carrying on of the defendants' trade. In pursuance of that action he delivered particulars. The first particular he delivered was to the effect that rather more than half the glass for display purposes had been replaced by beaver board. That was the first matter of complaint. The second matter of complaint, and what I have just referred to, is the complete elimination of about two-thirds of the arcade itself and its contents; and there were two others which I need not advert to. There was in that proceeding no claim that the work which had been done of beaver board and glass was not dustproof; I think perhaps that had not occurred to the defendants at that time, but I do not think the fact that they did not allege that in those proceedings prevents them from alleging it now if it is true. That action came on before Croom-Johnson, J., on May 20, 1943, and about a week later he delivered judgment. I desire to say that with his judgment I entirely agree. It is a reasonable application of the Act, and he said, in effect, this: If the landlord had done to the rest of the arcade what he has done to the front on Oxford Street and to the right-hand side of the arcade, I would have said that he had complied with the Act. Counsel for the defendants is quite right in saying that that was not necessary for the decision he came to, that it is to an extent *obiter*, but I desire to say that I agree with it. When you are considering whether a place is reasonably fit, and when the Act directs you to take into account all the circumstances, including the circumstances of your neighbours (because that is how I read this rather difficult passage in the definition section), I think it means, things being what they are, and times being what they are, and the other shops around you being in the state they are, is it reasonable to say that you cannot carry on business at all, or is it not reasonable to say that you can? I agree with Croom-Johnson, J., that, had that been proved to my satisfaction here, I would have said that the place was reasonably fit, that, of course, being, as I see it, and as other judges have commented, a pure question of fact for me.

Now Croom-Johnson, J., decided that case on the lines that it would be impossible, two-thirds of the defective part of the arcade having been abolished altogether, to say that the premises had been rendered fit for the business to be carried on therein. As a result of his decision, which was, therefore, against the landlord, the landlord (the plaintiff) took proceedings, in June, 1943, in the county court to get what I will for convenience refer to as an apportionment of the rent, because there are powers under the Act enabling a county court judge under various circumstances to apportion the rent where part of the premises (in this case the rest of the ground floor, the whole of the basement, and the upper floors) are perfectly fit for the purpose of trade; and he, after the hearing, awarded a rent of £5,200 to be paid, and that has since been paid. I do not know what the position is now, nor does it matter, because some time after the events with which we are concerned the premises which were empty were requisitioned, and now I believe are used for different purposes by some branch of the American public service.

As a result of these events, the plaintiff did some more repairs, and there is no doubt that he wanted to put back the arcade into the position in which it had been before. It is not uninteresting, as counsel for the defendants pointed out, to see the view that the landlord and his advisers took at that time, which one gets from a document (I think it came from the possession of those instructing counsel for the plaintiff) produced this morning. That is a document in which the agents of Lloyds' Bank, who are the superior landlords or freeholders of these premises, made application to the Ministry of Works for permission to spend more than £100 on this job, that being the permission then necessary. The estimated amount of the proposed work was said to be £435 15*s.* 1*d.*, and the object of the work was described as follows :

> To render the premises fit within the meaning of the Landlord and Tenant (War Damage) Act, in accordance with a judgment given by Croom-Johnson, J., at the high court in connection with these premises.

I need not go into the facts, but the application was not " in accordance with a judgment given by CROOM-JOHNSON, J.", who had not said anything about putting the building back as it was before ; but that is their own phrase—" to render the premises fit." It may no doubt have been put in that way, and is said to have been put in that way, owing to a misunderstanding of the meaning of the judgment of CROOM-JOHNSON, J. At any rate, that document went in, and the licence was refused : that work was not allowed to be done. But, of course, they were allowed to spend up to £100. What happened in regard to what was spent and what was done is wrapped in the deepest mystery. I am quite certain that I have not been told the truth about it, nor anything like the truth. I will go into that matter in a minute or two.

The substituted shop front on Oxford Street, of beaver board and glass, which was the situation of the building at the time of the trial by CROOM-JOHNSON, J., was removed, and in its place were rebuilt the three front show cases. On the side facing Oxford Street they consisted of plate glass as before. On the four re-entrant sides there was also plate glass. On the second re-entrance of the middle case there was also plate glass, and on the back of the middle case there was beaver board, and all the other cases were treated with beaver board and glass, the result being that something like half the total area that had once been plate glass was beaver board and opaque, but illuminated by large pieces of ordinary glass fitted into the beaver board, so that people could see into all the show cases, although, of course, as a display it was much less attractive than it had originally been, and much less attractive than the landlord desired to make it when he made his application to the Ministry of Works ; but still, I would have held, had the work been properly done, that it was rendered reasonably fit to carry on the business of this company. That is solely a question of fact. Was it reasonably well done, or was it done in a thoroughly shabby and shoddy manner, in such a way as to leave gaps and cracks in many places where dust could get in and spoil fine wear such as the defendants traded in ? If that is the position, it seems to me I would be quite wrong in finding that the place had been rendered reasonably fit for occupation for the purpose of the defendants' business.

The onus of satisfying me that the work was properly done lies upon the landlord, the plaintiff. And whom has he called to satisfy me that the work was properly done ?—because there is a great deal of evidence that it was not. He called, first of all, Pope, who was a surveyor. He did not profess to know very much about it. He had paid, I think, one visit since the last work was done, and what he said about it was that " it was quite a good job of a temporary kind." That is not a very attractive description, because this had got to last, presumably, for the duration of the war. I hoped for something better when Bedford was called. Now Bedford calls himself a builder, who has done, as he says, a great deal of work for this plaintiff for many years. His evidence was this. That the work could be done properly by him in four days. I do not believe that : but that is what this gentleman stated ; and, of course, he was in this position : that the more he made out of it, if he did his work thoroughly and well, the more it would be worth and the more awkward and difficult would loom the figure of £100, particularly when we got the bill which included the plate glass, and discovered that the supplying and fitting of that plate glass exhausted the £100 all but 16*s.*, so that 16*s.* was the most which lawfully could be paid to Bedford for all the work that he did. I do not believe that story. I do not know how much he was paid, but I do not think people in Bedford's position would undertake the refitting of an arcade like this, 50ft. long and 30ft. wide (leaving out the bit that was already done) for nothing.

I turn, therefore, to the next witness, Richards. Richards is the chief surveyor of the well-known firm of Lane, Saville & Co., and they are employed by Lloyds Bank, the freeholders, who, of course, have an interest in their tenant and in his lease of the premises. Now it must be observed, as that gentleman is sitting in court, that obviously the whole device was to represent that as little as possible had been spent to make the place fit for occupation, and I was told, and I believed it, because he told me without any hesitation, that the application for complete reinstatement of the whole thing as it was before, with plate glass from top to bottom, was only £204. The preciseness of the sum, of course, carries with it the sting, because that is not the figure of a man who is fishing about and is uncertain in his mind ; a man in that position who meant to tell the truth would have said, " Well, I believe it was about £200 " ; he would not say, " It was £204." Well, there was then produced a document of the Ministry of Works refusing permission to spend more than £100. Yesterday, in the course of the hearing, I had said that that document would have very much more meaning if one could see the application to which it was an answer, and it was as a result of that that the client of counsel for the plaintiff got a copy of the application, and that is the document to which I have already referred. Not £204, but £435 15*s.* 1*d.* was, in the view of that gentleman who was giving evidence before me, necessary to be spent to render this place fit for occupation. Various excuses for that statement that it was £204 have been put forward by counsel for the plaintiff in his address, but, in my view, that statement was untrue, and untrue to this extent deliberately : that when he gave that answer he did not know whether it was true or not, and in giving a figure like £204 he was giving a figure which no one would cross-examine to, because, coming from a gentleman in his position, such a figure would naturally be accepted. That witness made the statement yesterday, and I was very impressed by it when he gave it, that this work was very well done, no reasonable fault to be found with it at all. One is generally in the position of having to choose between one side and the other in a case, and I just waited to see what sort of evidence would be called to refute what that gentleman had said. Yesterday, I believed him ; but this morning, after having seen that document, I do not believe him, and I am bound to say so. That being so, stopping there, on that alone I would say that the plaintiff has certainly not satisfied me that the work was properly done.

Then we come to the defendants' witnesses. Some of the evidence was given yesterday—that of the managing director, Goorwitch. He said that the work was very badly done ; that there were spaces between the beaver board and the glass where he could put his finger through ; that the whole of this work was the reverse of dustproof, and that dust on fine fabrics is extremely bad. Upon that matter I think it right to call attention to the fact that Richards himself said, " I agree that with beaver board and glass you cannot get a dustproof job ; you can get a practically dustproof one." I think either he or one of the other witnesses for the plaintiff did agree about that. Then Hawes, a shop fitter, was called, and he said that, of the five show-cases, three of them were actually bent so that they could not be shut, and that they could not be locked, and that, of course, meant the admission of a great amount of dust and other matter.

Now here are premises in Oxford Street, from the point of view of commerce one of the most fashionable streets in London. The rent which this company was to pay a very high one ; it was over £8,000 a year. I think that the fitness of the premises for the purposes of carrying on a trade has to be judged with those matters in mind ; and what might be said to be good enough for a dirty little shop in a back street would not be fit for a place like this in Oxford Street. As I say, on the plaintiff's own case I am not satisfied that the place was reasonably fit, and having heard the evidence for the defence, I believe it, and I am satisfied, not only that the plaintiff has not made out his case, but that the contrary has been proved by the defendants.

For these reasons this action fails, and there will be judgment for the defendants with costs.

Judgment with costs for the defendants.

Solicitors : *Kerly, Sons & Karuth* (for the plaintiff) ; *Bristows, Cooke & Carpmael* (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

Re TATHAM, NATIONAL BANK, LTD., AND ANOTHER *v.* MACKENZIE AND OTHERS.

[CHANCERY DIVISION (Evershed, J.), **November 9, 1944.**]

Wills—Gift of annuity—Annuity of clear sum after " *deduction of income tax for the time being payable in respect thereof* "*—No reference to standard rate of tax—Rate computed in relation to reliefs and allowances—Post-war credits —Finance Act,* 1941 (c. 30), *ss.* 6 (2), (3), (4), 7.

By his will, dated Apr. 29, 1938, the testator directed his trustees *inter alia,* to pay the annuitant out of the residuary trust fund free of duty "such a sum in every year as after the deduction of income tax for the time being payable in respect thereof will leave a clear sum of £350." The questions for the determination of the court were (i) whether the trustees of the will were entitled to a due proportion (in respect of the annuity) of any sums repaid or allowed to the annuitant in respect of the reliefs and allowances to which she was entitled in calculating the income tax payable by her, or whether she was entitled to the whole of such sums, and (ii) whether, if the trustees were so entitled, the right extended to the post-war credits to which the annuitant was entitled (under the Finance Act, 1941, s. 7) :—

HELD : (i) upon the true construction of the words " income tax for the time being payable in respect thereof," the testator's aim was to relieve the annuitant from liability for income tax in respect of the gross annuity given to her ; and the income tax from time to time payable by her on the gross annuity must mean the income tax to which she was ultimately found liable in respect of that annuity after account had been taken of all reliefs and allowances to which she was entitled. She was, therefore, accountable to the trustees for a due proportion (in respect of the annuity) of all reliefs from and allowances of income tax to which she was entitled. In order for her to be held not accountable in respect of such reliefs and allowances, the words " income tax " should have been limited by express words or necessary inference to " income tax at the standard rate."

Re Pettit (1), *Re Maclennan* (3) and *Re Eves* (5) *followed. Michelham's Trustees* v. *Inland Revenue Comrs.* (4) *applied. Re Jones* (2) *distinguished.*

(ii) the annuitant was accountable to the trustees in respect of any benefits to which she was or might become entitled under the Finance Act, 1941, s. 7.

[**EDITORIAL NOTE.** The question here considered is whether in the case of tax-free annuities the annuitant is liable to account to the trustees for reliefs and allowances to which he is entitled. The result depends upon " rather fine distinction of language," as LORD GREENE, M.R., expresses it, but EVERSHED, J., summarises the authorities by saying that " in formulae of the kind here in question there must be found, if the annuitant is to be held not accountable in respect of the reliefs, and other repayments, a limitation of the phrase ' income tax ' to ' income tax at the standard rate ' by express words or necessary inference." Upon this test the annuitant is here held accountable, and the liability is held to extend to post-war credits. Post-war credits are indeed a " future question," but as in the circumstances of this trust no questions between capital and income could hereafter arise, the court deals with the point in the declaration.

AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386-388 ; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593. For the FINANCE ACT, 1941, ss. 6, 7, see HALSBURY'S STATUTES, Vol. 34, pp. 104-107.]

Cases referred to :

*(1) *Re Pettit, Le Fevre* v. *Pettit,* [1922] 2 Ch. 765 ; 39 Digest 167, *587* ; 91 L.J.Ch. 732 ; 127 L.T. 491.

*(2) *Re Jones, Jones* v. *Jones,* [1933] Ch. 842 ; Digest Supp. ; 102 L.J.Ch. 303 ; 149 L.T. 417.

*(3) *Re Maclennan, Few* v. *Byrne,* [1939] Ch. 750 ; [1939] 3 All E.R. 81 ; Digest Supp. ; 108 L.J.Ch. 364 ; 160 L.T. 612 ; *affg.* [1939] 1 All E.R. 587.

*(4) *Michelham's Trustees* v. *Inland Revenue Comrs., Michelham (Executors of Dowager Lady)* v. *Inland Revenue Comrs.* (1930), 15 Tax Cas. 737 ; Digest Supp. ; 144 L.T. 163.

*(5) *Re Eves, Midland Bank Executor and Trustee Co., Ltd.* v. *Eves,* [1939] Ch. 969 ; Digest Supp. ; 108 L.J.Ch. 374 ; 161 L.T. 270.

ADJOURNED SUMMONS to determine questions arising under the will of Arthur Trevor Tatham. The testator died on Nov. 15, 1938, and the summons was taken out by the trustees of the will on May 9, 1944. The facts are fully set out in the judgment.

E. M. Winterbotham for the trustees.

Wilfrid Hunt for the annuitant.

F. E. Skone James for the residuary legatees.

EVERSHED, J.: The determination of the first question raised in this summons depends—and I use the language of LORD GREENE, M.R., in one of the cases to which I shall have presently to refer—"upon rather fine distinctions of language." By his will dated Apr. 29, 1938, the testator, Arthur Trevor Tatham, directed his trustees (who are the plaintiffs in this application) to stand possessed of his residuary trust fund upon trust to pay thereout to the annuitant, the first defendant, free of duty:

> . . . such a sum in every year as after the deduction of income tax for the time being payable in respect thereof will leave a clear sum of £350 to begin from my death and to be payable by equal quarterly payments in advance.

Subject to this annuity and to the payment on the death of the annuitant of three pecuniary legacies, the second and third defendants, the residuary legatees, are between them now absolutely entitled to the capital and income of the testator's residuary trust fund.

The first question raised by the summons is as follows:

> Whether upon the true construction of the said will the plaintiffs as trustees of the said will of the testator are entitled to a due proportion (in respect of the said annuity) of any sums repaid or allowed to the [annuitant] in respect of the reliefs and allowances to which she is entitled in calculating the income tax payable by her or whether the [annuitant] is entitled to the whole of such sums.

The answer to this question is one of construction and depends upon the proper meaning to be given to the words used by the testator in this will. Nevertheless it will be convenient for me to refer first to certain decisions which have been cited, namely, *Re Pettit* (1), *Re Jones* (2), and *Re Maclennan* (3). I do not forget, and I have already stated, that the decision in this case turns on the words used in this will; but where the distinctions of language are fine it is plainly necessary to observe carefully the grounds upon which the decisions of cases of the same kind have proceeded, if conflict of reasoning and uncertainty in the law are to be avoided. It is, moreover, clear that the language of this will falls somewhere mid-way between the terms used in the wills discussed in *Re Pettit* (1) and *Re Jones* (2); and I observe that in the plaintiff's affidavit in support of the summons the problem is stated as being whether in the present case the decision in *Re Pettit* (1) or the decision in *Re Jones* (2) is applicable.

In *Re Pettit* the question arose in reference to the gifts of two annuities, each expressed in the simple form permissible in wills to which the Income Tax Act, 1918, All Schedules Rules, r. 23, is inapplicable, namely, "To A.B. an annuity of £x a year free of income tax." ROMER, J., decided on the construction of that will that the testator's purpose was to provide in each case for the object of his bounty an addition to her income after discharging liability for income tax of £x and no more and that the annuitant was accountable to the trustees in respect of any reliefs and allowances received by her, the retention of which would have increased the benefit received by her from the testator to a figure greater than £x; and I note that ROMER, J., was not deterred from reaching this conclusion by the circumstances that the testator had provided for payment of the annuity by equal quarterly instalments. In arriving at his decision ROMER, J., explained that in his view the direction to pay £x free of income tax necessarily meant that the trustees would each year have to provide "such a sum as, after payment of the tax properly payable thereon, would leave a clear sum" of £x.

In *Michelham's Trustees* v. *Inland Revenue Comrs.* (4), the same point arose incidentally, and ROMER, L.J., used this language, at p. 751:

> . . . where a testator by his will purports to give an annuity free of income tax, the will necessarily must be read as conferring upon the annuitant such an annuity as, after deduction of the tax therefrom, shall leave the clear sum mentioned by the testator.

It will be observed that the late LORD ROMER's paraphrase in *Michelham's Trustees* (4) differs slightly from that used by him in *Re Pettit* (1), and is remarkably close to the language used in the present case, particularly in the use of the word " deduction " in reference to the income tax.

In *Re Jones* (2) the material language of the testator's gift was :

> . . , such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum [of £*x*] . . .

On this form of words EVE, J., held that the annuitant was entitled to retain any reliefs, etc., recovered without liability to account to the trustees of the will. It is, however, clear that the judge founded himself upon the addition of the phrase " at the current rate " to the reference to income tax, which phrase he construed as meaning " at the standard rate."

In *Re Maclennan* (3) a similar problem arose out of the language of a deed but it is clear from the judgment of SIR WILFRID GREENE, M.R., in the Court of Appeal, that no difference of principle applies in construing deeds from that applicable to wills. The words used in *Re Maclennan* (3) were as follows :

> . . . such an annual sum as . . . would . . . after deduction of income tax but not sur-tax leave in her hands the sum of £500 clear of all deductions for income tax but not sur-tax.

The Court of Appeal, affirming the decision of BENNETT, J., held that, as in the case of *Re Pettit* (1), the recipient of the annuity was accountable in respect of all reliefs and allowances obtained by her. In the course of his judgment SIR WILFRID GREENE, M.R., drew attention, at p. 757 ([1939] 3 All E.R., at p. 87), to the reference to sur-tax as showing that the word " deduction " could not have been intended to import the administrative process specified in the All Schedules Rules, r. 19—it was not an echo of that rule. I do not, however, read SIR WILFRID GREENE's judgment as meaning that, in the absence of such a reference, the use of the word " deduction " must be taken to be such an echo. SIR WILFRID GREENE, M.R., further laid stress upon the phrase " leave in her hands " as an indication that the emphasis, so to speak, was upon the net sum mentioned as being the full extent of the benefit intended. He then proceeded to a consideration of the earlier cases and in reference to *Re Pettit* (1) stated as follows, at pp. 758, 759 ([1939] 3 All E.R., at p. 88) :

> But the reasoning by which the judge arrived at the conclusion he did—namely, that the annuitant was bound to account for the sum recovered to the estate, was reasoning which, in my judgment, applies equally in the present case. He treats the direction in the will as a direction to the trustees to ascertain what is the gross sum which will give the net annuity specified, a clear sum of £1,000. He points out that in calculating that gross sum it would lead to an inaccurate result if the trustees merely calculated it by reference to the deduction which it was permissible for them to make without reference to the recoveries which the annuitant might obtain. He says that the true calculation which the trustees ought to make is to ascertain a sum which, after taking not merely the initial deduction but also the matter of the relief into account, will produce the net sum specified. If I may say so with respect, that reasoning appears to me to be as satisfying as any reasoning can be. The case, of course, was the case of a will, and the phrase used was " free of income tax." In the case of a deed the result desired cannot be obtained by phraseology such as that by reason of r. 23, and it is for that reason, as I have already said, that when it is desired to produce a similar result in the case of a deed the formula which must be adopted is the formula which gives you the sum which I have described as X. The interesting thing about ROMER, J.'s decision is that in analysing the language of that will he treats it as though it was an instruction to arrive at a sum X by means of a formula of that character, and that is the meaning which he attributes to the words " free of income tax " in a will.

Before leaving *Re Maclennan* (3), I observe that, as pointed out by SIR WILFRID GREENE, M.R., the effect in regard to reliefs and allowances of the income tax legislation applicable to that case and also applicable to the annuity under the present will is that such reliefs are treated as repayments to which the annuitant is entitled if part of the income tax is already paid on the annuitant's behalf ; so that until such reliefs have been received there will in fact have been, by virtue of the machinery of deduction under r. 19, an overpayment of the tax to which the annuitant is properly liable in respect of the annuity. I add also that under the income tax legislation applicable in *Re Maclennan* (3) and in the present case " income tax " comprehends both income tax at what is called the standard rate—that is, at the rate fixed from year to year at so much in the £—and also additional income tax commonly known as sur-tax.

With these decisions in mind, I now turn to the relevant words of the present will. The effect of the Finance Act, 1941, in the present case has been to qualify the extent of the benefit in respect of income tax conferred by the testator, but this qualification is immaterial for present purposes. For simplicity, therefore, I shall ignore the qualification, and I also leave out of account that since the annuitant appears to have other income than the annuity given by the will, her liability, if any, to account is limited to a proportion only of the reliefs and allowances received by her.

In my judgment, the question as a matter of construction turns upon the proper meaning to be given to the words "income tax payable in respect thereof." The word "thereof" must mean "of the gross annuity before mentioned." What then is the income tax payable from time to time in respect of that gross sum ? The income tax in fact payable by any individual in respect of any sum of money will depend upon the particular circumstances of the individual and will be arrived at after taking into account all reliefs or other allowances to which that individual may from time to time be entitled. Whose tax liability then has the testator in mind ? In my judgment the testator in this bequest is considering the income tax liability of the annuitant. His aim is to relieve the annuitant from liability for income tax in respect of the annuity given to her. On this view, and treating the problem as being one of the true meaning of a few English words, it seems to me that the income tax from time to time payable by the annuitant in respect of the gross annuity here directed to be paid must mean the income tax to which the annuitant is ultimately found to be liable in respect of that annuity after account has been taken of all reliefs and other allowances which the circumstances from time to time applicable to her case entitle her to obtain. Put in another way, I think, if I may respectfully borrow the language of BENNETT, J., in the court of first instance in *Re Maclennan* (3) ([1939] 1 All E.R., at p. 590) :

> . . . the charge means what it says, that income tax means income tax, and not income tax at the standard rate . . .

I add that, if the argument of counsel for the annuitants is accepted that "deduction" imports a reference to or echo of the All Schedules Rules, r. 19, so that the relevant phrase in the will should be construed as equivalent to "after deduction of the income tax at the standard rate payable in respect thereof," the addition of the words "at the standard rate" to this formula would be mere surplusage, a conclusion which seems to me at variance with well-established canons of construction and also with the reasoning of EVE, J., in *Re Jones* (2), in resting his decision upon the presence in the instrument before him of the words "at the current rate."

Counsel for the annuitant laid stress upon the word "deduction" and invited me to hold, in the absence of any contrary context, that its use indicated a reference to the process described in the All Schedules Rules, r. 19 ; but, in my judgment, this common English word is equally referable to an arithmetical process, and, as I have stated above, I do not think SIR WILFRID GREENE, M.R., intended to lay it down that, in such a context as the present, the primary sense of the word was to import the process of r. 19 ; and I am supported in this view by the paraphrase of ROMER, L.J., in *Michelham's Trustees* v. *Inland Revenue Comrs.* (4). Counsel for the annuitant further pointed to the direction for payment of the annuity by equal quarterly payments as an indication that the testator intended a single and final calculation to be made. I do not think the inference is strong enough to outweigh what I take to be the ordinary meaning of the language, any more than did the presence of a similar direction in *Re Pettit* (1). Indeed, I note that the direction appears in any case to be impossible of strict performance, since the yearly periods for the purposes of the testator's will do not correspond with the income tax years. Finally counsel for the annuitant argued that the testator in using this formula instead of the simple form of gift permissible in wills—£x a year free of income tax—must be taken to have intended a result different from that which would by virtue of the decision in *Re Pettit* (1) have flowed from the use of the latter form. Such a conclusion would, in my opinion, go beyond the inference permissible to be drawn from the use of what is now a common formula—intended in the case of deeds to achieve exactly the same result as the simpler form prohibited by the All Schedules Rules. Nor do I think that the points relied on by counsel for the annuitant cumulatively have sufficient force to prevail against the contrary argument to which I have referred and to which I add finally that the real intention of the testator, as I construe his will, was to provide for the annuitant an addition of a specified amount and no more to what is sometimes called her " spending " income.

The conclusion which I have reached is, in my judgment, in conformity with the reasoning in the three cases to which I have referred, and particularly with the analysis of the reasoning of Romer, L.J., in the judgment of Sir Wilfrid Greene, M.R., in *Re Maclennan* (3), which I have already quoted. I venture respectfully to add to what Sir Wilfrid Greene, M.R., has said in the passage in the judgment of Romer, L.J., in *Michelham's Trustees* (4) to which I have already made reference also. As I understand it, the reasoning which underlies all these decisions involves the result that in formulae of the kind here in question there must be found, if the annuitant is to be held not accountable in respect of the reliefs and other repayments, a limitation of the phrase "income tax," to "income tax at the standard rate" by express words or necessary inference ; and that in the absence of express words the necessary inference will not be lightly drawn. This last observation is, in my judgment, supported by the decision of Morton, J., in *Re Eves* (5). I, therefore, answer the first question in the summons by declaring that the annuitant is accountable to the trustees of the testator's will for a due proportion (in respect of the annuity bequeathed to her by the will) of all reliefs from and allowances of income tax to which the annuitant is from time to time entitled.

The second question in the summons asks :

> If the plaintiffs as such trustees as aforesaid are so entitled whether their right extends to the post-war credits to which the [annuitant] is entitled or whether it is limited to sums repaid or allowed in cash in respect of such reliefs and allowances.

If I am right in my answer to the first question, it is, I think, clear as a matter of logic and it has not been disputed that, subject to what follows, the annuitant is equally accountable in respect of any benefits to which she is, or may become, entitled of the kind described in the question.

The term " post-war credits " has arisen out of the Finance Act, 1941, ss. 6, 7. The effect of those sections so far as material for present purposes, may be shortly stated as follows : By sect. 6 (2), (3), (4) of the Act the extent of certain reliefs granted under earlier Finance Acts was reduced. Sect. 7 of the 1941 Act provides that the amount of additional tax paid by the taxpayer which is attributable to the effect of sect. 6 (2), (3), or (4) shall be recorded and notified to the taxpayer and shall be credited to the taxpayer at such date as may be fixed by the Treasury as soon as may be after the determination of hostilities in the present war. From my recital of the effect of these two sections it will be seen that the expression " post-war credits " is something of a misnomer. The taxpayer at present has no " credits." He has been given (by the Act) a promise that at some future date after the war he will obtain a " credit " for an amount of which he has already been notified. The second question raised by the summons may, therefore, well be said to be a " future question " : but since the residuary legatees are now absolutely entitled between them to the capital and income of the testator's residuary trust fund subject to the annuitant's annuity and to three legacies payable on her death, no question can hereafter arise between capital and income, so that there seems to be no reason why the question should not be answered immediately. I think, however, subject to what counsel may say, that the form of the declaration ought to be on the lines that the annuitant is accountable to the trustees of the testator's will in respect of any rights or benefits to which she is or may become entitled by virtue of the provisions of the Finance Act, 1941, s. 7.

Declaration accordingly. Costs of all parties as between solicitor and client out of the testator's estate.

Solicitors : *S. F. Miller, Mathews & Co.* (for the trustees and the annuitant) ; *Wilberforce Allen & Bryant* (for the residuary legatees.)

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

ARISTOC, LTD. *v.* RYSTA, LTD., AND ANOTHER.

[House of Lords (Viscount Maugham, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Simonds), **June 26, 27, October 16, 17, 18, 19, 23, December 8, 1944.**]

Trade Marks—Registration—Use of mark on repaired stockings—Application to register mark for use on manufactured stockings—Opposition by manufacturers who own another mark on ground of similarity—Trade mark generally limited to indication of origin—Use " in relation " to goods—" Connection in the course of trade "—Trade Marks Act, 1938 (*c.* 22), *ss.* 3, 4 (1), 9, 11, 12, 17 (1), 28, 65, 68.

The respondents who had carried on business since 1929, were the owners of an undisclosed process for effecting invisible repairs to ladies' stockings, and this process they had called the " Rysta " process. On Nov. 10, 1938, the respondents filed an application to register the word " Rysta " as a trade mark in respect of the use they had hitherto made of the word to indicate stockings repaired by the " Rysta " process. They subsequently amended their application stating that they intended to offer for sale stockings made by them bearing the brand name " Rysta " as opposed to stockings of other manufacturers repaired by them. The appellants who were manufacturers of stockings and the owners of the mark " Aristoc " opposed the application on the grounds that (*a*) the word " Rysta " if used as a trade mark for stockings, so nearly resembled the word " Aristoc " already on the register in respect of the same class of goods as to be likely to deceive or cause confusion, within the meaning of the Trade Marks Act, 1938, s. 12, and (*b*) the use of " Rysta " as a trade mark both upon stockings of the respondents' merchandise concurrently with use by them of the same mark upon stockings which were not their merchandise, but were only repaired by them, was likely to lead to confusion or deception and was, therefore, unlawful by the Trade Marks Act, 1938, s. 11. By consent of both parties the appeal was extended to the general question whether a mark indicating the mere repair of goods was registrable under the Act, and it was contended on behalf of the registrar of trade marks that a mark used by a repairer might qualify as a trade mark inasmuch as it was the use of a mark in relation to goods and that the repaired goods might be said to originate with the repairer, and that the repaired goods were, therefore, rightly to be regarded as connected in the course of trade with the repairer :—

Held : (1) the word " Rysta " so nearly resembled in sound the word " Aristoc " that if admitted to the register and used in respect of stockings it would be likely to deceive or cause confusion.

(ii) the intended use by the respondents of the mark " Rysta " both upon stockings manufactured by them and upon those merely repaired by them was likely to confuse, and cause deception of, the public and was, therefore, unlawful within the meaning of the Trade Marks Act, 1938, s. 11.

(iii) it was the essence of a trade mark that it should indicate origin and be used as indicative of origin. The widened language of the Trade Marks Act, 1938, s. 4, giving the registered proprietor of a trade mark in respect to any goods " the exclusive right to the use of the trade mark in relation to those goods " did not alter this essential conception of a trade mark in law. The mere repair of goods did not constitute a " connection in the course of trade " within the meaning of sect. 68 of the Act since, once the goods had reached the consumer, they were no longer in the course of trade.

Decision of the Court of Appeal ([1943] 1 All E.R. 400) *reversed and decision of* Farwell, J., *restored.*

[**EDITORIAL NOTE.** It is established by this decision that a trade mark may not be accepted which is intended to indicate a process or other operation on goods after they have come into the hands of the public. The fundamental function of a trade mark is still, as it has always been, to indicate the origin of goods, and the wider language of sect. 68 of the Trade Marks Act, 1938, defining a trade mark as, *inter alia*, a mark used so as to indicate a connection in the course of trade between the goods and the proprietor of the mark is not to be construed as giving any right different in principle. Trade refers here to selling or merchanting or to a dealing with goods in the course of preparation for the market, and not to such a subsequent process as repair. A mark should indicate a quality of permanence and not something of an ephemeral character which may be repeated many times by different persons, for example, cleaners, repairers, or even carriers. No decision was given upon this question by the Court of Appeal, where it was not fully argued. The majority judgment of that court was based upon the possibility of deception and confusion under sects. 11 and 12. On these points the House of Lords prefer the minority judgment of LUXMOORE, L.J.

AS TO DECEPTIVE TRADE MARKS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 563-573, paras. 872-874; and FOR CASES, see DIGEST, Vol. 43, pp. 158-175, Nos. 167-288. AS TO THE TRADE MARKS ACT, 1938, ss. 4, 68, see HALSBURY'S STATUTES, Vol. 31, pp. 756, 757, 791, 792.]

Cases referred to:

*(1) *Bradford Dyers Case* (1928) (C), Notes of Rulings by the Comptroller-General, (1928), 45 R.P.C., App. VI.

*(2) *Bass, Ratcliffe & Gretton, Ltd.* v. *Nicholson & Sons, Ltd.*, [1932] A.C. 130; Digest Supp.; 101 L.J.Ch. 98; *sub nom. Re Nicholson & Sons' Application for registration of a trade mark, Re Bass, Ratcliff & Gretton's Trade Mark*, 146 L.T. 349.

(3) *Eno* v. *Dunn* (1890), 15 App. Cas. 252; 43 Digest 160, *180*; 63 L.T. 6; 7 R.P.C. 311; *revsg. S.C. sub nom. Re Dunn Trade Marks* (1889), 41 Ch.D. 439.

*(4) *Re Powell's Trade Mark*, [1893] 2 Ch. 388; 43 Digest 198, *458*; *on appeal sub nom. Powell* v. *Birmingham Vinegar Brewery Co.*, [1894] A.C. 8; 63 L.J.Ch. 152; 70 L.T. 1.

*(5) *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (*Ex p.*) (1934), 103 L.J.Ch. 106; Digest Supp.; 150 L.T. 402; 51 R.P.C. 110.

(6) *Bismag, Ltd.* v. *Amblins* (*Chemists*), *Ltd.*, [1940] Ch. 667; [1940] 2 All E.R. 608; Digest Supp.; 109 L.J.Ch. 305; 163 L.T. 127; 57 R.P.C. 209; *varg.* S.C. [1940] Ch. 225; [1940] 1 All E.R. 156.

*(7) *Saville Perfumery, Ltd.* v. *June Perfect, Ltd. and F. W. Woolworth & Co., Ltd.* (1941), 58 R.P.C. 147.

(8) *Major Brothers* v. *Franklin & Son*, [1908] 1 K.B. 712; 43 Digest 216, *609*; 77 L.J.K.B. 601; 98 L.T. 925.

APPEAL of the owners of the registered trade mark "Aristoc" from an Order of the Court of Appeal (LORD GREENE, M.R., and MACKINNON, L.J., LUXMOORE, L.J., dissenting), dated Mar. 9, 1943, and reported ([1943] 1 All E.R. 400), reversing an Order of FARWELL, J., dated May 15, 1942. The facts and arguments are fully set out in the opinion of VISCOUNT MAUGHAM.

Kenneth R. Swan, K.C., and *James Mould* for the appellants.

Robert Burrell, K.C., and *G. H. Lloyd Jacob* for the respondents.

The Solicitor-General (*Sir D. Maxwell Fyfe, K.C.*), and *H. O. Danckwerts* for the Registrar of Trade Marks.

VISCOUNT MAUGHAM: My Lords, this is an appeal from an order of the Court of Appeal, dated Mar. 9, 1943, reversing an order of FARWELL, J., dated May 15, 1942. He had discharged an order of the assistant comptroller acting for the registrar of trade marks dated July 28, 1941, and had directed the registrar not to proceed with the registration of a trade mark consisting of the word "Rysta" propounded by the present respondents. The ultimate question, therefore, is simply whether the registrar ought to accept the word "Rysta" for registration as a trade mark under the present Act, namely, the Trade Marks Act, 1938. The application was for a mark consisting of the word "Rysta" alone (a word which according to the evidence is commonly pronounced as if it rhymed with the word "vista") in respect of "stockings" which are goods included in class 25 of the classification contained in the Trade Marks Rules, 1938. But the preceding history of the word and the application may not be irrelevant. The appellants, who opposed the registration, carry on business as manufacturers of, and dealers in, women's stockings. They adopted the invented word "Aristoc" as a trade mark in the year 1923 and have sold silk stockings of their manufacture throughout the United Kingdom to the value of about four million pounds sterling. They are the registered proprietors of some 24 registered trade marks consisting of the word "Aristoc" alone or having that word as the most important and prominent feature.

The respondents have carried on business since 1929. At the date of their application for a trade mark they had neither made nor sold any stockings. They are the owners of an undisclosed process for effecting invisible repairs to ladies' stockings by catching up the broken threads which have caused ladders therein, and this process they have called the "Rysta" process. The word is said to have been devised by two persons whose Christian names were Rydall and Stanley, and it is not suggested that any connection with the word " Aristoc " was intended. The respondents in general did not deal directly with members of the public. It seems that laundries and retail stores have been accustomed to accept from ladies their stockings which had laddered. These stockings were then on directions of the owners forwarded to the respondents, who carried out the repairs and returned them to the laundries and retail stores with a printed ticket or label attached in which the word " Rysta " appears in bold type and on which there is letter press indicating that the stockings had been repaired by the " Rysta " process. The laundries and retail stores then returned the repaired stockings to the owner and accepted payment for the repair work done upon them.

On November 10, 1938, the respondents filed their application to register the word " Rysta " as a trade mark in part A of the register. The specification of goods in respect of which registration was applied for was stated in the application as " stockings, and re-weaving repairs effected thereto," and the mark was stated to be used by the respondents, the words in the printed form stating that the mark was " proposed to be used " having been struck out. It is clear that at that date the registration claim was not in respect of a prospective use of the mark, but was in respect of the use they had hitherto made of the word to indicate stockings repaired by the " Rysta " process. At the suggestion of the registrar or of the assistant comptroller acting on his behalf the application was amended by striking out the words " and re-weaving repairs effected thereto," leaving the application as one for goods described simply as stockings. No alteration was made in the statement that the mark sought to be registered was a mark already in use. The registration of the mark was opposed by the appellants as being calculated to deceive or cause confusion and the objection was also taken that a mark used to indicate repairs to stockings could not be registered. The respondents put in a counter-statement in which, after stating that they had been engaged since the year 1930 in the business of repairing stockings by the " Rysta " process and that hundreds of thousands of stockings had been repaired by that process annually and that they had circulated in a year no less than four million forms advertising the process, they continued as follows :

> (Para. 3). The applicants intend to offer for sale stockings bearing the brand name " Rysta " and have applied for registration of the said mark, which they desire to use to exploit the goodwill built up by them in the said mark in connection with stockings over the long period of trading by them under the said mark in connection with their stocking repairing business.

It would appear, however, that the respondents since the original application have formed and expressed by their amended form of application the intention of offering for sale stockings made by them as opposed to stockings of other manufacturers repaired by them. There was no cross-examination or evidence on this question of intention to manufacture, and for the purposes of my judgment I shall accept the view taken by the Court of Appeal that the intention to use the mark in connection with stockings manufactured or offered for sale by the respondents has been sufficiently made out. There was no evidence before the assistant comptroller as to the mode of pronunciation generally adopted by purchasers or dealers in ladies' stockings of the words " Rysta " and " Aristoc," but evidence was filed on the hearing before Farwell, J., which it would seem established the fact that large numbers of members of the public pronounce the word to rhyme with vista. The evidence also proved that the appellants' mark " Aristoc " was pronounced by many persons with the emphasis on the middle syllable.

A number of points have been argued in the courts below and before your Lordships. I propose to deal in the main with three questions :—

1.—Whether the word " Rysta," if used as a trade mark for stockings, so nearly resembles the word " Aristoc " already on the register in respect of the same class of goods as to be likely to deceive or cause confusion within the meaning of the Trade Marks Act, 1938, s. 12.

2. Whether the use by the respondents of " Rysta " as a trade mark both upon stockings of the respondents' merchandise concurrently with use by them of the same mark upon stockings which are not their merchandise, but are only

repaired by them, is likely to lead to confusion or deception and is therefore unlawful by virtue of the provisions of the Trade Marks Act, 1938, s. 11, or for other reasons should be rejected by the registrar.

3. The third question is of a more general kind, namely, whether a mark proposed to be used on or in relation to stockings or other goods for the purpose of indicating, or so as to indicate, the fact that the stockings or the goods had been repaired by the person seeking registration as a trade mark is within the definition of a trade mark contained in the Trade Marks Act, 1938, s. 68 (1), or in other words whether a mark indicating the mere repair of stockings or, I may add, any other goods is registrable under the provisions of that Act.

The assistant comptroller decided adversely to the appellants upon all these questions, and as regards the third question he felt himself bound by the ruling of the Comptroller General in the *Bradford Dyers* case (1), to hold that there could be a proper mark upon cloth sent by manufacturers to dyers for dyeing. He did not, however, notice that the decision of the comptroller seems only to have referred to dyeing of cloth in the course of the manufacture or the finishing of the goods before they reached the hands of the public, as to which it may be stated that dyeing goods in general is only one form of the finishing of goods before they reach the market. He also dealt elaborately with the other two questions, and held that there was no likelihood of deception or confusion.

It was stated by FARWELL, J., in his judgment that he was not at all sure that he would have come to the same conclusion as the assistant comptroller on the question of resemblance between the words " Aristoc " and " Rysta." He said it was largely a matter of opinion and that he did not think that he ought to reverse the decision of the assistant comptroller on that ground alone, having regard to the great care with which that part of the case had been considered by the assistant comptroller. He also observed that there was much to be said for the contention that a trade mark was never intended to be applicable to a process of repair applied to an article after it had passed into private hands, but he thought it was not necessary for him to decide that very important question, because there was another ground upon which he was prepared to decide the case. That was on the ground that, apart from any resemblance between the words " Rysta " and " Aristoc," the proposed use of the word " Rysta " by the applicants would itself lead inevitably to confusion in the minds of the public. This is the second of the questions above stated. He assumed that, if the respondents were entitled to register " Rysta " as their trade mark, they would use it on the stockings which they repaired, but which were not of their manufacture. He said :

> This, it seems to me, must inevitably lead to confusion in the minds of the public. A person seeing a stocking with the mark " Rysta " on it will not know whether the stocking has been manufactured or only repaired by the applicants and confusion will result.

For that reason he thought the assistant comptroller should have refused the application.

The Court of Appeal by a majority represented by LORD GREENE, M.R., and MACKINNON, L.J. (LUXMOORE, L.J., dissenting) took the other view and allowed the appeal. They did not express any opinion on the question whether the use of the " Rysta " mark in connection with the business of repairers of stockings was a use of the kind described in the Trade Marks Act, 1938, s. 68 (1). That question was left entirely open ; but, for the purposes of their judgment, they assumed, where it was relevant to do so, that the use in relation to repaired stockings was not a trade mark use. They assumed that the respondents were proposing to use the mark as a mark to indicate that the goods were of the manufacture or merchandise of the respondents. On that assumption LORD GREENE, M.R., rejected the contention that the mark would not possess distinctiveness as indicating that the goods were of the manufacture or merchandise of the respondents, and also the contention that the public would be deceived or confused, on a rather special ground, namely, that the mark could only be affixed in a harmless way by some detachable label, and that, if such a label used in the future bore upon its face the information that the stockings had been repaired by " Rysta," no possibility of confusion could arise. Even if the word " Rysta " alone was put upon the label, LORD GREENE, M.R., thought no deception or confusion was possible, for the reason that the only persons to whose notice the mark would normally come in connection with the repaired stocking would be the owner of the stocking and the laundry proprietor or cleaner through whose agency it was sent to the applicants for repair. In those circumstances, he thought that it was quite impossible to suppose that either the owner of the stockings or the laundry proprietor or cleaner would be led to think that the mark so attached was intended to indicate that the respondents had any other connection with the goods than that of repairs. On this ground, he thought that the argument based on possibility of deception or confusion broke down. He also differed from Farwell, J., because, as he said, the judge appeared to have overlooked the fact that the mark when used in connection with repaired stockings would not be brought to the attention of purchasers of stockings, and that the owner of a stocking sent for repair could not possibly be confused by the use of the mark. Finally, on the question whether the mark " Rysta " so nearly resembles the mark " Aristoc " as to be likely to deceive or cause confusion, he thought he ought to follow the decision of the assistant comptroller upon that point, with which in fact he agreed.

In substance, MacKinnon, L.J., took the same view. He was, however, of opinion that the confusion and possible deception suggested in the ground of decision adopted by Farwell, J., was not justified by anything in the Trade Marks Act, 1938, or by any principles of law hitherto applied to that and similar Acts that preceded it. He proceeded to say ([1943] 1 All E.R., at p. 405) :

> The prohibition in sect. 11 of registering any mark " the use of which would, by reason of its being likely to deceive or cause confusion or otherwise," refers, I think, only to such use as would, by similarity or competition with another mark or other marks or names, be likely to deceive or cause confusion.

I may say here that, in my opinion, that particular view of sect. 11 cannot be accepted. There is nothing in sect. 11 to show that the legislature is there dealing with competing marks. It has been regarded (like sect. 11 of the 1905 Act), as a general provision which is to be contrasted with the present sect. 12. The latter section is concerned with the competition of the proposed mark with some trade mark belonging to a different proprietor already on the register in respect of the same goods or description of goods, and with the question of the likelihood of deception or confusion between the two marks. Moreover, the precise point was dealt with in the decision of their Lordships' House in *Bass Ratcliff & Gretton* v. *Nicholson & Sons* (2). Lord Russell of Killowen explained his view of sect. 11, and said, amongst other things, at p. 152, that :

> . . . it is to be observed that the likelihood of deception which is contemplated by sect. 11 need not necessarily flow from any resemblance between the matter proposed to be registered and other matter, or another mark. It might flow from something contained in the matter proposed to be registered . . .

and he added :

> In short, sect. 11 (so far as relevant) is a prohibition in general terms of the registration of matter the use of which would not be protected in a court of justice.

For my part, I entirely accept this statement by my noble friend. MacKinnon, L.J., also agreed with the view expressed by Lord Greene, M.R., as to the possible confusion between the two words. Luxmoore, L.J., however, preferred to dispose of the appeal on the simple ground that the word " Rysta " was likely to cause confusion having regard to the existence of the appellants' trade mark " Aristoc." His grounds for differing from his colleagues and the assistant comptroller seem to me to be clear and cogent, and I agree with his view as to how the word " Rysta " on the evidence must be taken to be pronounced and as to how a considerable number of persons pronounce the word " Aristoc," namely, with the emphasis on the middle syllable. He also stated what is not in dispute, that it is well settled that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark. (*Eno* v. *Dunn* (3)). There follows a passage ([1943] 1 All E.R., at p. 407), which I completely accept as a fair statement of the duty cast upon the court in such a case :

> The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of the Trade Marks Act, 1938, s. 12, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who

> only knows the one word and has perhaps an imperfect recollection of it who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words letter by letter and syllable by syllable pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

And then he adds a little later :

> The tendency to slur a word beginning with " a " is, generally speaking, very common and the similarity between " Rysta " and " Ristoc " would, I think, be fairly obvious. It would not be surprising to learn that a person asking for " Aristoc " stockings from a shop assistant who only knew of " Rysta " stockings had been supplied with the latter and *vice versa.*

He also said that he thought that the assistant comptroller had failed to take into full account the effect of careless and slurred pronunciation, imperfect recollection, and the limitation of the knowledge of the customer and the shop assistant to one only of the marks, that being the one of which the other is ignorant. He felt strongly that the two words were likely to deceive and also to cause confusion, and that being so, he thought the applicants had not discharged the onus which was on them of proving that there was no likelihood of deception or of confusion. On the other questions, however, raised on the appeal, he found himself in complete agreement with the judgment of LORD GREENE, M.R.

All the three questions which I have stated above were elaborately and very well argued before your Lordships. The appeal might, of course, be decided on a single point, for instance, the point on which LUXMOORE, L.J., dealt with the case. On the other hand, the assistant comptroller dealt with all three questions, and the registrar of trade marks has put in a case and has appeared before us by the Solicitor-General, who has argued the questions other than the first question as above stated. The construction of the definition of a trade mark contained in sect. 68 of the 1938 Act is a matter of great general importance and has been discussed at length. Their Lordships, therefore, think it desirable in the particular circumstances of this case to express their views on all three questions.

My Lords, on the first point I am of opinion, with great respect for the views of LORD GREENE, M.R., and MACKINNON, L.J., that the word " Rysta " so nearly resembles in sound the word " Aristoc " that, if it is admitted to the register and used in respect of stockings it will be likely to deceive or cause confusion. I agree with and would adopt the passages in the judgment of LUXMOORE, L.J., above set out. Using the best judgment I can in such a matter, and after carefully considering the reasons for a contrary view stated by LORD GREENE, M.R., and MACKINNON, L.J., I am not persuaded that the onus of proving that there is no reasonable probability of deception or confusion has been discharged by the respondents. The case is one very largely of first impression, on which opinions may well differ. My conclusion is that the view of LUXMOORE, L.J., is the right one.

The second point is the one on which FARWELL, J., decided the case, and in considering it we must disregard the existence of the " Aristoc " mark. The Court of Appeal decided this point on the rather special ground above stated, namely, that the circumstances in which ladies' stockings are sold and repaired are such that deception or confusion are most unlikely to occur. My Lords, I do not think reliance in a question of registration should be placed on the practice which has heretofore existed and been followed by the respondents in their repair of stockings. In the first place it should be remembered that the mark for which the statutory monopoly is sought is for " stockings," and this will include those used by men and boys ; and obviously a quite different method of getting stockings repaired might be adopted. Nor need the present system be followed in relation to women's stockings ; and the laundry proprietors or cleaners may cease to have any part in the system. It seems to me that, if the respondents put upon the market stockings of their own manufacture with a " Rysta " mark consisting of the word alone and continue also the business of repairing stockings of other makes, adding a " Rysta " mark to them, there may come into existence large quantities of stockings of both categories ; and the question is whether there may not be a fair number of people who will have, or who may have, no means of knowing whether the word " Rysta " used as a mark is intended to indicate that the stockings have been made or that they have only been repaired by the respondents. I am not prepared to answer this question in the negative. It is, I think, a matter of general knowledge that stockings are constantly provided by persons for their children or given as presents to friends. Nor do I see anything unlikely in stockings both for men and children as well as women being dealt with, or in the future being largely dealt with, by purchasers and vendors of second-hand stockings. In this connection it is to be remembered that stockings are largely dealt in all over the country and are bought by rich and poor alike. Moreover, in my opinion, we have to bear in mind the reputation gained by a word mark if it becomes generally known. Women, for instance, may hear the word "Rysta" as denoting a quality in stockings and at other times may hear the word spoken of as denoting merely a repair, and this may lead to confusion. The respondents themselves have in para. 3 of their counter-statement (quoted above) suggested that their goodwill as stocking repairers will help them to sell stockings which they will manufacture in the future if they can obtain a trade mark for the word "Rysta," which has hitherto merely indicated repair. My conclusion, therefore, is that there is no sufficient reason for holding that in the ordinary course of business a number of persons to whose notice the mark "Rysta" will come in connection with stockings will not be in doubt as to whether the mark indicates that the stockings have been made by or have merely been repaired by the owners of the mark.

I now come to the third question which is concerned with the true construction of the definition of a trade mark in the Trade Marks Act, 1938, s. 68 (1). This definition takes the place of the definition in the Trade Marks Act, 1905, s. 3, which ran as follows:

> A "trade mark" shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale.

The main difference between this section and the definition in the 1938 Act (which I shall cite later) is in the words relating to the *purpose* of the mark. In the one case, the purpose is stated to be that of:

> . . . indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale.

In the other, a much vaguer phrase is used, namely, indicating or so as to indicate "a connection in the course of trade" between the goods and the proprietor of the mark. I need not refer to the use by a registered user, which means the user under sect. 28. It is not in dispute that the definition in sect. 68 (1) is wider than the older definition. The question is as to the extent of the alteration effected by the use of the words "in the course of trade."

My Lords, it seems to me beyond doubt that hitherto a registered trade mark has been understood as being used in relation to goods for the purpose of indicating the *origin* of the goods, in other words, for the purpose of indicating either manufacture or some other dealing with the goods in the process of manufacture or in the course of business before they are offered for sale to the public. It must be remembered that in the early days when trade mark law was being slowly laid down, chiefly in Chancery Courts (where alone an injunction could be obtained), a trade mark was inevitably taken as indicating the origin of the goods. It was used for the purpose of indicating that the goods were those of the manufacturer or the merchant of the goods. It was closely connected with the goodwill of his business, of which it was often a valuable item, for the mark represented a quality or character on which the purchaser could place reliance. The cases mentioned in the introductory chapters of Sebastian on Trade-marks (5th Edn.) and Kerly on Trademarks (6th Edn.), which are too numerous to be cited here, are conclusive, in my opinion, to show that, until at any rate the recent Act, trade marks were always taken as indicative of the origin of the goods. The actual phrase is often used; and in other cases the same view is implicit. Bowen, L.J., was not laying down any new law when he said, in *Re Powell's Trade Mark* (4), at pp. 403, 404:

> It seems to me the answer is to be given by the simplest consideration of what is really the function of a trade mark. The function of a trade mark is to give an indication

> to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market.

This passage was not *obiter dictum* but the reason for that part of the judgment. It has not infrequently been cited and so far as I know it has never been adversely criticised. I think it was undeniably correct in 1893.

In my opinion, the same view was taken by the legislature when the Trade Marks Act, 1905, was passed, including for the first time a definition of a trade mark for the purpose of that Act. The purpose of a mark was said to be that of indicating that they (the goods) are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale. It is argued that the words "dealing with" are sufficiently wide to cover any operation on the goods by a trader or workman after the goods have come into the hands of a member of the public, however slight the effect of the operation may be, and however little it indicates the origin of the goods or their character or quality. Having regard to the repeated statements in the authorities that a registrable mark must be an indication of origin and to the fact that the words "dealing with" (not, be it observed, "dealing in") are found in the midst of other words which have that general meaning, I am quite unable to take the view that the function of a trade mark was being so radically altered.

It is admitted by the respondents, and it was, indeed, pointed out by the assistant comptroller, that a trade mark could not be registered for a process or an operation; but the assistant comptroller was of opinion that it could have the benefit of registration if the mark was for goods to which the process or the operation had been applied. The distinction can readily be understood by lawyers; but I doubt whether traders and the public will appreciate it. In a commercial sense and in substance it tends to give a trade mark for the process or operation; for it merely indicates that the process or operation has been applied. And there would seem to be nothing in the Act if the respondents are right to require them to indicate by the mark the precise extent of the operation. It might be only for a single strand of the stocking or for the repair of one toe: yet the mark would be given for the stocking, a surprising result.

That a trade mark must still be related to origin was the view taken by Lord Macmillan in this House in *Bass Ratcliff & Gretton, Ltd.* v. *Nicholson & Sons, Ltd.* (2), where he observed that a trade mark must have been used for the purpose of indicating the origin of the goods in connection with which it is used. The well-known text books I have already referred to have taken the same view (see Sebastian on Trade Marks, 5th Edn., pp. 4 and 5; Kerly on Trade Marks, 6th Edn., at pp. 27, 31, 35). A number of other cases might be cited; but I will add only one more, and that one of high authority. In *Irving's Yeast Vite* v. *Horsenail* (5), the question was whether the word "Yeast-Vite" had been used as a trade mark. Lord Tomlin, in deciding that it had not been so used, said, at p. 109:

> It is not a use of the word as a trade mark; that is, to indicate the origin of the goods in the respondent by virtue of manufacture, selection, certification, dealing with or offering for sale, . . .

and again, at p. 110:

> The phrase "the exclusive right to the use of such trade mark" carries, in my opinion, the implication of use of the mark for the purpose of indicating in relation to the goods upon or in connection with which the use takes place, the origin of such goods in the user of the mark by virtue of the matters indicated in the definition of "trade mark" contained in sect. 3.

These observations had reference to the definition of "trade mark" contained in the Trade Marks Act, 1905, s. 3, as amended by the 1919 Act. The history of the matter affords further ground for the same view of the essential nature of a trade mark. It must be observed that there is a very striking difference between a mark intended to indicate origin and one intended to signify repair, cleaning, or some analogous process after and it may be long after the goods have come upon the market. The former will indicate a character or quality which will ordinarily remain so long as the goods remain recognisable. The latter may indicate a purely temporary connection with the goods such as repairing, washing, cleaning or adjusting them; and I am not able to see why the principle should not extend to the connection by warehousing or carrying the goods. Not only may the effect of such operation be quite ephemeral, but such operations may be repeated many times by different persons, and only one or some of these persons may desire to affix a trade mark to the goods. A washing mark or a cleaner's tab is usually affixed only to indicate that the articles are the property of a certain customer, that is, to prevent loss, but, if the respondents' view is right such persons may obtain a trade mark for the goods when washed or cleaned. In the course of a few years there may be, on the same hypothesis, half a dozen different marks attached to the goods each indicating that a laundryman or a cleaner has washed or cleaned the articles at some generally unknown time in the past—a matter of no interest to the owner of the goods and giving no information as to their character or quality. The usual phrase that the mark should be distinctive, meaning "adapted to distinguish the goods from those of other persons" (sect. 9 of the 1905 Act) would seem to be curiously inappropriate if (to take an example) a number of piano-tuners or painters or overhaulers of motor cars or other mechanical instruments were to affix their respective marks from time to time. And it is clear that the value of the mark of origin, whether used by the maker or the merchant, would in some cases be rendered of little value. It is not clear to me that the purchaser of the article second-hand would be able to tell who was the maker or merchant on whose reputation he was disposed to rely. Many other and perhaps better illustrations might be given. My opinion is that until at any rate the recent Act there was no ground at all for the view that the basic meaning of a trade mark as a mark signifying origin had been altered by the legislature.

But then comes the Trade Marks Act, 1938 (which consolidated various amendments in preceding Acts) with a new definition of a trade mark in sect. 68 (1):

> In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . . "trade mark" means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under sect. 37 of this Act.

There is also an amendment (as contrasted with the 1905 Act) in sect. 9 as to the distinctiveness requisite for registration in Pt. A. There is there a reference to the quality of distinguishing:

> . . . goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, . . .

The present tense should be noted. Have these amendments or has anything else in the Act altered the essential nature of a trade mark as being generally limited to an indication of origin?

My Lords, I am unable to take the view that so vital an alteration could have been intended by the words used without much clearer language. There was, as far as your Lordships are aware, no demand among commercial men for any such an alteration, and certainly there was no custom in the registrar's office to accept trade marks in substance intended to indicate a process or any mere operation on goods. If the new definition had been meant to extend to a mere temporary connection with goods after they have come into the hands of the public, I should have expected some qualification as to the nature of the right conferred. In such a case as this I think the remark in MAXWELL ON THE INTERPRETATION OF STATUTES, 6th Edn., p. 148, ought to have weight, namely, that no substantial alteration of the law is to be anticipated in an amending Act unless that is clearly indicated. There is no such indication here. It is to be observed that under sect. 4 of the new Act the proprietor of the repair mark (if I may so describe it) would have the exclusive right to the use of that mark in relation to the goods repaired. Why a person who has performed an operation of repair for his customer should be given a permanently exclusive right to a mark used to indicate that at some past date he repaired the article I do not understand. And I do not think the language of sect. 9, which I have quoted, is apt to describe a temporary connection such as is now in question. The last words in that section seem to contemplate a continuing connection.

Authority is also against the contention that the new definition has the effect in question. In *Bismag* v. *Amblins* (6), Clauson, L.J., had to deal with the point. After referring to the old definition (in the 1905 Act) and the change in the modern Act, he said this, at p. 692 ([1940] 2 All E.R., at p. 626) :

> That definition still, as I read it, treats a trade mark as something which indicates origin, but whereas the old definition contemplates that the trade mark is to be used upon or in connection with goods as an indication of origin, the new definition contemplates that the trade mark may be used not only upon or in connection with goods, but " in relation to goods."

And in other passages of his judgment he emphasised the essential function of a trade mark, namely, that it indicates the origin of the goods. The decision may perhaps be criticised ; but that observation is, I doubt not, correct.

In *Saville Perfumery, Ltd.* v. *June Perfect, Ltd.* (7), it was observed by Sir Wilfrid Greene, M.R., at p. 161 :

> In an infringement action, once it is found the defendant's mark is used as a trade mark, the fact that he makes it clear that the commercial origin of the goods indicated by the trade mark is some business other than that of the plaintiff avails him nothing, since infringement consists in using the mark as a trade mark, that is, as indicating any origin.

This passage was approved by your Lordships when the case came before this House. It fell to my duty to write the leading judgment ; but it was approved in all respects by my noble friends Lord Atkin and Lord Russell of Killowen. I am, therefore, justified in saying that the statement of Sir Wilfrid Greene, M.R., was adopted as being correct by this House ; and it is impossible to reconcile it with the view on behalf of the respondents with which I am now dealing.

My conclusion upon a careful consideration of the 1938 Act and of the authorities is that the repair of stockings undertaken or proposed to be undertaken by the respondents does not constitute " a connection in the course of trade " within the meaning of the Trade Marks Act, 1938, and that a trade mark for stockings intended merely to indicate that they have been repaired by the person claiming to register such a mark cannot be accepted for registration. The claim is not improved in this case by the statement that they also intend to use the mark " Rysta " on stockings of their own manufacture in order to get the benefit of the goodwill they have acquired in the repair of stockings in connection with the same word. I should add that it is not necessary, in my opinion, to determine the precise effect of sect. 11 of the Act. The reasons I have given above, if correct, are sufficient to show that, whether under that section or under the general discretion of the registrar the mark cannot be accepted. The result is that, in my opinion, the appeal should be allowed with costs and the judgment of Farwell, J., should be restored. I move your Lordships accordingly.

Lord Thankerton : My Lords, I have had the privilege of considering the opinion which has just been delivered by Viscount Maugham, and I find myself in such complete agreement with his reasoning and his conclusions that I need only add one further observation on the construction of the definition of a trade mark in the 1938 Act, s. 68 (1), and in particular the words :

> . . . a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person . . .

In my opinion, the " connection in course of trade " refers to trade in such goods, and repairers of goods which have already reached the hands of the public cannot be said to be trading in such goods.

I agree with the motion proposed by Viscount Maugham.

Lord Macmillan : My Lords, the respondents have for a number of years been engaged in carrying on a highly successful business as repairers of women's silk stockings. The repairs, which are said to be invisible, are effected by a mechanical process of reweaving or reknitting to which they have given the name " Rysta." Under this name their process has acquired a wide reputation and upwards of sixteen million pairs of stockings, sent to them either directly by members of the public or through the agency of laundries and cleaning establishments, have been repaired by them. The stockings after repair are returned with a label attached bearing that they have been repaired by the

"Genuine Rysta Guaranteed Hosiery Repair Process."

In November, 1938, the respondents presented an application for the registration of the word "Rysta" as a trade mark in Pt. A of the register. The appellants, who for many years have carried on a large business as manufacturers of and dealers in women's silk stockings under the registered trade mark "Aristoc," gave notice of opposition to the respondents' application on the ground that the use of the word "Rysta" as a trade mark was calculated to deceive and lead to confusion because of its similarity to the appellants' registered trade mark "Aristoc." They also asserted that the respondents' use of the word "Rysta" on stockings to indicate that the stockings had been repaired by them was not user of the word as a trade mark. The Trade Marks Act, 1938, s. 3, prescribes that:

> A trade mark must be registered in respect of particular goods or classes of goods . .

and the forms of application for registration prescribed by the Board of Trade with statutory effect under sect. 40 require the applicant to specify the goods in respect of which he proposes to use the trade mark for which he seeks registration. The respondents filled up this part of the form by specifying "stockings and reweaving repairs effected thereto" as the goods in respect of which they sought registration of the trade mark "Rysta." On receipt of the respondents' application the registrar addressed a letter to them intimating that "it will eventually be necessary for you to alter the specification of goods to 'stockings.' Registration cannot be obtained for a 'repairing system or service'." This alteration was accordingly made and the words "and reweaving repairs effected thereto" were deleted.

To the appellants' notice of opposition the respondents lodged a counter statement from which I quote the following paragraph:

> The applicants intend to offer for sale stockings bearing the brand name "Rysta" and have applied for registration of the said mark which they desire to use to exploit the goodwill built up by them in the said mark in connection with stockings over the long period of trading by them under the said mark in connection with their stocking repairing business.

It will be observed that in this oddly phrased statement they do not express an intention to manufacture stockings, but only to offer stockings for sale. The genuineness of their intention to enter upon the business of dealing in stockings as manufacturers or vendors has not been challenged. The upshot is that, the word "Rysta" having acquired a widespread and favourable reputation as indicative of their stocking repair process, they propose to use it for stockings to be sold by them. They have throughout frankly avowed that, if their application is granted and the word "Rysta" is registered as a trade mark for stockings, they will continue to use the word on stockings which they have only repaired and they have maintained that they would be within their rights in so using it as a registered trade mark. The application having come before the assistant comptroller, acting for the registrar, he issued his decision authorising it to proceed. In the course of his decision he expressed the view that:

> . . . if any person repairs the stockings of other persons as a matter of business, the stockings that he repairs are rightly to be regarded as connected in the course of trade with him.

The consequence is that, if the respondents obtain registration of the trade mark "Rysta" for stockings, as the Court of Appeal, reversing the judgment of FARWELL, J., have decided, the respondents will have the authority of the registrar for using "Rysta" as a trade mark for stockings which they have neither manufactured nor sold but have only repaired. The remarkable result ensues that although the registrar had advised the respondents that "registration cannot be obtained for a repairing system or service," nevertheless, if the respondents are authorised to register the trade mark "Rysta" for stockings they will be entitled according to the assistant comptroller to use it to denote that they have applied a repairing system or service to stockings of any manufacture.

The Court of Appeal did not deal with this aspect of the case, which was not fully argued before them, as they proceeded on other grounds. The matter was, however, elaborately developed in argument at your Lordships' bar both on behalf of the parties and on behalf of the public interest by the Solicitor-General, who supported the view expressed by the assistant comptroller and urged the importance of having that view either affirmed or negatived. As the judgment of the Court of Appeal, if the view of the assistant comptroller stands uncontroverted, would justify the respondents in using the word "Rysta" as a trade mark for their repairing system or service, I agree with your Lordships that this House should pronounce upon the matter.

In my opinion, the view expressed by the assistant comptroller is unsound, and is inconsistent with the true function of a trade mark. The Act of 1938, in sect. 68, defines a trade mark as :

> . . . a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods . . .

and the person having right to use the mark. In construing this definition it is essential to bear in mind what is the function of a trade mark. If there is one thing that may be described as fundamental in this branch of law it is that the function of a trade mark is to indicate the origin of the goods to which it is applied. As it was expressed by BOWEN, L.J., in *Re Powell's Trade Mark* (4), at pp. 403-404 :

> The function of a trade mark is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market.

I could multiply quotations to the same effect. I was merely repeating a common-place when on a former occasion I said in this House that it is :

> . . . of the essence of a trade mark that it should indicate origin and be used as indicative of origin.

(*Bass Ratcliff and Gretton, Ltd.* v. *Nicholson and Sons, Ltd.* (2)). It is true that these pronouncements were made before the passing of the 1938 Act, and that this statute enacted a new definition of a trade mark in the words which I have quoted and also in sect. 4, when defining the right given by registration, used new language, *viz.*, that registration of a person as the proprietor of a trade mark in respect of any goods should give that person "the exclusive right to the use of the trade mark in relation to those goods." But I do not agree that thereby "a radical alteration in the law relating to trade marks" has been effected or that there has thereby been conferred "a right crucially different in principle from the rights heretofore enjoyed by the owners of trade marks," as SIR WILFRID GREENE, M.R., and CLAUSON, L.J., held in *Bismag, Ltd.* v. *Amblins* (*Chemists*), *Ltd.* (6), at pp. 677 and 695 ([1940] 2 All E.R., at pp. 616 and 628). I do not think that the widened language of the 1938 Act has inferentially altered the essential conception of a trade mark in law and in this I agree with and prefer the judgments in the *Bismag* case (6), of SIMONDS, J., and MACKINNON, L.J., whose reasoning I need not repeat. A trade mark must still be registered in respect of goods, it must be used in relation to goods, it must indicate a connection in the course of trade between goods and the user of the trade mark. A trade mark must thus be used in trade. "Trade" is no doubt a wide word, but its meaning must vary with and be controlled by its context. A connection with goods in the course of trade, in my opinion, means in the definition section an association with the goods in the course of their production and preparation for the market. After goods have reached the consumer they are no longer in the course of trade. The trading in them has reached its objective and its conclusion in their acquisition by the consumer.

The respondents in carrying on the business of repairing stockings do not, in my opinion, trade in stockings. They do not trade in any goods. They effect repairs on other people's goods. The Solicitor-General suggested that a mark used by a repairer might qualify as a trade mark inasmuch as it was the use of a mark in relation to goods, and that the repaired goods might be said to originate with the repairer. The repairs may have originated with the repairer but the goods repaired have in no sense originated with him. He has not in any way contributed to their production for the market. Repairs are not goods. The registrar was right when he said that registration cannot be obtained of a trade mark for "a repairing system or service." The use of a registered trade mark by a repairer on or in relation to goods which he has merely repaired might well lead to confusion for it would imply, contrary to the fact, that the goods had in some way originated with him. FARWELL, J., and the Court of Appeal, as I have said, found themselves able to dispose of the present case without deciding the important general question with which I have just dealt, though FARWELL, J., thought there was much to be said for the view which I have expressed. LORD GREENE, M.R., for the purpose of his judgment, assumed that "use in relation to repaired stockings is not a trade mark use" but expressly reserved the question as entirely open. Both he and MACKINNON, L.J., treating the case as an application to register the word "Rysta" as a trade mark to be used for stockings and not for the repair of stockings, were of opinion that it should be granted because there was no likelihood of deceit or confusion occurring either generally or by reason of the resemblance between the word "Rysta" and the word "Aristoc." LUXMOORE, L.J., dissented on the ground of the resemblance between the two words.

I would observe that the Act does not confer any absolute right to obtain registration of a trade mark if certain conditions are satisfied. The registrar has a general discretion in the matter (sect. 17 (2)) and the court on appeal possesses the same discretionary powers (sect. 52). It is thus proper to take into account in considering the question of the admission of a trade mark to the register the whole circumstances of the past user and the intended future user of the mark.

The word "Rysta" is not a newly invented word intended to be used in a trade about to be inaugurated by the respondents. On the contrary, the respondents with justifiable pride claim that the word has acquired a wide and favourable recognition by the public as the name of their method of repairing stockings manufactured or sold by other people. They propose now to use the word with a new signification as denoting stockings to be manufactured or sold by themselves. At the same time they make no secret of their intention to continue the use of the word for stockings only repaired by them and, supported by the assistant comptroller, they maintain their right to do so. In future, accordingly, a member of the public seeing the word "Rysta" on a pair of stockings will not know whether, as he has always hitherto understood, it denotes that the stockings have only been repaired by the respondents or whether it denotes that they are the goods of the respondents. The repairs, it will be remembered, are invisible. The respondents might in future repair stockings of their own manufacture; in that case the mark might be indicative of origin or of repair or of both. It is no doubt true that the owner of a pair of stockings sending them to the respondents for repair and receiving them back with the word "Rysta" attached would know that the word indicated repair by the respondents. But this is to take too narrow a view of the possibilities. Suppose that stockings marked "Rysta" which the respondents have only repaired are placed in a drawer with stockings marked "Rysta" which the respondents have manufactured, who can tell which are which? It is common knowledge that silk stockings are a most popular form of gift. If a gift is made of stockings manufactured by the respondents and bearing the trade mark "Rysta," will the recipient, to whom "Rysta" is, as the respondents proclaim, a household word for stockings repaired by the respondents, not be liable to think that the gift is of a second-hand article? I need not pursue the possible, indeed probable, eventualities. I agree with FARWELL, J., in his view that the ambiguities which would attend the use by the respondents of the word "Rysta" if registered as a trade mark might well be likely to cause confusion in the public mind.

Lastly, I find myself in agreement also with LUXMOORE, L.J., in holding that the proposed trade mark "Rysta" ought not to be registered because it so nearly resembles phonetically the appellants' trade mark "Aristoc" as to be likely to cause confusion. If I say no more on this aspect of the case it is only because the late Lord Justice has so adequately and convincingly dealt with it. On all grounds I am for allowing the appeal and refusing the respondents' application.

LORD WRIGHT: My Lords, I agree with the opinion of VISCOUNT MAUGHAM which I have read in print. I add some brief observations in deference to the distinguished judges who have taken a different view.

In my opinion, the assistant comptroller should have refused to register the respondents' mark in virtue of the Trade Marks Act, 1938, s. 12. On that issue I am in complete agreement with the judgment on this point delivered in the Court of Appeal by Luxmoore, L.J.; indeed, I am so completely in accord both with his conclusion and his reasoning that I need say no more on this issue. The central question; that is, the degree of similarity between the appellants' and the respondents' marks is, it is true, one which depends on the judge's personal impression, whether visual or phonetic. He cannot shelter under another judge's decision. But he has to envisage the circumstances in which visual or phonetic confusion is or is not likely to arise. On this I do not repeat what Luxmoore, L.J., has so admirably said. It is true that great weight must always be given to what the comptroller and assistant comptroller had decided. But his decision does not relieve the judge of his own individual responsibility. In this case I venture to take a view different from that of the assistant comptroller and the majority of the Court of Appeal. This would in itself be sufficient to decide the appeal in the appellants' favour, but both sides have asked that the appeal should be decided on other and broader issues of principle and in particular the Solicitor-General has submitted that the issue he raised was matter of general importance and of public interest. I shall now deal with them.

The issue raised and argued by the Solicitor-General and by the respondents' counsel is whether, under the 1938 Act, it is competent to register as a trade mark a mark which the applicant intends to use as a trade mark on goods which he has repaired after the goods have been sold or have otherwise reached the public: in other words, would the definition in sect. 68 of the Act be satisfied on the basis that the fact of repairing constitutes "a connection in the course of trade" between the goods repaired and the applicant. The assistant comptroller has held that it would.

The goods in question in this case were stockings. The respondents had since 1929 carried on a large business of repairing stockings by a secret process. In their counter-statement laid before the assistant comptroller they stated that they intended to offer for sale stockings bearing the brand name "Rysta" and applied for registration of the mark which they said they desired to use to exploit the goodwill built up by them in the mark in connection with stockings over the long period of trading by them under the said mark in connection with their stocking-repairing business. Their counsel expressly claimed that the trade mark would give them the right to use it for stockings made by them or for stockings which they had merely repaired. It was, therefore, necessary to decide whether it was a legitimate use of the trade mark, to use it to indicate that the stockings had been repaired by the respondents though no further connection existed between them and the goods.

The definition of trade mark in the 1905 Act was much narrower than that in the 1938 Act. But the assistant comptroller relied on a decision of the comptroller under the 1905 Act, the *Bradford Dyers*' case (1); in that case registration of a trade mark for a concern which dyed and finished cloth which it had not manufactured, was upheld. But two points are to be noted. In that case the applicants were specialists who carried out particular processes in the course of and as part of the manufacture and did so before the goods were offered to the public in the market. It might thus be said that the goods at the particular stage of the production were the goods of the proprietor of the trade mark by virtue of manufacture, which was enough under the definition in the 1905 Act, s. 3, even though the applicants there were merely sub-contractors to carry out the particular processes which had to be completed before the principal manufacturers could place the goods as vendible goods on the market. The facts of that decision did not, therefore, furnish any parallel for what the respondents claim to do if they are able to register the trade mark.

The question must now be approached on the basis of the definition in the 1938 Act, s. 68, and in particular the words "used or proposed to be used . . . so as to indicate a connection in the course of trade between the goods" and the proposed proprietor of the mark. These are indeed very general words, which replaced the catalogue of specific kinds of connection contained in the 1905 Act, s. 3. They undoubtedly changed the law to some extent, but they did not, in my opinion, change the fundamental idea of the function of a trade mark, which was to indicate *the origin* of the goods. Lord Macmillan in *Bass* v. *Nicholson* (2), was fully justified in dwelling on this aspect. I need not repeat the authorities under the old law which support him. I do not think so radical

a change in the law could have been intended or can be taken to have been intended by the actual change in language made in the 1938 Act. According to established rules for the interpretation of statutes, much more specific words would have been necessary. There is a fundamental difference between the "origin" of goods, that is between that which gives them their permanent and essential character before they leave their source of origin, and a mere repair or processing which may be done at any subsequent time and is merely partial and evanescent, like the repair of "ladders" in stockings or the processing or A
servicing of goods which does not affect their essential character. The word "origin" is no doubt used in a special and almost technical sense in this connection, but it denotes at least that the goods are issued as vendible goods under the aegis of the proprietor of the trade mark who thus assumes responsibility for them, even though the responsibility is limited to selection like that of the salesman of carrots on commission in *Major* v. *Franklin* (8). By putting them on the market under his trade mark he vouched his responsibility, and the B
carrots were "his goods" by selection though he was neither the owner nor grower of them. The limitation in the 1938 Act, "in the course of trade," sufficiently, in my opinion, preserves the essential and characteristic function of the mark. The proprietor is required to be a trader who places the goods before the public as being his goods. That is the vital connection, not some later partial and ephemeral attribution to some one else. Trade is a very wide term: it is one of the oldest and commonest words in the English language. C
Its great width of meaning and application can be seen by referring to the heading in the Oxford English Dictionary. But it must always be read in its context. That gives it the special connotation appropriate to the particular case. In the 1938 Act the context shows that "trade" refers to selling or otherwise trading in the goods to which the mark is applied. Thus in sect. 26 (2), (6), we find the words "goods to be sold or otherwise traded in"; the D
same collocation of words is found in sect. 31; and again in sect. 68 in the definition of Limitations. These instances show that trade is here used in the particular sense of merchanting, selling or the like, which would nowadays include the more modern practices of hire purchase, leasing (*e.g.*, of valuable machines), letting out for public use, exporting, etc. But equally it is clear that repairing or processing or the like is not included because it is not trade in the particular sense intended. This construction is consonant with the E
established user in the past of the word trade mark and the established definition of its functions. In my opinion, the comptroller ought, in exercising his jurisdiction under sect. 17 of the Act, to have refused to register the trade mark. The registration should, in my judgment, be held invalid. The Solicitor-General on behalf of the comptroller arguing for the opposite view has contended that the definition of trade mark in sect. 68 of the Act calls for a wider interpretation which would include the use of a trade mark for repairing or F
other services to goods even though they are already the subjects of an existing trade mark indicating origin with the consequence that further trade marks covering the same goods might be accumulated as different services for repairs or even more ephemeral services like the valeting or cleaning of clothes or laundry work on garments are from time to time rendered to the goods. He has stated that the comptroller has made a practice of registering such trade G
marks, and further that the practice is advantageous in the public interest. It is, however, clear that, if such a practice does not come within the terms of the Act (and I think it does not), it is not lawful, however convenient. If the law is to be altered, that must be done by Parliament, which can consider all the different factors relative to the proposed change of the law.

The appellant, however, has pointed out that, if the impugned trade mark is upheld, it would lead to serious confusion. It has acquired a very important H
goodwill as manufacturer and seller of stockings under the "Aristoc" mark, and has sold them in quantities running into several millions over about 20 years. It is pointed out on its behalf, that, if every time one of its stockings was repaired by the respondents, they would be entitled to put upon it their mark "Rysta," the public could never know whether the appellant or the respondents had made the stocking. This uncertainty (which may be taken merely as an illustration of what might happen in a great number of other instances if the respondents' claim were justified), will almost inevitably deceive or cause confusion.

The public would not know whether the stockings were made by or merely repaired by the respondents. This risk of confusion is a different risk from that which follows from the phonetic similarity between the words "Aristoc" and "Rysta" or arises in other like instances of competing marks. It is not here necessary to decide whether the case comes within the terms of sect. 11 of the 1938 Act, which prohibits the registration as a trade mark of any matter which by reason of being likely to deceive or cause confusion or otherwise, would be disentitled to protection in a court of law, or would be contrary to morality, etc. The test under the section obviously is whether "Rysta," if used as a trade mark on repaired stockings would be disentitled to protection in a court of law by reason of its being likely to deceive or cause confusion or otherwise. I am disposed to think that the terms of the section would apply to such facts. But I need not definitely decide that, because (quite apart from the construction which I adopt of the definition in sect. 68), the comptroller ought not in my opinion, to exercise his discretion under sect. 17 in favour of the respondents. There is here a general risk of confusion which in the public interest should not be authorised. The question is not merely one of competing marks and the right *inter se* of their respective proprietors. I have shortly set out these considerations which, together with Lord Maugham's more detailed examination of the whole question, lead me to concur in the motion he has proposed. I would allow the appeal.

Lord Simonds: My Lords, I would allow this appeal. In the first place the respondents have, in my opinion, failed to discharge the burden which lies upon them of showing that their proposed trade mark "Rysta" does not so nearly resemble the registered trade mark "Aristoc" as to be likely to deceive or cause confusion. Upon this question I find myself in complete accord with the reasoning and conclusion of Luxmoore, L.J. A comparison of the two words "Rysta" and "Aristoc," syllable by syllable, may be necessary as a test, though it will serve to emphasise differences rather than similarities. But I think that the truer test is to take the hypothetical case of a sales-woman, who has heard of "Rysta" stockings but not of "Aristoc" stockings, being asked by a customer whether she has any "Aristoc" stockings. Is there in such a case a reasonable possibility that she will think that it is "Rysta" stockings for which the customer is asking? The answer is necessarily one of first impression, but no doubt is left in my mind that there is a real danger of confusion. It is easy, perhaps, to exaggerate the risk of careless pronunciation, but it may at least be said that the standard of ordinary speech is not the precise articulation of the perfect announcer and that the enquiry for one article or the other will not be made in the quiet atmosphere of the studio. There is, in my opinion, ample ground for refusing the application under sect. 12 of the Act.

But though this is sufficient to dispose of this case, other questions of wider import have been raised, upon which your Lordships are agreed that it is right for this House to express an opinion. I do not think it necessary to restate the facts and documents. It is sufficient to say that the registrar when the application to register "Rysta" as a trade mark was before him could not properly come to any other conclusion than that (*a*) the applicants had in the past purported to use "Rysta" as a trade mark in respect of stockings not of their own manufacture, which they had repaired by the well-known "Rysta" process, and (*b*) that in future they intended to use the same trade mark in respect both of stockings of their own manufacture and of stockings not of their own manufacture but repaired by them. He might assume complete *bona fides* on the part of the applicants, disregarding the suggestion that they had no real intention to manufacture or sell stockings. He might also assume that, if and when they used the same mark in respect of both classes of goods, they would at least not intentionally so use it as to create any confusion. Here, as it appears to me, two questions were involved for the consideration of the registrar, first, whether the process of repair created such a "connection in the course of trade" between the repaired stockings and the applicants as to justify the registration of a trade mark in respect of the stockings so repaired, and, secondly, if this question should be answered in the affirmative, whether, however well-intentioned the applicants, it was right to register a trade mark with the knowledge that it was intended to be used in respect of goods of such essentially different character as stockings manufactured by the applicants and stockings

of other manufacture repaired by them. Upon the first question your Lordships
have not the advantage of a judgment of the Court of Appeal who found it
possible to dispose of the case without determining it. It is, however, a question
upon which the Solicitor-General has expressly invited a decision and it is one
that is clearly of far reaching importance. To me the answer seems plain.
It was established beyond all doubt before the Trade Mark Act, 1938, that
the function of a trade mark was to indicate the origin of goods. The language
of the preceding 1905 Act, s. 3, is explicit : A

> . . . for the purpose of indicating that they are the goods of the proprietors of such
> trade mark by virtue of manufacture, selection, certification, dealing with, or offering
> for sale.

It is " the goods " which are indicated by the mark to be the goods of the proprietor of the mark. The extreme limit of the meaning of these words was
reached in *Major* v. *Franklin* (8), where a market salesman selling goods on
commission was able to register a trade mark in respect of goods so sold. But B
no judicial authority has been cited for the proposition that a valid trade mark
could be obtained under the old Act in respect of goods to which the applicant
had rendered some service such as repair or cleaning. The definition of trade
mark in the 1938 Act differs in some respects from that in the earlier Act. The
substantial change—and the only one that affects the present question—is the
introduction of the words :

> . . . **a connection in the course of trade between the goods and some person having** C
> **the right . . . to use the mark . . .**

The mark no longer indicates that goods are the goods of the proprietor of the
mark by virtue of one of the enumerated facts. It indicates only " a connection
in the course of trade " between the goods and the user of the mark. It is right
perhaps to assume that the new words are wider than the old. But it would,
in my opinion, be wrong to conclude that a change of a revolutionary character D
has been effected unless the language enforces that conclusion. It is not, I
think, an exaggeration so to describe the change involved in the applicants'
claim. It is in effect a claim to register a trade mark in respect of goods (for
it is only in respect of goods that a mark can be registered) by reason of some
operation performed upon them after they have reached the hands of the public.
This is something fundamentally different from the connection previously
existing between the goods and the mark : it is not the origin of the goods E
that is now to be indicated but the fact that something has been done to them,
and that something may be of an impermanent nature in no way affecting the
character or quality of the goods themselves. I should be driven only by the
most cogent words to the conclusion that such a change was effected by a change
of definition in the statute. But in truth there is no reason for ascribing any
such effect to the relevant words " connection in the course of trade." The word
" trade " has many meanings, wide or narrow, according to the context in which F
it is found. It is by the ascription to it of a wide meaning in sect. 65 of the
Act that the respondents support their claim. But it appears to me that the
subject-matter, the history of the law and the context in which the word is
found both in sect. 65 and elsewhere in the Act, unite to deny to it any such
meaning. It might be true to say that the respondents carry on a trade which
is connected with stockings just as a cleaner carries on a trade which is connected with the goods that he cleans or a piano-tuner a trade connected with G
the piano he tunes. But it does not follow and, in my opinion, it is not the
fact that there is in any such case such a connection in the course of trade between
the goods and the person rendering that service or performing that operation
as to satisfy the definition in sect. 65. It is unnecessary and would be dangerous
to attempt to give a positive and exhaustive meaning to the word " trade "
in the definition. It is sufficient to say that it can bear no wider meaning than H
if the words " in the goods " were added after it. The test is then whether the
applicant for the mark can be said to trade in the goods, and this test is clearly
not satisfied by one who merely renders some service in respect of them after
they have reached the public. These considerations, in my opinion, should
have led to the refusal by the registrar of the application for registration. He
should have taken a realist view of the position and not allowed the fact (which
I will for this purpose assume) that at some time in the future the applicant
might use the mark to indicate the origin of the stockings in relation to which

it was used to obscure the fact that it was the immediate intention to use it so as to indicate not the origin of the stockings but a connection which I hold to be not a valid ground for registration.

This leads me to the second question which the registrar had to consider. Assuming, contrary to what is, in my opinion, the true view, that the process of repairing stockings which have reached the public is a " connection in the course of trade " which will support registration of a mark, ought the registrar A to register such a mark when he has been told that the goods in respect of which it is intended to be used will be (*a*) stockings repaired by the applicants, and (*b*) stockings manufactured by them ? I think, clearly not. It appears to me that in such circumstances it is impossible for the applicant to discharge the burden which lies upon him of showing that there is no likelihood of deception or confusion. An enumeration of the conditions in which there is not likely to be deception or confusion does not satisfy me that there may not be other con- B ditions in which they may occur. The precise scope of sect. 11 of the Act is not easy to define, though I would venture to emphasise what has already fallen from your Lordships that it is certainly not limited in its operation to cases of similarity or competition between the proposed mark and another mark. It is sufficient for the purpose of this case to say that there is an inherent probability of confusion arising from the same mark being used to distinguish two articles which are essentially different in origin and may be wholly different C in character and quality, and that when that factor is present the registrar ought to refuse registration. I concur in the motion that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Peacock & Goddard,* agents for *Browne, Jacobson & Hallam,* Nottingham (for the appellants); *Timbrell, Deighton & Nichols* (for the respondents); *Solicitor to the Board of Trade* (for the Registrar of Trade Marks).

D [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LONDON AND NORTH EASTERN RAILWAY CO. *v.* B.A. COLLIERIES, LTD.

E [HOUSE OF LORDS (Viscount Maugham, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Simonds), **October 26, 27, 30, 31, November 1, December 8, 1944.**]

Mines—Coal mine—Seam passing under railway—Notice of intention to work—Counter-notice—Assessment of compensation—Statutory liability of mine owner to make good surface damage to railway if minerals worked—Hypothetical working and damage to be taken into account in assessing compensation— F *Mines (Working Facilities and Support) Act,* 1923 (*c.* 20), *ss.* 15, 78 (1), (2), (5), 78A (1) 79A (1), (2), 79B.

The respondent company was the owner of a coal mine. Part of the coal lay under certain works of the appellant railway company. The respondents gave notice of their intention to work this coal, but the appellant company by a counter-notice given under the Mines (Working Facilities and Support) G Act, 1923, s. 15, sterilised the coal, that is, for the protection of the railway the coal could not be worked but compensation was to be paid by the railway company to the respondents. The point in issue was whether, when the railway company had served the counter-notice requiring the respondents to leave specified minerals unworked, account ought to be taken, in assessing the compensation payable, of the statutory liability of the mine-owners to contribute to the cost of making good surface damage if they had worked H the minerals and thereby caused damage to the railway or its works, since such consideration affected the value of the coal :—

HELD [VISCOUNT MAUGHAM and LORD SIMONDS dissenting] : the compensation was to be assessed by calculating what the coal would have realised if it had been brought to the market in the usual course. On the true construction of the Mines (Working Facilities and Support) Act, 1923, the potential liability to contribute under sect. 79A must be taken into account is assessing the compensation payable under sect. 78.

Edinburgh and District Water Trustees v. *Clippens Oil Co., Ltd.* (9) *applied.*

Decision of the Court of Appeal ([1944] 1 All E.R. 391) *reversed and decision of* Morton, J. ([1943] 2 All E.R. 637) *restored on the point in issue.*

[**EDITORIAL NOTE.** This question of great importance to railway companies and mine owners regarding the construction of the Mining Code has now been decided by a majority of the House of Lords in favour of the railway company, restoring the decision of Morton, J. The provisions in sect. 78 relating to the payment of compensation in respect of minerals left unworked, and in sect. 79A relating to the payment of contribution for damage to railway works caused by actual working of minerals in a protected area, as to which no counter-notice has been served, are held not to be unrelated, but to be regarded as parts of an integrated whole. The judgments of the Court of Appeal proceeded largely upon a consideration of the extreme difficulty, or even impossibility, of the task of assessment of potential damage imposed upon the arbitrator, but the majority judgments of the House of Lords do not take this view. They hold that the assessment of potential liability to contribution is no more hypothetical than the estimate of the market value of coal left unworked, and the problem for an expert arbitrator, though highly complicated, is no more incalculable than that frequently before the courts of estimating the value of the expectation of human life.

The divergence of judicial opinion is demonstrated by the fact that Lords Maugham and Simonds in the House of Lords, and the Master of the Rolls and MacKinnon and Luxmoore, L.JJ., in the Court of Appeal, all disagree with the view which is now established as the law.

One further point raised by Lord Thankerton remains to be decided, and that is, whether in any future demand for contribution under sect. 79A a mine-owner would be entitled to credit for the potential contribution taken into account in assessing compensation under sect. 78.

As to Compensation in Case of Railways, see HALSBURY, Hailsham Edn., Vol. 22, pp. 649, 650, para. 1399 ; and for Cases, see DIGEST, Vol. 11, pp. 156-158, Nos. 371-381.]

Cases referred to :

(1) *Dalton* v. *Angus* (1881), 6 App.Cas. 740 ; 19 Digest 7, *4* ; *sub nom. Public Works Comrs.* v. *Angus & Co., Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689 ; 44 L.T. 844.

(2) *Brown* v. *Robins* (1859), H.H. & N. 186 ; 19 Digest 169, *1180* ; 28 L.J.Ex. 250.

(3) *Caledonian Ry. Co.* v. *Sprot* (1856), 27 L.T.O.S. 264 ; 19 Digest 46, *256* ; 2 Jur. N.S. 623 ; 4 W.R. 659 ; 2 Macq. 449.

(4) *Elliot* v. *North Eastern Ry. Co.* (1863), 10 H.L.Cas. 333 ; 19 Digest 164, *1145* ; 2 New Rep. 87 ; 32 L.J.Ch. 402 ; 8 L.T. 337.

(5) *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A.C. 426 ; 11 Digest 129, *186*.

(6) *Eden* v. *North Eastern Ry. Co.* (1907), A.C. 400 ; 11 Digest 167, *374* ; 76 L.J.K.B. 940 ; 97 L.T. 254.

(7) *Howley Park Coal and Cannel Co.* v. *London and North Eastern Ry. Co.*, [1913] A.C. 11 ; 11 Digest 153, *353* ; 82 L.J.Ch. 76 ; 107 L.T. 625.

(8) *Great Western Ry. Co.* v. *Bennett* (1867), L.R. 2 H.L. 27 ; 11 Digest 152, *349* ; 36 L.J.Q.B. 133 ; 16 L.T. 186.

*(9) *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ltd.* (1902), 4 F.(H.L.) 40 ; 11 Digest 157, *379* ; 87 L.T. 275.

(10) *Backhouse* v. *Bonomi* (1861) 9 H.L.Cas. 503 ; 19 Digest 163, *1140* ; 34 L.J.Q.B. 181 ; 4 L.T. 754.

(11) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App.Cas. 127 ; 34 Digest 713, *981* ; 55 L.J.Q.B. 529 ; 54 L.T. 882.

(12) *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.*, [1908] A.C. 27 ; 17 Digest 91, *85* ; 77 L.J.Ch. 102 ; 98 L.T. 4.

(13) *Chaplin* v. *Hicks*, [1911] 2 K.B. 786 ; 17 Digest 92, *98* ; 80 L.J.K.B. 1292 ; 105 L.T. 285.

Appeal by the railway company from a decision of the Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), dated Mar. 15, 1944, and reported [1944] 1 All E.R. 391, reversing a decision of Morton, J., dated July 30, 1943, and reported [1943] 2 All E.R. 637. The facts are sufficiently set out in the opinion of Viscount Maugham.

Sir Walter Monckton, K.C., David Bowen, K.C., and *J. B. Herbert* for the appellent railway company, respondents in the court below.

N. L. C. Macaskie, K.C., and *L. M. Jopling* for the respondent colliery company appellants in the court below.

Viscount Maugham : My Lords, the question raised on this appeal turns upon the true interpretation of certain sections, particularly sects. 78 to 85E, of the Mines (Working Facilities and Support) Act, 1923, which were substituted (by sect. 15 of that Act) for sects. 78 to 85 of the Railway Clauses Consolidation Act, 1845. The First, Second and Third Schedules of the former Act were also substituted for the First, Second and Third Schedules of the Act of 1845. I cannot say that the substituted sections and schedules are easier to construe than those which they replaced. The Court of Appeal (Lord Greene, M.R. MacKinnon and Luxmoore, L.JJ.) after an elaborate consideration of both Acts, so far as relevant, allowed an appeal from Morton, J. Hence the appeal (with leave given by that court) to this House.

The facts can be stated very shortly. The plaintiffs (the respondents on this appeal) are mine owners in respect of a colliery called the Gedling Colliery, and they work a seam called the Low Hazel Seam. Towards the end of 1939 the plaintiffs were approaching by their workings a tunnel called the Mapperley Tunnel. On Jan. 24, 1940, the plaintiffs gave to the appellants a notice in the following terms :

> We hereby give notice, under and by virtue of the Mines (Working Facilities and Support) Act, 1923, Part II, s. 78 (1) that we intend at the expiration of thirty days from the service of this notice, to work the coal, of which we are the lessees in part and owners in part, in the seam known as the Low Hazel Seam at Gedling Colliery, lying in the area of protection comprising your railway and works shewn on the plan hereto annexed, situate in the parishes of Arnold and Carlton in the county of Nottingham.

The appellants thereupon served a counter-notice on Dec. 30, 1940, in respect of part of the railway and works which were comprised in the notice, specifying the minerals required to be left unworked by reference to a plan. These are called in the 1923 Act " the specified minerals," and are sometimes described as being " sterilised " by the counter-notice. The mine-owner and the royalty owner (if any) are entitled to compensation for the loss caused by the specified minerals being left unworked (sect. 78 (4)), and that compensation is, somewhat loosely, defined in sect. 78A.

The question is thus formulated by originating summons :—

Whether, upon the true construction of the Mines (Working Facilities and Support) Act, 1923, s. 15, and in particular of sects. 78 and 78A included in sect. 15 aforesaid, in assessing the compensation payable by the appellants to the respondents under a counter notice dated Dec. 30, 1940, given by the appellants to the respondents, account ought to be taken of the possible contribution for which the respondents might, in the future, have become liable under sect. 79A included in sect. 15 aforesaid if the coal covered by such counter notice had been actually worked and damage to the railway and works of the appellants had been caused by such working.

Your Lordships have been informed that this is a question of great importance to many railway companies and colliery owners throughout the country.

My Lords, I find myself in agreement with the reasons and considerations contained in the judgment of Lord Greene, M.R., and Luxmoore, L.J., with which MacKinnon, L.J., substantially agreed, and I do not think it necessary to repeat them. I propose however to add a few observations which tend, I think to support their view.

It is not accurate to refer to the common law right of support to which the owner of the surface of land is entitled from the subjacent land as if that right extended to all the buildings and works on the surface. The common law right is to have support to the land in its natural state, which is not an easement, but an incident to the land itself (see per Lord Selborne in the leading case of *Dalton* v. *Angus* (1)). The surface owner may, of course, acquire by grant, prescription or statute an easement of support for his surface burdened with buildings and other works. This consideration is I think, of importance in relation to the question before us ; for it is an error to suppose that the " specified minerals," which under the 1923 Act, s. 78, have been required to be left unworked, would if worked have exposed the mineral owner to a claim co-extensive with that which may be made (under sect. 79A) in relation to the working of minerals lying under the area of protection but not being " protected works."

Sect. 79A of the 1923 Act refers to :

> . . . any damage caused by such working to the railway or works . . .

of the railway company. That is, it is not confined to the infringement of the right to have the land in its natural state. It is conferring a statutory right of a special kind (extending as it does to all buildings and works whenever built), and, having regard to the provisions of the six subsections, a right of a very artificial and complex character with several provisions limiting the liability of the mine owner which otherwise might be very great. We must not, therefore, begin with the assumption that by sect. 78:

> . . . the loss caused by the specified minerals being left unworked . . .

must be calculated with a deduction for the hypothetical damage which would necessarily be caused to the railway and works by a hypothetical working of the specified minerals. That I think would be a deduction for damage on the footing of a non-natural right of support, and we must find words in the sections which justify such a deduction. Where there is a right to support of land in its natural state and it has had artificial burdens, e.g., buildings, placed upon it, then if the buildings are injured, the owner claiming damages has to prove that the land would have been damaged even if it had been left in its natural state: *Brown* v. *Robins* (2); (and see MACSWINNEY'S LAW OF MINES AND MINERALS, 5th Edn., 1922, p. 613). It does not seem to me possible, except by a guess, to establish such a proposition in a case where there have been no workings, no subsidence, and no injury to any buildings or other works.

Another circumstance to be borne in mind is that damage by infringement of the right of support does not in many cases arise at all as an element in ascertaining the value of the minerals left unworked; for in many cases the minerals could be worked without infringing the right. The sections extend to all kinds of minerals, some of which can certainly be worked without causing subsidence. Even in the case of coal there may be a stratum of marble or other hard stone which will make it unnecessary to leave any minerals for support of the surface. The minerals themselves, such as iron-stone, may lie in hard rock (see *Caledonian Ry. Co.* v. *Sprot* (3); *N.E. Ry. Co.* v. *Elliot* (4)). Again the proper and usual method of working may include the leaving of sufficient pillars for support or some other artificial support, and it may not pay the colliery owner to remove the pillars or other support. The Act itself in sect. 81 (1) contemplates that:

> Where a counter-notice has been given by the company to a mine owner, the company shall from time to time pay to the mine owner the appropriate percentage (if any) of all such additional expenses and losses as may be incurred by such mine owner in consequence of such counter-notice by reason of: (i) . . . (ii) The mine being worked in such manner and under such restrictions as not to prejudice or injure the protected works.

For instance the mine owner may be the lessee of a seam working under restrictions imposed by his lessor which will or may preclude the letting down of the surface. He then gets "an appropriate percentage (if any)" of his additional expenses and losses. It seems to be difficult to reconcile this section with the view that the loss caused by the minerals being sterilised by the counter-notice (mentioned in the first line of the section) must be diminished by an estimate of hypothetical damage caused by a hypothetical working.

Thirdly, it should be remembered that in 1923 it was the general view as shown by many cases that coal (to say nothing of other minerals) could be so worked as to keep up the surface. It must be noted that where under the 1923 Act the mine owner is allowed to work he is precluded by sect. 79 from working minerals (after he has served his notice of intention to work) otherwise than in the manner proper and necessary for the beneficial working thereof and according to the usual manner of working such minerals in the district, and he has under sect. 79 (2) to make good all damage caused by "improper working." These provisions are inserted for the protection of the railway company and in the hope that the permitted workings will not seriously let down the surface, though it was appreciated that such damage was possible. In view of these facts it might reasonably have been anticipated that if it had been intended to provide that in estimating loss (as mentioned in sect. 78) caused by specified minerals being left unworked the arbitrator was to make a deduction for a possible damage by a hypothetical working in the usual manner not merely to the surface but also to the railway and works, that would have been stated in clear language.

The problem of assessing compensation to a mine owner who has become bound to leave specified minerals unworked for support of the surface and the works thereon has been arising under private and public Acts for at least a century. It arose under the Railway Clauses Consolidation Act, 1845, s. 78, and under the Waterworks Clauses Consolidation Act, 1847, s. 22, and the

Acts which incorporated one or other of these Acts. It is a striking fact that your Lordships have not been referred to a single authority to show that in such a case compensation should be assessed not only for the value of the minerals less the cost of getting them to the surface, but also with a deduction for the hypothetical damages which might be payable for letting down the surface and the buildings and works thereon. Moreover, in some cases it seems to be clear that the compensation to the mine owner has been assessed without making such a deduction. (See *Bwllfa, etc. and Pontypridd Waterworks Co.* (5); *Eden* v. *N.E.Ry. Co.* (6), affirming a judgment of BIGHAM, J., where apparently no such deduction was made.) The legislature must be taken to have known that the right to such a deduction prior to the 1923 Act was at any rate in doubt, and I can find nothing in the Act to show any intention to decide the matter in favour of the railways.

The question, then, that arises in my opinion is whether as a matter of construction the Act has provided by express words or necessary implication that for the purpose of ascertaining the "loss" to the mine owner referred to in sect. 78 (4) all the artificial and elaborate provisions of sect. 79A of the schedules must be applied, though they include damage to the railways and works which may be on the surface when subsidence occurs. I find it very difficult to suppose that that was intended, since 79A begins with the words:

> If a mine owner works any minerals lying under any part of the area of protection in the manner authorised by this Act . . .

As I have already pointed out, this refers to a working in a necessary and proper manner and in the usual way. Obviously it relates only to an actual working Moreover, the words in the bracket in sect. 79A:

> . . . not being protected works comprised in any counter-notice relating to such area of protection . . .

seem clearly to confirm the view that the section is confined to an actual working and is not applicable to a hypothetical working causing a hypothetical injury in cases where it is not possible to be certain that any subsidence would have been caused if the working had taken place. This view is, moreover, powerfully supported by the reasons and considerations contained in the judgment of LORD GREENE, M.R., and LUXMOORE, L.J., which I have already referred to. I have also had the advantage of reading in print the speech which LORD SIMONDS is about to deliver, with which I so fully agree that I do not think it necessary to state his reasons in my own language.

I will only add that I do not think it necessary to decide that the extraordinary difficulty of the task which on the respondent's contention would assuredly be cast upon the arbitrator would be alone a sufficient answer to this appeal. The legislature might conceivably have imposed on the arbitrator the duty of making a mere guess. My conclusion is based also on the framework of the sections which have to be construed in the light of the authorities, and on the view I have endeavoured to express that if the legislature had intended that the artificial provisions of sect. 79A were to be invoked for the purpose of ascertaining the loss caused to the mine owner by leaving the specified minerals unworked, it must have said so. The language used, in my opinion, points to the contrary conclusion.

My Lords, for these reasons I am for dismissing this appeal, but since a majority of your Lordships, as I understand, take the other view the appeal must be allowed.

LORD THANKERTON: My Lords, this appeal raises an important question as to the basis of assessment of the compensation for minerals—in this case coal—which the appellants have required the respondents to leave unworked under the provisions of the Railways Clauses Consolidation Act, 1845, as amended by the Mines (Working Facilities and Support) Act, 1923, s. 15. It arises on an originating summons, by which the respondents applied for the determination by the court of two questions, of which the first is alone now in issue and is as follows:

> Whether upon the true construction of the Mines (Working Facilities and Support) Act, 1923, s. 15, and in particular sects. 78 and 78A included in sect. 15 aforesaid in assessing the compensation payable by the defendants to the plaintiffs under the counter-notice dated Dec. 30, 1940, given by the defendants to the plaintiffs, any account ought to be taken of the possible contribution for which the plaintiffs might in the

future have become liable under sect. 79A if the coal covered by such counter-notice had been actually worked and damage to the railway and works of the defendants had been caused by such working.

On Jan. 24, 1940, the respondents gave the statutory notice of their intention to work, at the expiry of thirty days, the coal, of which they were lessees in part and owners in part, in the seam known as the Low Hazel Seam at Gedling Colliery, lying in the area of protection comprising the appellants' railway and works. On Dec. 30, 1940, the appellants served a statutory counter-notice for the protection of their Mapperley tunnel, being part of the railway and works comprised in the notice. The present question relates to the assessment of the compensation payable in respect of the coal required to be left unworked. The parties have agreed, for the purposes of this case, that the aggregate amount of compensation so payable would be £37,155 1*s.* 0*d.*, if no account is to be taken of a possible contribution under sect. 79A, but that the said sum must be reduced by the sum of £2,324, to £34, 831 1*s.* 0*d.*, if such potential liability ought to be taken into account.

My Lords, so far as it goes, I find it unnecessary to repeat the clear statement by Lord Greene, M.R., of the state of the law under the Railway Clauses Consolidation Act, 1845, and the common law, as laid down in *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (7). I will only remind your Lordships that in *Great Western Ry. Co.* v. *Bennett* (8) it had been decided by this House that, as regards the minerals within the distance prescribed by the special Act, or, otherwise, within forty yards, the 1845 Act had created a specific code, by which alone the rights of the company and the mine owner were regulated, and that the company could only secure support by service of a counter-notice. It may further be borne in mind that the working of the deep coal measures which is so common now was a development of the industry subsequent to 1845.

But the statement of Lord Greene, M.R., fails to notice a decision of this House in 1902, which, in my opinion, is relevant and crucial for decision of the present question in view of the course that the arguments have taken, and the statement by Lord Greene, M.R., ([1944] 1 All E.R., at p. 394) that :

> . . . the use of the word " value " in sect. 78A (1) of the new code does not suggest that any departure from the old basis of compensation is intended or that a new factor, unknown under the old code, is to be taken into account. The potential liability to contribute cannot affect the value of the minerals when brought to market, nor, as it seems to us, can it properly be described as part of the cost of working within the meaning of *Eden's* case (6).

The decision in *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ltd.* (9), which was referred to at the hearing of the appeal is quite inconsistent with that statement. The water trustees owned two water pipes alongside each other which passed through the lands of the Clippens company ; the latter were under a common law obligation to support the Crawley pipe, which was the older one. The water trustees had served a counter-notice under the Water-Works Clauses Act, s. 22, on the Clippens company to abstain from working certain specified minerals under the Moorfoot pipe, and the compensation was fixed by arbitration and an award was issued. The Clippens company sued on the award. It was held, affirming the judgment of the First Division of the Court of Sessions, that the question referred to the arbiters was the amount of compensation payable by the water trustees for the minerals which they had prevented the company from removing by the statutory notice, and that, in fixing the amount it was necessary for the arbiters to consider what minerals the company were precluded from removing by their common law obligation to support the Crawley pipe, and that the judgment of the arbiters was conclusive. Though Lord Halsbury, L.C., had some doubt as to whether the arbiters had adequately considered the matter, all the five noble Lords who took part agreed as to the duty of the arbiters. The Lord Chancellor said, at p. 42 :

> . . . if incidentally, by reason of its existence and its legal foundation, the one pipe could not be supported without, at all events to some extent, giving support to the other, then, not by reason of any legal principal, but by reason of physical necessity, if the one was supported and had a right to support, and the other could not be disturbed physically without disturbing the neighbouring pipe by reason of the combining together of these two—the right of the one and the physical proximity of the other —I should have thought it was improper to allow the mine owner to have an unqualified

right to remove all the minerals simply because in respect of one of the pipes the notice under the Act was sufficient to call into operation the functions of an arbiter.

LORD MACNAGHTEN, at p. 44, after referring to the service by the appellants of the counter-notice under the Act, said:

> On the other hand, what was the position of the respondents? The minerals belonged to them. They could not, indeed, work so as to injure the Crawley pipe, but, if they could avoid doing injury to it they were free to work out every particle of the minerals lying under the pipe-track. There was a restriction on their working, but the minerals were theirs. There was no adverse claim; there was no question of title. It was for the arbitrators or the oversman to determine what amount of compensation was payable to the mineral owners for the loss to them occasioned by their being prevented from working the minerals specified in the appellants' counter-notices. It may be that the oversman gave the respondents too much as the appellants contend, or too little as the respondents seem to think. It may be that he did not give weight to the restriction which the presence of the Crawley pipe had the effect of imposing on the working of subjacent minerals. It may be that though the matter was presented to him he disregarded it altogether. It may be that the appellants put their case far too high, as they did in the action before the Lord Ordinary, and suffered in consequence. But the award on the face of it is not open to objection.

LORD ROBERTSON, at p. 50, said:

> The contention, be it observed, is not and does not involve any dispute that the respondents are owners of the mineral for which compensation is claimed. On the contrary, the argument is that they being proprietors are losing the less from not working their minerals because as regards a part of those minerals they were already debarred from working by their obligation to support the water-track. The fact that the embargo on working is a legal one reduces the value just as some physical obstacle might do, either by adding to the cost of working, or even by rendering work impossible.

Lastly, LORD LINDLEY said, at p. 52:

> The title of the Clippens company to the minerals under the pipe and their right to work them out cannot be denied, but this title and right are subject to a restriction which affects their value, for it appears that in some places either some mineral must be left to support the Crawley pipe or some expense must be incurred to prevent injury to it by subsidence of the soil in which it lies. To what extent the value of the minerals under the Crawley pipe is diminished by this consideration is entirely a question for the arbitrator.

I make no apology for the extent of my citation of these opinions, which in my opinion, can be applied in terms to the statutory restriction on working which is now imposed by the 1923 Act, s. 79A. It will be noted that the arbitrator's duty, as thus defined, involved the consideration—not of actual damage—but of potential damage involved in the hypothetical working of the minerals required to be left unworked. As LORD LINDLEY makes clear, the rule laid down in *Backhouse* v. *Bonomi* (10), which was followed in *Darley Main Colliery Co.* v. *Mitchell* (11), and *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson Ltd.* (12), is not applicable in the present issue.

There can be no doubt that discussion and negotiation between the parties interested led to the new code which is enacted by the 1923 Act, Part II. I desire to stress the point that, with the exception of the leading sect. 77, the whole *fasciculus* of sections in the 1845 Act, which was headed:

> . . . and with respect to mines lying under or near the railway,

is superseded by the 1923 Act, s. 15, which substitutes fourteen new sections and three new schedules, which along with the original sect. 77, form a complete and integrated code, obviously closely balanced, and, in my opinion, it is not for the court to consider whether any individual provision of the code does justice to the one party interested or the other. The duty of the court is to construe the language used.

I now turn to the material sections of the new code enacted by the 1923 Act, s. 15, and which are made applicable to the appellants by sect. 16. [His Lordship proceeded to read sects. 78 (1), (2), (4), (5), 78A of the 1923 Act and continued]: It should be noted that the payments to which the mine owner, on whom a counter-notice has been served, may become entitled under sect. 78A (2) and sect. 81 (1) are not included in the compensation for loss caused by the specified minerals being left unworked which is provided by sect. 78 (5) and sect. 78A (1). In contrast with the latter, such payments are not based on any hypothetical working of the specified minerals.

My Lords, I am clearly of opinion that the arbitrator can only assess the loss caused to the mine owner by the specified minerals being left unworked by proceeding on the basis of a hypothetical working of the specified minerals, and for this purpose he will require to ignore the counter-notice, but he cannot ignore the mine owner's notice of intention to work these very minerals within an area of protection. I am also clearly of opinion that he must take into account the statutory provisions of sect. 79, which alone authorise the working of such minerals, and the provisions of sect. 79A, which imposes a statutory condition of any such working, and the operation of which would be bound to diminish the profit realisable from the winning of the minerals, and *pro tanto* to diminish the hypothetical loss in respect of which compensation is to be paid.

Before dealing more fully with sect. 79A, I desire to deal with a construction of proviso (ii) of sect. 78A (1) which was maintained by the respondents and appears to have been accepted by both courts below. The effect of that construction is that regard is alone to be had to the value of minerals lying under the inner area, that the tonnage rate is alone to be ascertained on these minerals and that one-third of the rate so ascertained is to be applied to the tonnage of minerals lying under the outer area. With all respect to the judges, I am glad to feel bound to differ from their construction, which, *exempli gratia,* would mean, as the respondents' counsel admitted, that if none of the specified minerals lay under the inner area, but there were valuable minerals lying under the outer area, the mine owner would get no compensation. While such a situation might be unusual in the case of coal, it might more easily be found in the case of other minerals which are equally subject to these statutory provisions. I am clearly of opinion that the duty of the arbiter is to ascertain the value of the whole specified minerals, and to reduce that value to a rate per ton over the whole tonnage, and to apply 100 per cent. of that rate to the tonnage lying under the inner area, and one-third of that rate to the tonnage lying under the outer area. My construction is based on the language of the opening words of the proviso, and of provisos (ii) and (iv). The other construction appears to treat the phrases " compensation payable " and " value " as co-terminous in meaning. [His Lordship read the material parts of sects. 79, 79A and continued] : under sect. 79A (5), any dispute as to contributions or the deductions from royalties are to be settled by arbitration. Under sect. 79B provision is made that, when and so far as reasonable and practicable, the company is to send to the mine owner and the royalty owner (if any) particulars of the railway or works to which damage has occurred or is apprehended, the nature of the damage or apprehended damage, and the nature of the works intended to be carried out, and, further, that the company is to keep separate accounts of the cost of making good any such damage, open for inspection by the mine owner or the royalty owner (if any).

In the Court of Appeal, MACKINNON, L.J., said ([1944] 1 All E.R., at p. 399) :

> But I prefer to rest my conclusion upon the simpler and broader ground that, in estimating " value " under sect. 78A, it is not possible to estimate the prospective and hypothetical liability under sect. 79A.

If that were a correct view, it would be a sufficient ground for deciding against the appellants ; but counsel for the respondents—rightly, in my view—found himself unable to support that contention. On the contrary, his submission was that the attempt by the arbitrator to arrive at the hypothetical liability under sect. 79A involved a *catena* of difficulties—especially in the case of a single mine—which really made such an assessment amount to an impossibility. This is not precisely the way in which LORD GREENE, M.R., and Luxmoore, L.J., expressed it ; as I understand their judgment, they held that the assessment of the potential liability was so complicated and difficult that ([1944] 1 All E.R., at p. 396) :

> It appears to us to be in the highest degree unlikely that the legislature would have imposed such a task on the arbitrator without express language to that effect.

My Lords, as I have stated already, the phrase " loss caused by the specified minerals being left unworked " naturally involves that this potential liability, if assessable, should be deducted as an expense of the hypothetical winning of the specified minerals, and, if it were intended to exclude it, it was necessary to make express provision for such exclusion. Further, in legislation such as the present, I should distrust the usefulness of the well-worn phrase " the intention of Parliament " ; if Parliament had any intention, it would be more likely to involve abstention from interfering with the nicely balanced compromise which had been arrived at by the parties interested.

I turn then to the suggested difficulty alleged to amount to impossibility: counsel for the respondents conceded that mere difficulty in assessment was not enough, and that a reasonable assessment, though not made with certainty, was as much within the province of the arbitrator in assessment of compensation as within the province of a jury in assessment of damages. I may refer to *Chaplin* v. *Hicks* (13), per VAUGHAN WILLIAMS, L.J. He further agreed that, in any view, the arbitrator would require to consider, not what was the value of the coal at the date of the counter-notice, but what would the coal-owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it. (*Bwllfa and Merthyr Dare Steam Collieries* (1891) v. *Pontypridd Waterworks Co.* (5)). As LORD ROBERTSON states at p. 432:

> Any estimate of this profit necessarily involves the question, "How long would the coal in question take to work out?" if for no other reason than in order to compute the cost of working. If the question thus presented has to be solved *ab ante*, the arbitrator, or whoever has to deal with it, must form the best conjecture he can of probable prices and probable wages during the period required to work out the area in question.

It appears clear to me that, while there may be cases in which the arbitrator might find himself unable to form a reasonable conjecture as to the potential liability under sect. 79A—in which case he would make no deduction in respect thereof—there will certainly be cases, of which the present case may well be an example, in which every mining expert would agree that any further substantial working of the specified minerals would almost certainly involve damage to the protected works, and I fail to see that the arbitrator would not be in much the same position as an arbitrator under sect. 79A (6) might be, for I regret to have to differ from the judges' view that liability under sect. 79A arises when and only when damage is actually caused. It would be surprising if that were the correct construction, but I am satisfied, especially when the provisions of sect. 79B are considered, that apprehension of damage and the cost of works to be carried out for the purpose of preventing such apprehended damage are covered by both sections. This is clearly stated in sect. 79B (1), and in sect. 79B (2) the general phrase "making good any damage caused to the railway or works" is used, which corresponds to the language of sect. 79A (1). In the class of case to which I refer the arbitrator would be able to make a reasonable conjecture as to the date at or about which the damage might be reasonably apprehended, and the limit as to minerals gotten more than six years prior thereto could be taken into account by the arbitrator. Again, as regards the element of ungotten minerals in sect. 79A (2), (4), I fail to see any reason why the arbitrator in the present case would be in any worse position as regards available information than the arbitrator under subsect. (6) of that section, and, under subsect. (4) the consideration of future workings referred to in the penultimate paragraph of the subsection is common to both types of arbitration. Equally I am unable to see any difference in the complexity of the task of making an allowance for the portion of the mine owner's contribution which he could have passed on to the royalty owner (if any), except that precision might be expected from the arbitrator under sect. 79A (6). It may be well to remember that it is the risk of damage and the necessity of its prevention that induces the service of a counter-notice.

The only point, in my opinion, that may present doubt does not concern the present arbitration, but the right of the mine owner in any future demand for a statutory contribution under sect. 79A, to claim credit for the potential contribution taken into account in assessing the present compensation. I do not propose to anticipate the decision of such a future claim. It is enough for me to say that the present arbitration merely involves the adoption of a hypothetical basis for assessing the compensation payable by the appellants, and that, even if the future claim of the mine owner to credit for any hypothetical deduction in the present arbitration would rightly be rejected, that is no adequate reason for now awarding the mine owner compensation for a profit which he would not have gained, and, therefore, he has not lost by the embargo.

Finally, I may add that a somewhat parallel case might arise under sect. 85B (2), where a counter-notice has been served on a mine-owner who has an antecedent right to let down the surface subject to payment of compensation. It seems clear to me that the same question as to hypothetical damage by the hypothetical working would arise, and it is difficult to assume that such a mine owner with a qualified right to let down the surface is to be entitled to the same amount of compensation as he would have been entitled if his right had been unqualified. Indeed, this case seems also to be covered by the *Clippens* case (9). Such cases support the reasonableness of the construction I feel bound to place on the language used in sect. 78 (5), and sect. 78A (1); also, the ability of the parties to agree the figures in the present case seems to lend similar support.

On the whole matter, I am of opinion that the appeal should be allowed with costs, that the judgment of the Court of Appeal should be set aside, and that the first question raised by the originating summons should be answered in the affirmative in terms of the declaration granted by the judgment of Morton, J., and, further, that the respondents should pay the present appellants' costs in the courts below.

Lord Macmillan: My Lords, the history and the contents of the legislation with which this appeal is concerned have been so fully and so clearly set out in the judgment of Lord Greene, M.R., and Luxmoore, L.J., that I need do no more than give such an outline as is necessary to place the question at issue in its setting.

When a railway company acquires land for the purposes of its undertaking the subjacent minerals are in the ordinary case excepted from the title which it obtains. The reciprocal rights and duties of the railway company and the owner of the excepted minerals are thenceforth regulated by what is known as the "mining code," embodied in the Railways Clauses Consolidation Act, 1845, as amended by the Mines (Working Facilities and Support) Act, 1923.

Broadly stated, the resulting position is that the mine owner or his lessee, if he be desirous of working the minerals within a prescribed distance of the railway, known as the "area of protection," must give notice to the railway company of his intention to do so. The railway company has then two alternative courses open to it. It may disregard the notice and take no action, whereupon the mine owner may proceed to work and win the minerals to which his notice applies; or, if the railway company apprehends damage to its undertaking from the proposed workings, it may serve on the mine owner a counter-notice requiring him to leave unworked all or any part of the minerals in question and stating the particular portion of the railway or its works for the support of which the "specified minerals" (as they are denominated) are required to be left unworked. The effect of the service of such a counter-notice on the mine-owner is to prevent him thereafter from working the specified minerals and to entitle him to be compensated by the railway company "for the loss caused by the specified minerals being left unworked."

If the railway company serves no counter-notice the mine owner is entitled to proceed to work the minerals as to which he has given notice to the railway company, free from any obligation to support the railway or its works. But this right is not unqualified. If the mine owner in working the minerals within the railway's area of protection does damage to the railway or its works, he is liable to make a contribution up to a prescribed maximum and under certain conditions to the expense incurred by the railway company in making good such damage. Failing agreement, the amount of the compensation payable by the railway company to the mine-owner for leaving minerals unworked and the amount of the expense of making good damage to the railway to which the mine-owner must contribute if he is not interpelled from working, are to be determined by arbitration.

The question posed in the originating summons in the present case, upon which your Lordships have now to pronounce, is whether, when a railway company has served on the mine-owner a counter-notice requiring specified minerals to be left unworked, account ought to be taken, in assessing the compensation to be paid to the mine-owner, of the statutory liability which he would have incurred to contribute to the cost of making good surface damage if he had worked the minerals and thereby caused damage to the railway or its works. Morton, J., has answered the question in the affirmative, the Court of Appeal in the negative.

The facts are simple. A portion of the railway line of the appellant, the London and North Eastern Railway Co., in Nottinghamshire runs in a tunnel, known as the Mapperley tunnel, above a seam of coal designated the Low Hazel Seam. The coal is excepted from the railway company's title and the respondent colliery company, within whose lease or ownership the Low Hazel Seam is included, has intimated its intention to work the seam within the railway company's area of protection. The railway company has replied with a counter-notice requiring the seam to be left unworked within a specified area for the support of the tunnel. It is agreed that the colliery company is entitled to be compensated for the loss occasioned by this embargo, and the amount of the compensation has also been agreed subject now only to the determination of the question I have above stated. If the question is answered in the affirmative the parties are agreed on the figure to be deducted.

Apart altogether from the special provisions of the mining code, I should think it indisputable that the value of a coal seam to the mine-owner or his lessee must be affected by the consideration whether he is liable for surface damage or not, and that if he is liable for surface damage to any extent this factor must affect the profit which he can make by working the seam. As LORD ROBERTSON pointed out in *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ltd.* (9), at p. 50, any limitation physical or legal, which affects an owner in the free use of his property "goes to diminish value." I have now to consider whether this does or does not apply in the present case, in view of the special statutory provisions which govern the matter.

The measure of the compensation to be paid to the mine owner cannot in my opinion be better expressed than it was by LORD MACNAGHTEN in *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Pontypridd Waterworks Co.* (5), at p. 431, namely, that:

> . . . so far as money can compensate him, he is to be placed in the position in which he would have been if he had been free to go on working.

If the railway company in the present instance had served no counter-notice, the colliery company would have been free to go on working. The statute by sect. 79 (1) expressly authorises him to do so in that event. But the statute in the very next section goes on to enact that if the mine owner does, in the exercise of that authority, work the minerals, he is to be liable to make a contribution towards the expense of making good any damage which his workings may cause to the railway or its works. The hypothesis being that the mine owner is to receive by way of compensation for not working the minerals what he would have made by working them, I am at a loss to understand why a potential liability to which he would have been subject had he worked them should be disregarded in assessing the compensation due to him.

In the original legislation of 1845 there was no provision corresponding to sect. 79A which is the section of the 1923 Act giving the railway company the right to claim a contribution to the expense of making good damage caused by workings which it has not stopped by counter-notice. It is important to bear in mind the circumstances which led to this alteration of the law. It was in consequence of the decision in *Howley Park Coal and Cannel Co.* v. *London and North Western Ry. Co.* (7), and the great increase in deep mineral workings in modern times that the railway companies and the mine owners agreed in recognising the inadequacy of the then existing code to do justice to either interest. The consequent negotiations resulted in a compromise which is embodied in the elaborate expansion and alterations of the original code to which the 1923 Act gave legislative sanction. Like most compromises it is a compound of gives and takes and a high degree of logicality is not to be expected of it. This genesis of the revised mining code has in my view a not unimportant bearing on its interpretation. The main arguments adduced on behalf of the colliery company were that sect. 79A, dealing with what I may call the potential liability contribution, was entirely unrelated to sects. 78 and 78A which deal with compensation; that sect. 79A applied only where there were actual workings; and that any attempt to apply the section to hypothetical workings led to such inextricable difficulties and anomalies that Parliament cannot be assumed to have intended that it should be so applied.

As regards the first of these submissions I would point out that the code as it stands, like the compromise which it embodies, is a self-contained whole. No one can say which part of it was the consideration for any other part. The mutual rights and duties created are so interwoven as to be inseparable. The topic of compensation is not finally disposed of in sects. 78 and 78A. Thus sect. 81, subsequent to sect. 79A, gives the mine owner further compensation for losses due to severance if he is interpelled from working the specified minerals. Then as regards the other submissions, I fully recognise that the mine owner's potential liability to contribute to the cost of making good surface damage is hedged about with qualifications and conditions of the most complex character. Notwithstanding these complexities it is, of course, accepted that sect. 79A must receive effect in the case where the mine owner actually works the minerals and damages the railway. But to apply it to the case of the hypothetical working on which compensation is based is said to be impracticable. Parliament, it was argued, cannot have meant to impose an impossible problem on the parties or the arbitrator and, therefore, the statute must be construed as not imposing it.

I hope I yield to none in my respect for the wisdom of Parliament but I am not disposed to make a fetish of it least of all in such a case as the present where I take leave to doubt if the intricate provisions which have perplexed your Lordships for several days were any clearer to the minds of the legislature, which was doubtless content to accept and enact what the parties interested had agreed. It is always a legitimate and sometimes a cogent argument that Parliament could not have intended to enact a measure leading to unreasonable or impracticable results and that any admissible reading which avoids such results ought to be preferred. But a prolonged acquaintance with at least one branch of legislation, namely, that which relates to income tax, has engendered in my mind a pardonable scepticism of the doctrine that Parliament must be taken always to have foreseen all the possible consequences of its enactments and to have avoided every possible *cul de sac*. After all, it is with what a statute says that the courts have to deal. If I am right in holding, in Lord Macnaghten's words, that in assessing the compensation the mine owner must be placed in the position in which he would have been if he had been free to go on working then the statute in terms says that that position involves a potential liability to contribute to the expense of making good surface damage.

Difficulty of assessing damage affords no justification for denying the right to reparation if it exists. No right can be more problematical than one which depends upon the *liberum arbitrium* of a third party, for nothing is more incalculable than what a third party may do. But in *Chaplin* v. *Hicks* (13), which was such a case, the court held that this afforded no reason for denying the existence of the right or the possibility of assessing the remedy. I refer to, without quoting, the well-known judgment of Vaughan Williams, L.J. What more incalculable problem could there be than that of assessing in money the value of the loss of expectation of life ? Yet Parliament has required the courts to brace themselves to the performance of this task. It may be that a right may be so conditioned that the party complaining of a breach of it may be unable to substantiate his claim of damages, but that does not destroy his right to have his claim considered.

In the view which I take I do not find it necessary to pursue the analysis to which with relentless logic Lord Greene, M.R., and Luxmoore, L.J., have subjected the detailed provisions of the Act. I have endeavoured to follow it, not always, I fear, with complete success or with complete agreement. Thus I do not accept the reading of sect. 78A which they adopt and which would exclude any separate ascertainment of the value of the minerals in the outer area of protection. A merely arithmetical assessment of the value of the minerals in that area by taking one-third of a rate per ton arrived at from a valuation of the minerals in the inner area might have the most unjust results. An argument suggested against the applicability of sect. 79A in computing compensation was that it would be impossible to ascertain from a lump sum award how much had been given under this head so that it would not be possible in dealing with any future claim to know whether the sixpenny maximum had already been reached. Express provision, however, is made in sect. 79A (6) for the settlement by arbitration of any dispute as to the amount of the mine owner's contribution towards the expense of making good surface damage, and the difficulty suggested might thus perhaps be met.

Assuming, as I do, that the ascertainment of the mine owner's contribution under sect. 79A is beset with perplexing difficulties and anomalies in the case of hypothetical workings, I do not think that the total disregard of this element in the assessment of compensation for non-working is thereby justified. It may be that in a particular case the parties may agree, or the arbitrator may award, that little or nothing should be given or has been proved under this head, but I cannot hold them absolved from addressing themselves to the problem. Difficulties which seem so formidable to the legal mind may prove less so to the expert accustomed to deal practically with the intricate problems of mineral A working. It is a permissible comment that the parties themselves seem to have been able to achieve what one of them has sought to convince your Lordships was impracticable, for we are told in the memorandum of agreement in the case that they have agreed upon the precise sum—and it is not a round sum—which should be deducted as representing the potential liability under sect. 79A if it is held to justify a deduction.

I am accordingly in favour of allowing the appeal and restoring the judgment B of MORTON, J.

LORD WRIGHT: My Lords, the question for decision in this appeal is what is the true construction of the provisions contained in the Mines (Working Facilities and Support) Act, 1923, s. 15, in so far as they relate to the amount of compensation payable by a railway company to a mineowner for the loss caused to such mineowner by specified minerals being unworked by reason C of the railway company having required these minerals to be left unworked. On the broad question of the compensation, no dispute arises. An amount has been agreed. But the contest is whether account should be taken, by way of deduction from the gross amount, of a particular and subsidiary item which the appellant claims should be deducted under the provisions of the 1923 Act. These provisions I shall refer to as the Mining Code or the Code. They form a compact set of rules for the direction of arbitrators in such matters. D They are undoubtedly difficult to understand for laymen not versed in the abstruse and technical science and art of mining. The present proceeding was commenced by an originating summons which stated the issue as a question of construction of the Code. No evidence was called. MORTON, J., in the first court decided in favour of the appellants. His decision was reversed by the Court of Appeal. The solution of the question depends on the language of the Code which substantially changed the law and varied the former rules E regulating the relationship between railway companies and colliery companies in regard to coal lying under the railway works. The Code established a materially different scheme for securing on the one hand the protection of the railway company against the risk of its line and works being let down by the coal being removed and on the other hand for securing compensation for the mine owner if loss is caused to him because he is prevented from working the coal.

The Code is embodied in sects. 78 to 85E which by the 1923 Act, s. 15, are F substituted for the Railway Clauses Consolidation Act, 1845, s. 78 to 85. The Code itself is self-contained and complete save as expressly varied by any special Act or agreement. Subject to what it provides, it relieves the mine owner from liability to leave support either inside or outside the area of protection, a term which I shall later explain, and entitles him to remove such support without being, save as the Code provides, liable to pay compensation for damage G caused to the railway and its works so long as the removal is done in the proper and usual manner. It is common ground that the Code though enacted by the legislature and embodied in the statute, was the result of an agreement between the parties interested, in particular mine owners and railway companies and royalty owners. It bears indications that it has been reached by a compromise. Its provisions appear in places arbitrary and artificial, but if the language is sufficiently clear, it must receive the effect which business men H might fairly attribute to it. Details are in general left to be settled by agreement or arbitration. The matters are technical and abstruse, and the court cannot substitute its own ideas of what is reasonable for the compromise as reached and expressed by the interests concerned and sanctioned by the legislature.

In sect. 78 the Code defines an area of protection in relation to any seam of minerals, a term which includes coal. That area has relation to the "protected" works for the support of which the "specified" minerals, that is, specified in the counter-notice next referred to are to be left unworked. The area is divided into (a) an inner area consisting of the area of the railway or works and a distance of 40 yards beyond on each and all sides and (*b*) an outer area beyond the inner area and extending therefrom at each point to a point beyond at a distance of one half the depth of the seam at that point. If a mine owner desires to work the minerals under an area of protection he may serve notice of his intention to do so on the railway company. The latter may serve a counter-notice requiring the mine owner to leave the minerals or some particular part thereof unworked. Thereupon the minerals so specified may not be worked and the company " shall pay compensation to the mine owner for the loss caused by the specified minerals being left unworked." I omit here provisions for the protection of the royalty owner (if any).

The next sect. 78A provides that the compensation for the loss due to coal being left unworked under sect. 78 is to be determined by arbitration in default of agreement. Obviously a great deal is thus left to the judgment of the arbitrator. There is added the proviso :

> . . . that so far as such compensation is payable in respect of the value of the specified minerals [that is specified in the counter-notice] (ii) the compensation payable to the mine-owner shall be a sum for each ton of the specified minerals, the rate per ton in the case of minerals lying under the outer area of protection being one third of the rate which is or would be awarded in the case of minerals lying under the inner area of protection —(iv) in every case the arbitrator shall state in his award the tonnage of the specified minerals on which the award is based.

A question of construction is raised by these words. It was held in the Court of Appeal that all that they required the arbitrator to do was to value each ton of the specified coal in the inner area and then apply one-third of that rate to the tonnage in the outer area. There is here a specific direction to the arbitrator which must be construed. But I do not agree with the construction adopted by the Court of Appeal. The words seem to me to require each ton of the specified minerals to be valued but the rate of compensation per ton in the outer area is to be one-third of the rate which is or would be awarded " in the case of minerals lying under the inner area." When the arbitrator comes to value the coal in the outer area he is in my opinion, directed to find what he would award for each ton of coal if it had lain in the inner area and then divide it by three. This seems to accord with good sense because it is clear that the values of the coal in the two areas may differ. For instance there may be poor coal or little or no coal in the inner area, whereas the coal in the outer area may be of much higher quality. I shall later observe how the judgment of the Court of Appeal depends in part on their construction of this crucial section.

Apart from this question of construction, the section is fairly clear, though it leaves much scope for the arbitrator's decision in regard to detailed figures. The value is to be assessed by calculating what the coal would have realised if it had been brought to market in the usual course and deducting outlays. But it will never be marketed or turned into coal because of the counter-notice which " sterilises " it. The arbitrator must then in order to get the net value work on hypothetical figures of prices realised and outlays incurred. So far the arbitrator can use his experience of the ordinary course of business and of working. But now comes the crux of the case. That centres round sect. 79A, which I must now examine. Sects. 78 and 78A provide for cases where the notice has been followed by a counter-notice. Sect. 79 deals with a case in which no counter-notice is given. While that state of things lasts, the mine owner is free to work the coal included in the notice, working, of course, in the proper manner. But sect. 79A introduces a further item. The mine owner is doing what he is not debarred from doing by a counter-notice though he is working coal within the area of protection, but he is nevertheless " liable in respect of damage caused by such working to the company's railway or works " because even though he is working in the authorised manner the section requires him to contribute " on demand " to the extent defined by it towards expenses properly incurred or to be incurred in making good damage so caused. The amount of this contribution is to be determined by arbitration.

The Court of Appeal held as a matter of construction that sect. 79A is a separate part of the Code distinct from the earlier sections, in particular sect. 78A which deals with compensation. I cannot accept this construction. The whole Code can and ought to be read together as dealing in different sections with different aspects of the regulation of rights and liabilities connected with working or not working coal in a " protected " area. Sect. 79 introduces the case where no counter-notice is given, so that the mine owner is free to work the coal. But as he is working coal in a "protected" area, there is a danger that the removal of the supporting coal may lead to subsidence and damage. Sect. 79A imposes a potential liability to contribute if the damage ensues. There is no need to "marry" these different parts of the Code; they dovetail as parts of an integrated whole. But then the Court of Appeal has emphasised that sect. 79A only imposes the liability to contribute if there were damage actually caused to the working whereas what the arbitrator was according to the appellant's contention asked to do was to take account of a purely hypothetical risk of damage due to the hypothetical working of the "sterilised" coal, and *pro tanto* reducing its net value. That is true, but it is equally true of the calculation of the value in all its aspects, for instance, the hypothetical outlays necessary to get the hypothetical value of the unworked and legally unworkable coal. I suppose that as a matter of business a mine owner who was considering whether to work coal under protected works not comprised in a counter-notice within the words of sect. 78A (1) would want to have before him all relevant estimates, including a figure to cover the potential risk of contribution under the section. I cannot see why the same should not be true of an arbitrator valuing the loss caused by the specified minerals being left unworked under sects. 78 and 78A. The matter is not disposed of by saying that it is all notional and hypothetical. So is the whole thing. The problem is the not uncommon problem of ascertaining what would be the position if something had happened which did not happen.

But the respondents have also relied on certain anomalies or inconsistencies or impossibilities which as they contend would be involved in the decision of the judge. I do not doubt that there may always be difficulties wherever it is necessary to solve the problem of attempting to reconstruct future possibilities in order to ascertain the value of an existing right, in particular a right to compensation or damages. There are two separate questions in these cases to be considered. First, whether the right or liability is established? Secondly, if it does exist, is it possible to assign any definite and appreciable value to it? In the Court of Appeal MacKinnon, L.J., held that in the present case it is impossible to evaluate the chance of having to pay contribution under sect. 79A and thence that it must be disregarded even though the mere words of the Code would require it to be taken into account as an element in determining the value under sect. 78A. The majority of the court did not go so far but treated the difficulties which they thought were inevitable as a ground for not construing the Code so as to require the potential liability to be brought into account.

The scale of contributions based on depths of workings which is set out in the First Schedule to the Act contains some complicated provisions fixing limits of total liability to contribute which I need not particularise because what is material here is that though the mine owner is properly working the coal within the area of protection he necessarily comes under a potential liability which, however, may never materialise if no damage is caused to the railway or the railway works. The question thus arises whether an arbitrator fixing the value of the coal necessarily left unworked under the provisions of sect. 78A and doing so by a notional estimate of the hypothetical market value of coal brought to market subject to deduction of the notional debits, is to include in the debits some estimate of the value of this notional liability, which must necessarily have arisen if the coal had actually been worked. Morton, J., held that this potential liability was as much a debit element to be taken into account in calculating the value of the coal as the equally notional expenses of the hypothetical but legally impossible working. The potential liability to contribute is a liability which must be incurred if the coal is worked. There is logically nothing to prevent an arbitrator, presumably skilled and expert in mining engineering, from fixing a figure of the money value of the liability in the same way as if he were asked to do so by a mineowner who before starting to work in fact in the protected area wanted to have an estimate of the potential liability.

The Court of Appeal have taken a different view and have excluded the item. The majority of the court held that so heavy a burden could not be imposed on the arbitrator without express words; it could not be imposed merely by an "implication" from the use of the word "value" in sect. 78A. MacKinnon, L.J., also went further and was of opinion that the task was impossible and could not be deemed to have been imposed.

Neither view ought, in my opinion, to be adopted. Before I deal with the particular reasons given to show the practical impossibility, which I do not accept, I venture to think that a fallacy in law is involved in the respondent's argument. As a general principle of law a right or liability is not destroyed because its value cannot be calculated or estimated with any approach to mathematical precision. The question here is whether the contingent risk of having to make compensation is an element of deduction. In my opinion, it is by the express words of the Code and not as a matter of implication because it is an item of deduction necessarily included under the word " value " in virtue of sect. 78A. In my opinion there is a positive though contingent and future liability expressly imposed if the coal is worked. Its " value " is left to the arbitrator to decide, if the parties do not agree it. As with other questions of compensation the Code expressly leaves the value to be settled by arbitration, presumably by mining engineers or other experienced and instructed experts in the particular art and science. They must use their *peritiam artis* to evaluate the future contingencies and to picture the possibilities which appertain to the underground coal. They may think the risk of damage is too problematical to be given any but a nugatory value or they may value it at a substantial figure. There can be no certainty in such matters but they must do the best they can. Their decision for all practical purposes cannot be questioned. They must be left to decide according to their judgment of what would be done in the usual course of events, for instance whether the particular volition or decision of the mine manager in the natural course of events would be that the seam should be worked at all, or if worked when it would be worked, and so on.

The problem is not unlike the problems which constantly arise at common law in estimating damages, for instance damages for breach of contract or for tortious acts. These damages often have to be based on future probabilities which may include consequences such as the choice or volition however capricious of third parties. As an instance I may refer to the judgments of the Court of Appeal in *Chaplin* v. *Hicks* (13), where the breach of contract deprived the plaintiff of her chance of winning a prize in a beauty contest. PICKFORD, J., entered judgment for £100 the amount of damages found by the jury and was upheld by the Court of Appeal. I quote some brief statements of principle contained in the court's judgments. VAUGHAN WILLIAMS, L.J., said, at p. 792 :

> . . . the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guess work. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.

Similarly, FARWELL, L.J., said, at p. 799 :

> In my opinion the existence of a contingency, which is dependent on the volition of a third party, is not enough to justify us in saying that the damages are incapable of assessment.

These principles which were there applied to damages for breach of a contract apply equally to the ascertainment of the sum (if any) to be taken into account in estimating the potential statutory liability under sect. 78A ; the problem is indeed simpler in the latter case in the sense that there is no issue of remoteness or causation. The contingent liability which is expressly, as I think, imposed, cannot in law be nullified by the assumed difficulty or impossibility of giving a figure of value to it. Nor can that difficulty or impossibility be a ground for deciding that the liability is not imposed in the notional or hypothetical sense which I have already explained.

But I am not satisfied that the Court of Appeal were justified in their opinion that the impugned item was not reasonably possible of ascertainment by an arbitrator. It would be so no doubt to a judge unassisted by expert evidence. But it is a different matter where the valuation is made by the expert. Even if his decision might be said to be a sort of guesswork, it would be the result of scientific and enlightened guesswork. That to my mind is what the Code anticipates. I should have arrived at this conclusion apart from the admitted fact that the parties agreed in writing that if the potential liability under sect. 79A is to be taken into account the aggregate amount of compensation would have to be reduced by the precise figure of £2,324. In the Court of Appeal it was said that the agreed sum must have been arrived at by a purely arbitrary compromise based on conflicting guesswork. I have, however, no reason to doubt that the figure was seriously agreed as a fair valuation and was as such accepted by the parties, who presumably knew their business. If so, it at least throws doubt on the suggested impossibility of forming any estimate at all, even though some of the detailed estimates required by the Code are very complicated and difficult.

I am not convinced that the problem of this particular valuation differs in principle from the problems which constantly confront courts and business men in valuing in pounds shillings and pence future uncertainties. I have considered very carefully the various reasons expounded in the judgment of the Court of Appeal before the House by counsel for the respondents. I am content to indicate briefly how I regard one or two of the objections. One principal objection relied on as showing the unfair or illogical nature of the appellants' case is based on the construction of sect. 78A, proviso (ii), which the Court of Appeal accepted. According to this construction the arbitrator only values each ton in the inner area and makes no separate value of the coal in the outer area. On that footing, it is said, it would be impossible to estimate the contribution to notional damage by working the outer area. But as I have already explained I do not agree with the suggested construction. The arbitrator has to deal with each ton both in the outer and in the inner area, as I read the provisions, and estimate the probability of the notional damage to the particular works in each part of the protected area. It is for him to do this as best he can and no doubt he would be equal to the task. I think this particular objection fails.

I have not examined in detail the provisions dealing with the position of the royalty owner *vis-a-vis* the mine owner. As to provisions in sect. 78A (ii) distinguishing between the compensation in the inner and outer areas they certainly appear artificial and arbitrary but so is the whole scheme. They can, however, be construed and an arbitrator is capable of giving effect to them as specific directions. There are also presumably special reasons for bringing the royalty owner into the arbitration under sect. 79A. These provisions in any case are clear enough. It is also objected that sects. 79A and 79B relate to actual damage only, and cannot apply to notional or contingent damage. But the whole enquiry under these sections, both 78A and 79A, is notional. In the same way sect. 79B which requires a railway company to give particulars of actual or apprehended damage within the terms of sect. 79 cannot be carried out in fact where the working is never done or damage caused in fact. But sect. 79B is not in any event a condition even of actual liability in fact; an arbitrator dealing with the notional problem may have to bear in mind the terms of sect. 79B and give such effect, if any, as he might think proper to it in his notional calculation. The whole conception of calculating the notional position under the Code on the assumption that coal was worked though it was never in fact worked, and the application to such a notional position of the complicated and arbitrary rules set out in the Code, is undoubtedly very difficult, but I can see no adequate reason for the view that the purpose of the legislature or of the business interests which framed the compromise scheme embodied in the Code is not sufficiently clear to enable an arbitrator to give effect to it.

Where legislation is ambiguous, it may be a sufficient reason for construing it in a particular way that the other possible way would lead to something impossible or irrational. But the legislation in question is not, as I think, ambiguous. Similarly if it is a question of implying what is not expressed, the implication may be rejected where it would lead to inconvenient or improbable results. In my opinion the Code, though difficult, is not ambiguous, but is expressed with sufficient clearness.

I should allow the appeal and restore the judgment of Morton, J.

Lord Simonds: My Lords, I would dismiss this appeal. The question for your Lordships' decision is one of construction of certain sections of the Mines (Working Facilities and Support) Act, 1923. The relevant provisions of this Act have already been sufficiently stated by Lord Thankerton, as have the few and indisputable facts of the present case. I do not think it necessary to restate them.

The question is accurately put in the summons with which these proceedings originated. It is whether, upon the true construction of sect. 15 of the Act and in particular sects. 78 and 78A included in that section, in assessing the compensation payable by the L. & N.E. Ry. Co. (the appellants, whom I will call " the railway company ") to B.A. Collieries, Ltd. (the respondents, whom I will call " the mine owner "), under the counter notice dated Dec. 30, 1940, given by the railway company to the mine owner, any account ought to be taken of the possible contribution for which the mine owner might in the future have become liable under sect. 79A if the coal covered by such counter notice had been actually worked and damage to the railway and works of the railway company had been caused by such working. This question was answered in the affirmtive by MORTON, J., in the negative by the unanimous judgment of the Court of Appeal.

In the consideration of the complicated provisions of the Act now under review it is necessary to bear in mind the state of the law at the time of its enactment. Here again I need not repeat matter of common knowledge to which reference has already been made. It had for many years before 1923 been clear that the so-called mining code provided by the Railways Clauses Consolidation Act, 1845, ss. 77-85, made inadequate provision for the conflicting needs and interests of railway companies or other statutory undertakings on the one hand and of mine owners on the other. Amendment of the law was seen to be necessary even before the decision in the *Howley Park* case (7). The necessity was emphasised by that decision, which prevented the mine owners from working his minerals outside the prescribed area in such manner as to deprive a railway company of lateral support without giving him the compensation to which a similar prohibition within the prescribed area would normally have entitled him. Opportunity was thus taken in the 1923 Act (which dealt also with other matters of grave public importance in the mining industry) to substitute for the old mining code a new set of provisions which would, in the light of 80 years' experience of the development of the mining industry and of the working of the old code, adjust the rival claims of railway company and mine owner.

The 1923 Act is a public general Act. But it is common ground that the sections now under consideration may be regarded as embodying a compromise reached by the interested parties which, as in the case of private Acts, the legislature is generally content to leave untouched so long as no public interest is adversely affected. They are, then, sections intended by parties thoroughly conversant with the subject to provide a business-like working agreement which should regulate the future working of minerals in the neighbourhood of statutory undertakings, fairly reconciling the interest of the mine owner to work out his minerals without regard to surface damage and that of the railway company to acquire support for its works and, if minerals have for that purpose to be left unworked, to ensure that that shall be done at as little cost as possible to itself.

Before turning to a consideration of the sections upon the construction of which the present issue depends, it may be well to mention that the new code introduces one quite novel feature. Previously, in the absence of any agreement to the contrary, the mine owner was, in respect of any minerals within the prescribed area not covered by a counter-notice, entitled to work them out by proper working without incurring liability for any damage done to the works of the railway company. There was no middle way. Either there was counter notice, sterilisation, compensation, or there was no counter-notice, liberty to work the minerals, no liability for damage. Under the new code, where there is no counter-notice, the mine owner may work his minerals in the new area of protection, but, if he does so, he is placed under a liability to contribute towards the expense of making good the damage caused by such working. This new benefit to the railway company and burden upon the mine owner, which arises where the mine owner elects to work his minerals, may be regarded as some set-off against the benefit to the mine owner and the increased burden upon the railway company, which arises where the company elects to sterilise the minerals within a wider area of protection than that for which the old code provided.

I turn to the relevant sections, premising once more that, as they have been already stated, I do no more than state their broad effect, except where their precise language is material. Sect. 78 (1) and (2) makes no material difference in the existing law except (and this is an important exception) that the area of protection therein mentioned is by virtue of the definition in sect. 78 (5) an area very different from that under the old code. It is or may be far more extensive than the old area and when the lateral distance from the area comprising the railway or works of the company exceeds 40 yards the area is divided into two parts called an inner and an outer area, the inner area consisting of the area comprising the railway or works and a distance of 40 yards therefrom on all or both sides thereof and the outer area consisting of so much of the area of protection as is not included in the inner area. It is this extension of area of protection which increases the burden of compensation imposed upon the railway company.

Sect. 78 (4) provides for compensation for both mine owner and royalty owner. The measure of the compensation is " the loss caused by the specified minerals being left unworked." In this measure there is nothing new: the old code had provided:

> . . . if the company be willing to make compensation for such mines or any part thereof to such owner, lessee or occupier thereof, then he shall not work the same.

In a series of decisions of high authority, of which it is only necessary to refer to *Eden's* case (6), the manner of ascertaining the compensation for not working the minerals was well settled. " The full value of the coal," said LORD MACNAGHTEN, citing LORD PENZANCE, " deducting the cost of getting it, must be the measure of the compensation."

By sect. 78A further provision is made in regard to compensation. Some argument revolved around the meaning of the second proviso to sect. 78A (1), the railway company urging that for the purpose of the compensation thereby prescribed the value must be ascertained of the minerals in both the inner and the outer areas, whilst the mine owner contended that only the minerals in the inner area must be so valued. Though my opinion inclines to the latter view, I do not think it necessary to decide the question. Its only relevance is that, if the contention of the mine owner is right, yet one more capricious result will follow from an application of the provisions of sect. 79A to the case of minerals for which compensation is payable under sect. 78A. I do not consider that there is need to seek reinforcement from considerations which rest upon an uncertain premise. Upon the third proviso also to the same subsection, which deals with the compensation payable to the royalty owner, some argument was founded, the mine owner urging that the clear language of the proviso does not admit of any deduction in respect of contributions under sect. 79A from the compensation payable to the royalty owner and that it cannot have been contemplated that in the case of the mine owner such a deduction should, and in the case of the royalty owner it should not, be made. I am not satisfied that an answer to this contention may not be found in the language of sect. 79A (3), but the question is one which may be of importance as between mine owner and royalty owner, and as it does not immediately arise for decision I prefer to express no opinion upon it.

Sects. 80 and 81 contain some further provisions in favour of the mine owner, but it is substantially in sects. 78 and 78A that there are found the advantages which the new code confers upon him. They relate to minerals which are sterilised and, though apart altogether from the proposed introduction of the provisions of sect. 79B, it may be impossible to determine with scientific accuracy the loss caused by leaving minerals unworked and the compensation accordingly payable, yet long experience has shown that the elements of doubt arising from uncertainty as to the quantity of ungotten minerals, future prices and so on can be fairly and satisfactorily resolved.

I turn now to the sections which deal with minerals that are not specified and accordingly may be worked. Sect. 79 introduces nothing new in the law that is of present importance. It is sect. 79A which for the first time imposes on the mine owner working unspecified minerals, and working them in a proper manner, the obligation nevertheless to contribute to the expenses of the railway company in making good the damage to its works caused by such working. It is not surprising to find that this new obligation is hedged about with a number of safeguards for the protection of the mine owner. The question is whether this liability to contribute to damage caused by the actual working of unspecified minerals is a factor of which account must be taken in calculating the compensation payable in respect of specified minerals which are left unworked.

My Lords, it is a truism, of which we have often been reminded in the course of this case, that the whole of an instrument should be read in order to ascertain the meaning of any part of it. I do not doubt that the sections constituting the new mining code should be read together as one whole. So reading them and remembering, as I am entitled to do, the pre-existing law and its anomalies, I respectfully concur in the view expressed in different language by LORD GREENE, M.R., and MACKINNON, L.J., that in ascertaining the "loss caused by the specified minerals being left unworked," and in particular "the value" of such minerals, the disputed factor of notional liability ought not to be brought into account, but that the provisions relating on the one hand to compensation and on the other to contribution are separate and distinct, and that the latter ought not to be taken as governing the measure of the former. There is, I think, much weight in the contention that in the absence of express words or necessary implication a radical departure from the old basis of compensation should not be assumed and a new factor, unknown to the old code, brought into account, and it is the more difficult to introduce these new factors when it is appreciated that at common law the surface owner could claim to have support of his land only in its natural state unless he had acquired also an easement of support for unnatural burdens thereon. On this part of the case I respectfully concur in the views of LORD MAUGHAM, whose opinion I have had the advantage of reading since I wrote my own judgment. But whatever view I might finally take of the matter, if the new factor proposed to be brought in was fairly capable of definition, I am confirmed in my *prima facie* view as to the correct construction of the section by a more critical examination of the task which the railway company's contention imposes on the arbitrator. For such an examination will reveal that he will be required to build upon guess-work and conjecture, and in doing so to deprive the mine owner of the very real safeguards which in the case of actual working the Act provides for him.

How is it possible, my Lords, fairly to apply the provisions of sect. 79A to the case of the notional working of minerals which are in fact unworked ? It has been urged that some weight should be given to the fact that in the present case the parties did arrive at a figure representing the factor of liability to contribution, if the mine owner was wrong in his contention, and that factor had to be brought into account. To me this appears to have no weight at all. The assumption being made that this factor has to be brought into account, the parties may agree a figure as well by irrational guess work as by rational estimate. They do so in order to save the expense of an arbitration which may be the more prolonged and expensive just because the elements are incalculable. It may indeed be that your Lordships would have regarded with suspicion as a tactical move in the game a refusal on the part of the mine owner to agree any figure under any circumstances.

Then it was contended that after all it was no uncommon thing for an arbitrator to have to take all manner of hypothetical elements into consideration. It is a commonplace that, wherever there is injury and there cannot be *restitutio in integrum*, the amount of damage, whether assessable by judge, jury or arbitrator, may be no more than an estimate and a capricious one at that. But when the question is one of construction, viz., whether the provisions of sect. 79A govern the ascertainment of compensation under sect. 78A, it appears to me, with all deference to those who think otherwise, to be a mere *petitio principii* to say that these are all matters which the arbitrator can take into consideration and that he will do his best. If it appears that the best that he can do cannot be founded on a rational estimate and must disregard essential features in the determination of the quantum of liability, surely the conclusion, if it is open to one must be that this is not a matter which the arbitrator is required to take into consideration at all.

My Lords, it appears to me that the provisions of sect. 79A can by no means be made applicable to the case of the notional working of unworked minerals. It is not a matter only of difficulty of estimate. For, though it is not possible to define the stage at which difficulty becomes impossibility, or at which rational estimate becomes irrational guesswork, yet here it appears to me plain that an arbitrator is set an impossible task if he is asked to determine fairly and rationally and in accordance with the provisions of sect. 79A what is the amount of contribution which the mine owner would have to make if he worked the minerals which he leaves unworked. There may be cases of rare simplicity where he could satisfactorily accomplish his task, but from this fact, if it be a fact, it is not a fair conclusion that it is the intention and effect of the Act that in such cases sect. 79A should be brought into account, but that in other cases the arbitrator should despairingly recognise that he had been set a task beyond his calculation.

The task which the appellants would impose upon the arbitrator is in my opinion, for many reasons, an impossible one and such as your Lordships should not hold the legislature to have imposed upon him. The factors are cumulative. Where there has been actual working, the liability to contribute arises on demand in respect of damage caused by such working. In the case of notional working the nature of the damage and the date of its occurrence are left to the conjecture of the arbitrator. It is worth noting that this runs counter to the usual policy of the law. It is well settled that no action will lie for anticipated damage which is expected to occur, but which has not actually occurred and may never occur. The surface owner can only claim for damage for subsidence when it has occurred. But in the case supposed the arbitrator must determine when the minerals will be worked, at what stage subsidence will occur, an event that may happen many years after the removal of the minerals, what will be the works then upon the land affected, what their condition, what the damage, what the expenses of making good such damage. And at every stage of such enquiry his estimate might be falsified if the mine owner proceeded to an actual working. His estimate could only proceed upon a notional working of all the minerals; in practice the mine owner might reduce or eliminate the risk of subsidence or indefinitely postpone it by leaving adequate pillars, by packing the roads, or by such other precautions as he thought fit. It is at this stage that it is worth mentioning sect. 79B. This section has been described as mere machinery. So it may be. But it is machinery which in practice may provide a most important safeguard for the mine owner. Mandatory in terms, it places on the railway company the obligation of giving to the mine owner precise information as to the railway or works to which damage has been caused or to which damage is apprehended from the working of minerals, the nature of the damage or apprehended damage and the nature of the works intended to be carried out for the purpose of making good or preventing the damage. It cannot, I think, be doubted that this is information of real importance to the mine owner which will assist him in his plan of working. He will then be able to decide whether he will work all the minerals at the cost of making his contribution or whether he will work out part only of the minerals in the hope that the apprehension of damage may not be realised. A nice question might well arise whether it would pay him better to work all the minerals and pay his contribution or work part only of the minerals in the hope of avoiding damage and consequent liability.

These are considerations which by themselves would lead one to reject this appeal. But there are yet more cogent reasons why, in my opinion, the arbitrator cannot fairly measure the contribution which the mine owner ought to make in respect of the notional working of specified minerals. It is, I think, a fair assumption that in the compromise to which these sections give effect it was an important element that the mine owner's liability under sect. 79A should be limited, and it is significant that this limitation is worked out in the most careful detail. Yet it is plain that this safeguard, so important to the mine owner in actual working, is in any notional working largely illusory. By sect. 79A (2) the liability of a mine owner to contribute is limited to an aggregate sum:

> . . . equivalent to sixpence for each ton of the commercially workable minerals, gotten or ungotten, in such part of any seams as lies under the area ascertained as respects the several seams in accordance with the rules contained in the Second Schedule to this Act, being seams which have been or are being worked under such area as aforesaid: provided that, in ascertaining such aggregate sum as aforesaid, minerals gotten more than six years before the date on which a contribution shall have been demanded by the company under this section shall not be reckoned.

The rules in the Second Schedule prescribe an elaborate calculation to which I need not refer. Bearing in mind that liability arises on demand and that demand follows on damage and that damage if any will take place on a date that is unpredictable, I can come to no other conclusion than that it is a sheer impossibility for the arbitrator to apply those provisions to a notional working. Consider the proviso alone. This is vital. Minerals gotten more than six years before the date of demand are not to be reckoned. By what process of reasoning can the arbitrator determine what minerals will have been gotten before an unpredictable date ? He cannot do so. I decline then to assume that for the real safeguard of an ascertainable maximum liability the legislature intended in the case of a notional working to substitute what could be at best an inspired guess.

In sect. 79A (4) I find further support for the view that I have formed. The operation of this subsection is confined to damage done by workings in a " single mine " as there defined. This may, however, cover a large number of cases. This subsection provides a further limitation upon the liability of the mine owner " as respects damage done by workings in any single mine " namely that when the aggregate of the sums paid by the mine owner in satisfaction of such liability amounts to a sum equivalent to sixpence for each ton of commercially workable minerals to be ascertained in accordance with the precise and elaborate method therein described, then :

> . . . the mine owner shall not be liable to make any further contribution under this section towards the expenses of making good any damage caused to any part of the railway or works by the working of such seams as aforesaid in that mine.

I need not repeat what I have said as to the sheer impossibility of making the prescribed calculation except *ex post facto* when the damage has in fact occurred. There is this further point, which is to me by itself almost conclusive. If the railway company is right, the arbitrator in (say) the year 1944, being called on to ascertain compensation payable in respect of specified minerals left unworked in a single mine and being required to take into account the element of hypothetical contribution, makes his answer accordingly. He is not required to state what sum he has allowed by way of deduction under this head : sect. 78A (4), which does require him to state the tonnage of the specified minerals on which his award is based, provides a contrast on this point. At a later date, it may be at a much later date, damage is done to some part of the railway or works of the company by the working of " such seams as aforesaid in that mine." It appears to me inevitable that the mine owner should be deprived of his safeguard of limited liability. For he cannot tell and no one can tell unless it be the arbitrator who may be dead or may have forgotten, what sum he has already contributed towards his maximum liability. Yet another aspect of this matter confirms my view. Just as past contributions in respect of notional workings ought to be taken into account in determining the contribution to be paid in respect of actual damage, so in determining the contribution to be deducted in the ascertainment of compensation the arbitrator should credit towards the maximum liability any contribution which may have already been made. He is *ex hypothesi* looking forward to a time when damage would have been caused by the working of the unworked minerals. It is no unreasonable assumption that before this time damage may have been caused by other working and a contribution made for which the mine owner is entitled to credit. Yet such an amount appears to me a matter not of rational estimate but of mere conjecture. In this respect as in others the construction, for which the railway company contends, imposes an impossible task upon the arbitrator.

For these reasons I think that if the alternative construction is open, by which the element of possible contribution is excluded from the assessment of compensation under sect. 78A, that construction should be adopted. As I have stated earlier in this opinion, such a construction can in my view fairly be put upon the language of sect. 78A. I am, therefore, of opinion that the first question in the originating summons should be answered in the negative and that this appeal should be dismissed.

Appeal allowed with costs.

Solicitors : *W. H. Hanscombe* (for the appellants, respondents in the court below) ; *Gregory, Rowcliffe & Co.*, and *H. Elliston Allen* (for the respondents, appellants in the court below.)

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PICKEN AND OTHERS v. BRUCE AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **November 20, 21, 22, 23, 24, December 11, 1944.**]

Railways—Superannuation—Employees of railway company—Contributory scheme—Contribution made by deduction from wages—Company contributing equal amount—Division of fund into classes—Contributions and pensions calculated by reference to annual wages—War bonus to be included for the purpose of contributions and pensions—Overtime and Sunday pay to be disregarded—Members' duty to make up deficiency in wages before participating in fund.

In 1875 a fund was established by the Great Northern Ry. Co. for the payment of superannuation and other retiring allowances to the salaried officers and the wages staff of the company. The scheme as now in operation was set out in its final form in 1914. In 1921 the Great Northern Ry. Co. became part of the London North Eastern Ry. Co. The only persons entitled at present to become members of the fund were those employed by the Great Northern Ry. Co. before the 1921 amalgamation. The fund consisted of contributions of members of the company and of all additions and accretions from whatever source arising, and the company had to contribute every half-year out of their revenues a sum equal to the amount of the contributions received by the members. The fund was divided into classes, and it was provided that every officer or servant whose ordinary salary at the date of his joining the fund amounted to £80 per annum should belong to class I and if the ordinary salary of a member of class II should be increased to or beyond £80 per annum, such member was to be transferred to class I and cease to be a member of class II. Every member so long as he continued in the employ of the company had to contribute to the fund according to the class or division to which he belonged. Contributions were to be deducted from the salary but there was no direction that members had to make payment. The amount of pension depended upon the total number of years during which an employee had been a member of the fund and was based on his "average salary" during membership. The fund was managed by a committee composed of members of the board and the management staff and three members of the contributors. The committee, acting by majority, had power to decide all claims made upon the fund and all applications for admission to the fund; it could also modify the scheme and the conditions on which thereafter contributors should contribute, with the proviso that any modification should require the sanction of a resolution of the company's board. The scheme contained an interpretation clause to the effect that the word "salary" wherever it appeared was to apply throughout the regulations as "including wages and any bonus, house or house allowance, except so far as the context or the nature of the subject matter may otherwise require." Originally, the wages staff was paid on a day by day basis and had no guaranteed week, but in 1919 as a result of certain decisions and agreements regulating wages in the industry, rates of pay and conditions of service of railwaymen in the conciliation scheme grades, which included engine drivers, were fixed and the war bonus then paid was incorporated in, and became part of, the standard rate of wages. In 1922, by an award of the Industrial Court, the wages of shopmen were fixed, but the incorporation of the war bonus in the wages was not effected and remained separate from the standard rate of pay. P., the first plaintiff, had joined the company in 1914 and became a contributor in 1921. He was then a fireman. In 1937 he became a driver, and in 1939 he became, for reasons of redundancy, a driver-put-back, which meant that he was down-graded. He remained so for 11 months when he was reinstated in his former rank. He contended that for the purpose of calculating his contributions to the fund and, ultimately, the pension he would derive from the fund, there should be included as part of his wages overtime pay and Sunday duty extra pay. He also contended that his actual receipts for the period he was a driver-put-back, and not his basic wages only, should be brought in for the purpose of calculating his contributions. S., the second plaintiff, was retired and in receipt of an annual pension. He claimed to be entitled to a pension calculated in such a way as to take into account what he had received, during the years of his service, when he was a contributor, for overtime, Sunday pay and war bonus. B., the third plaintiff, raised the same contentions as P., claiming the inclusion of war bonus specially, since he was a shopman, and war-bonus had not been incorporated in his standard rate of pay. All three plaintiffs contended finally that if they were right, they were not bound to make good any shortage of contributions previously made on the footing that overtime and the other matters in respect of which claims were made should have been taken into account in calculating their contributions :—

HELD : (i) the nature of a war bonus was a temporary increase in the remuneration to meet the higher costs of living conditioned by the war, and a war bonus was, therefore, in every true sense a wage.

Sutton v. *A.-G.* (1) *followed.*

(ii) the scheme contemplated a static rate of remuneration as the basis for contributions. Overtime and Sunday pay were fluctuating allowances which did not fall naturally under the description of wages.

(iii) the extra money which a driver-put-back happened to earn by actually driving was in the nature of an allowance and ought not to be brought into account in ascertaining his wages for the purposes of the scheme.

(iv) if a member's contributions were deficient in amount, the member must bring the fund up to its right level before he could claim to participate in it.

Re Akerman, Akerman v. *Akerman* (4) and *Gissing* v. *Liverpool Corpn.* (6) *applied.*

[**EDITORIAL NOTE.** The question of the true nature of a war bonus has been before the courts on several occasions both in connection with the calculation of wages during war-time service with the forces, as in *Sutton's* case (1), and with the calculation of superannuation, as in *Tibbals* v. *Port of London Authority* ([1937] 2 All E.R. 413), not referred to in the judgments here reported. On the true construction of the pension scheme here under consideration, the court is satisfied that wages includes war bonus.

The second and third points here, the question of the inclusion of overtime, Sunday pay and extra pay of a driver-put-back, in wages, are also questions of construction.

The last matter is of wider application. It is decided that a contributor to a pension fund whose payments in are deficient owing to a wrong basis having been adopted cannot claim payments out without making up the deficiency. The court reverses the court below on this point and on the authority of *Re Akerman* (4) applies the principle that he who seeks equity must do equity. The *Tees Conservancy* case (3) by which EVERSHED, J., held himself bound, is held to go no farther than to decide that in such circumstances the trustees of the fund cannot recover payment of any deficiency from the contributor. But if the contributor makes a claim upon the fund he must make his contribution up to the right level before participating in the fund.

AS TO SIMILAR SUPERANNUATION SCHEME, see HALSBURY, Hailsham Edn., Vol. 21, pp. 71-83, paras. 123-143 ; and FOR CASES, see DIGEST SUPP., Poor Law 105b-105d.]

Cases referred to :

*(1) *Sutton* v. *A.-G.* (1923), 39 T.L.R. 295 ; 34 Digest 85, *269*.
*(2) *James* v. *Tees Conservancy Comrs.* (1933), 46 Ll.L. Rep. 19 ; *on appeal* 46 Ll.L. Rep. 283.
*(3) *Tees Conservancy Comrs.* v. *James*, [1935] Ch. 544 ; Digest Supp. ; 104 L.J.Ch. 260 ; 153 L.T. 146.
*(4) *Re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212 ; 23 Digest 439, *5085* ; 61 L.J.Ch. 34 ; 65 L.T. 194.
*(5) *Dewhurst* v. *Salford Union*, [1925] Ch. 655 ; *on appeal sub nom. Salford Union* v. *Dewhurst*, [1926] A.C. 619 ; 37 Digest 215, *105* ; 95 L.J.Ch. 457 ; 135 L.T. 514.
*(6) *Gissing* v. *Liverpool Corpn.*, [1935] Ch. 1 ; Digest Supp. ; 104 L.J.Ch. 68 ; 151 L.T. 513.

APPEAL of the defendant railway company and cross-appeal of the plaintiff employees from a decision of EVERSHED, J., dated June 14, 1944, who held that (i) in substance a war bonus was an addition, albeit temporary, to, and became part of, while it lasted, the standard rate of wages ; (ii) overtime, Sunday duty extra pay and similar allowances dependent on added labour were not included in the word " wages " and the meaning of " wages " ought to be confined to the standard rate of pay ; (iii) the actual sums of money received by a driver-put-back while actually working as a driver, could not be added to the receipts applicable to his grade for the purposes of contribution to the fund ; (iv) applying the decision of FARWELL, J., in *Tees Conservancy Comrs.* v. *James* (3), the plaintiffs were under no obligation to make good any under-contributions they had made.

Sir Walter Monckton, K.C., C. E. Harman, K.C., and *Wilfrid Hunt* for the appellants (the London & North Eastern Ry. Co.).

F. W. Beney, K.C., and *M. R. Nicholas* for the respondents.

G. D. Johnston and *J. Pennycuick* for the first six defendants (directors' committee men).

W. Harvey Moore for the individual defendants (members' committee men).

LORD GREENE, M.R. : This appeal raises questions of considerable difficulty in relation to the Great Northern Railway company's superannuation scheme. The questions are of particular importance because, if certain of them are decided in a particular way, the result, as it appears to me, will be to throw this scheme into complete confusion. However serious the consequences may be in practice, we have nothing to do save to ascertain as best we can the rights of the parties in accordance with the true answers to the questions involved.

The judge has stated with admirable clearness the relevant facts which gave rise to the litigation, and there is no necessity to repeat them. He decided, putting it broadly, these questions in the following way. The first question was : Was war bonus, which was later described as war wage but which for convenience I will refer to as war bonus, a matter in respect of which a deduction fell to be made under the superannuation scheme from the member's wage and a matter, consequently, which had to be taken into account in calculating his pension ? That question the judge decided in favour of the member ; in other words, that the bonus was to be taken into account in that way.

The next broad question was : Ought wages out of which or in relation to which contributions are to be made and pensions paid to include, not merely the standard wage applicable to the member's grade in the company's service, but also various elements which might increase his actual cash receipts, such as overtime, Sunday pay, and certain matters (in one of the cases) which are to be found in Sched. F to the decision of the Industrial Court relating to railway shopmen dated July 8, 1922 ? As a sub-head of that question, was the question whether or not in the case of a driver-put-back his actual receipts were to form the basis of contribution or the receipts applicable to his grade ; in other words, when a driver-put-back receives a driver's wage higher than he would have received because he happens on one day, or perhaps for several days, to be employed to drive an engine, is that extra wage to be brought in for the purpose of calculating his contribution ? Those questions the judge decided against the member, and they are the subject of the cross-appeal.

The third question was this. The judge having held that the war bonus should be included for the purpose of contribution and pension, could the claimant require payment of the higher scale of pension which would thus become appropriate without contributing to the fund the deficiency in his past contributions which had arisen owing to the fact that when he contributed the war bonus was not taken into account ? That question the judge answered in favour of the member, thinking it right to follow an earlier decision of FARWELL, J. I rather read the judgment of EVERSHED, J., in this case that, if it had not been for that decision his own judgment would have been the other way. That, together with the question of war bonus, forms the subject of the main appeal.

I think it is convenient to deal first with the main appeal. The first question, namely, whether the war bonus ought to be brought into the calculation, is a very short question of construction : what is meant by the definition clause, cl. (E) of r. 1 in the existing constitution of 1914 ? That definition is as follows :

> " Salary " includes wages, and any bonus, house, or house allowance.

That definition had appeared for the first time in the 1906 rules and, of course, in 1906 and up to date when the 1914 rules were made, no such thing as war bonus as we know it existed or was apparently in contemplation. There are two arguments in favour of the view that the war bonus is included. First of all, it is said that the definition itself uses the phrase " bonus " ; indeed, it uses the phrase " any bonus." This payment, it is said, is called a bonus, or was originally called a bonus ; therefore, it is included. As against that, it is argued that the phrase " any bonus " must be construed in relation to the type of payment known in the railway world as a bonus or, at any rate in the case of this railway company, as a bonus, at the date when the rules came into force. The only things known as bonuses were things like special payments to traffic agents for securing tonnage of traffic over and above a certain *datum* line, a coal bonus to drivers, and I think there was one other with which I need not trouble. Speaking for myself, I do not think it necessary to go into that question, because it seems to me that this war payment falls within the word "wages" itself. Its nature is not very precisely defined in the evidence, nor have we the documents before us under which it was brought into existence; but there is no real dispute as to its essential character. It was a payment introduced, first of all, in the beginning of 1915 by way of a flat rate addition to the pay packet, to use a neutral term, of all concerned, granted in view of the rise in the cost of living. It was in that sense a temporary addition. It could equally well be described as an addition made which was contemplated as lasting for an indefinite or unpredictable period. Nobody could tell for how long it might have to be paid. In point of fact, in the case of the shopmen, it still exists today to the extent, I think I am right in saying, of 16*s*. 6*d*. It was not at first taken into account for the purpose of calculating overtime or Sunday pay. That first took place in Aug., 1917, when the war bonus, which had then risen to 15*s*., was re-named war wage and was taken into account thereafter in the calculation of overtime and Sunday pay. The scale of payment continued to rise until in Jan., 1920, in the case of the operating grades, it had risen to 38*s*.—I take that as an example—and under a later conciliation scheme it became merged in the revised basic wage subject to a small sliding scale variation in accordance with the variation in the cost of living. After that merger in the basic wage, of course, no question could arise with regard to it. It is said, however, that so long as it remained a separate item with a separate description of its own and its own peculiarities, it was something other than wages within the true meaning of the definition. In my opinion, that argument is not sound. This war bonus appears to me to be in every true sense a wage. It was a flat rate and applicable to all grades for the very simple reason that the rise in the cost of living affected all grades. It was put into a separate category of nomenclature for a very good reason, being regarded as something not necessarily permanent, something which, if the war came to an end within a reasonable time, might be expected to disappear when the circumstances which gave rise to its creation had themselves, as no doubt it was hoped, disappeared. Those circumstances do not appear to me to make any difference to the true nature of this payment. I may take an analogy, not because it is an analogy which ought to be followed but because I think it helps to explain the reasoning that appeals to me. Suppose a company which is in the habit of maintaining, let me say, a 5 per cent. dividend, earns in one year, or perhaps in two or three years, some exceptional profits and then proceeds to declare a dividend of 5 per cent. and a bonus of, let me say, 2 per cent., that bonus is just as much a dividend as the 5 per cent. The reason why the directors choose to call it a bonus is that they want to mark it as something which is not regarded as the company's normal rate of dividend but which is something which may or may not be continued on a future occasion. Very much in the same way the parties concerned chose to treat this war bonus as being something which ought to be labelled in a particular way in order to show its particular character, namely, that it was not necessarily permanent and was expected some day or another to come to an end. All those considerations appear to me to be quite irrelevant when looking at the true nature of this payment.

That conclusion, I think, is helped and, indeed, almost forced upon us, by authority. In the case of *Sutton* v. *A.-G.* (1), a question arose under the Post Office Scheme in the last war under which members of the Post Office staff enlisting as office telegraphists in the Royal Engineers were allowed—these are the words: "Full civil pay in addition to military pay" when called up for service. The question was whether the phrase "full civil pay" included the war bonus which these employees would have received had they not joined the Armed Forces. The word, it is true, is different, it was "pay," but the question as dealt with in the House of Lords involved an examination of the true nature of the payment. LORD BIRKENHEAD, L.C., says this, on p. 297:

> I have no doubt that the war bonuses were part of the civilian's pay. For good and

> sufficient reasons that part of pay which was intended to remain permanently was distinguished from that part which was granted only for a period and was to cease when the need which occasioned it had disappeared; but it was none the less pay. He was entitled to be paid for the time being for his services the total amount of permanent pay and war bonuses. The term "bonus" may, of course, be properly used to describe payments made of grace and not as of right. But it nevertheless may also include, as here, payments made because legally due, but which the parties contemplate will not continue indefinitely.

Then LORD FINLAY, on the same page, says this:

> If, in consequence of an increase in the cost of living, a bonus had been given in the shape of the payment of a lump sum, this would not, ordinarily speaking, have been regarded as increase of pay. But the method adopted for dealing with the situation was not the payment of a lump sum. There was a temporary increase in the remuneration of the officials affected, spoken of as war bonus. It is, in fact, an increase of pay in respect of war conditions.

Then on the next page he quotes with approval the following words of ATKIN, L.J.:

> For these reasons it appears to me that "pay" covers the war bonus that was given to civil servants by reason no doubt of the abnormal conditions caused by the war. It is not an allowance. It is a wage.

A later case of *James* v. *Tees Conservancy Comrs.* (2) was a decision of MAUGHAM, J., which raised a similar class of question under the statutory scheme set up for the Tees Conservancy Commissioners. The words that required interpretation were "salary or wages," and the question again was whether the war bonus which the Commissioners were paying and which in all essential particulars was of the same character as that with which we now have to deal, was or was not a wage. MAUGHAM, J., decided that it was, and when the matter came to this court LORD HANWORTH, M.R., agreed with that judgment, quoted the passages, or one at any rate of the passages, from the speeches in *Sutton's* case (1), which I have already quoted, and held, at p. 285, that they really governed the case. Whether or not one can strictly say that they governed the case, the language being different, is neither here nor there. What is important is that the logic and reasoning of those speeches in regard to the particular subject matter appears to me to apply irresistibly to the present case; and that was the view that this court took in *James* v. *Tees Conservancy Comrs.* (2). I come, therefore, to the conclusion that the judge was right in saying that the war bonus ought to be taken into account.

The next question on the appeal is whether or not a claimant can claim a pension on that basis without bringing into account the deficit in his past contributions. The judge held that he was not so bound, and he based his decision on the judgment of FARWELL, J., in the later *Tees Conservancy* case (3). In order to understand that decision, one or two matters have to be remembered. First of all, the question was raised as the result of the decision of this court in the earlier case. The form of the proceedings before FARWELL, J., was that of an originating summons taken out by the commissioners with one James as a respondent (he was a pensioner), in order to determine the question—and this is the only one that is relevant—whether they, that is to say, the commissioners, were entitled to recover from the defendants the amount of the deductions which should have been made from the bonus for the purposes of the Act and which had not been made. They had taken the view that bonus was not to be brought into the calculation; accordingly, they had not deducted from the wage of the employee the amount which they ought to have deducted as was subsequently determined by this court in the earlier case. Then they wanted to know whether they could recover from the respondents, the employees, the amount which they should have paid in the past. That was, therefore, the only question: could they recover? FARWELL, J., held that there was no legal liability in that case on the members to make any such payment, and that is the limit of the decision. It was not argued, nor on the face of the summons without amendment was it arguable, that a different principle applied, and that whether or not there was a right to recover directly from the member, that member ought not to be allowed to take money from the fund without himself contributing to it what he ought to have contributed in the past. That is a very well-known principle of equity and is often referred to by reference to the decision of KEKEWICH, J., in *Re Akerman* (4). That aspect of the matter was not dealt with at all by FARWELL, J., but he had before him two earlier cases in which, as it appears to me, that principle was asserted quite clearly as being applicable to superannuation cases of this character. It is worth looking at them in a little detail. The earliest one was *Dewhurst* v. *Salford Guardians* (5). There the plaintiff, an employee of the guardians, who had a pension scheme by virtue of the Poor Law Officers' Superannuation Act, 1896, was claiming a declaration that the war bonus should be included in the computation, and he asked for an account and payment of what he said were the arrears of his pension. He was a pensioner. The main question that was discussed was whether or not the plaintiff could contract out of the scheme; but in the course of his judgment WARRINGTON, L.J., said this, at p. 672:

> What is asked is a declaration, and an account of the money due to him founded upon that declaration, and, in my opinion, he is entitled to the costs here and below. But to the declaration should be added the words "subject to the obligation of the plaintiff to contribute to the common fund, as provided for by the Act."

The way that came into it is quite obvious when the record in the House of Lords printed Appeal Book is examined. The statement of claim had asked merely for a declaration that the bonus should be included and said nothing about the obligation of the plaintiff to contribute his arrears, and had asked for an account. WARRINGTON, L.J., saw that that was, as I should have thought, quite obviously wrong and that such a declaration could only be granted if qualified by a reference to the obligation of the plaintiff himself. That qualification was embodied in the order. Nobody objected to it, nobody argued that it ought not to be there; and when the matter went to the House of Lords no suggestion was made in the printed cases on either side that that addition to the order was in any way wrong. It is said: "Well, not very much weight ought to be attached to that because obviously nobody argued about it, and this was just an idea of WARRINGTON, L.J., which was put in, and we must take it that it was put in by consent." That is the argument. In my opinion, that is quite wrong. It is just as much part of the order of the court as the rest of the order, and the court does not make a declaration by consent. It is the embodiment in the order of what the court considered (and nobody chose to argue to the contrary) the order ought to be. It therefore seems to me a matter of direct decision.

FARWELL, J., dealing with that case, accepted an argument put before him by counsel that the explanation of that addition was to be found in the fact that the plaintiff had tendered the amount. With all respect, I cannot find a trace of a suggestion in the report of *Dewhurst's* case (5), that that was the reason why it was inserted. I should have thought it was manifest that it was inserted in order to bring the declaration into accordance with the well-known rule of equity to which I have referred. As that rule was not argued before FARWELL, J., he was naturally placed in a position of some difficulty with regard to it. But I cannot agree with his view that that paragraph in the order was inserted with reference to anything save what the court regarded as the law applicable to the case.

The next case was that of *Gissing* v. *Liverpool Corpn.* (6). That, again, was a superannuation case in which the Board of Guardians had not made the proper deductions. Eventually, after the plaintiff had agreed to make up some of the arrears caused by that failure to deduct, it was said against her that she was not in any event entitled to the benefit of the fund. In the course of that case it was said by ROMER, L.J. (as he then was), on p. 25:

> Payment of the annual contributions prescribed by the 1896 Act, s. 12, is no doubt a condition precedent to the officer or servant becoming entitled to a pension, and the pension will, of course, only be paid on the terms that the pensioner makes good to the fund out of which the pension is paid the sums that ought to have been paid into such fund.

That paragraph appears to suggest two ways of looking at questions of this kind. One is whether or not the payment of contributions is a condition precedent to the right to claim benefit, and the other is the application of the equitable rule in *Re Akerman* (4). I think that, in the present case the matter could be put on either ground, because it seems to me that on the true view of the meaning of the rules the right to a pension is conditional on the contributions having been paid. I do not take up time with investigating that aspect of the matter because it seems to me that on the equitable principle the same result is arrived at. MAUGHAM, L.J., at the end of his judgment in *Gissing* v. *Liverpool Corpn.* (6), says this, on p. 33:

> . . . I am of opinion that this judgment should be reversed and that we should hold that Kate Gissing has not forfeited her rights to superannuation allowance, and subject to the payment in due course of any contributions which may still be due from her she will be entitled, subject to the provisions of sect. 124, to the benefits of the superannuation scheme embodied in the 1896 Act.

Now it is perfectly true that, having regard to the particular claim in that case and the circumstances in which it arose, that conclusion of MAUGHAM, L.J., did not appear in the order, and there was no necessity for it at that stage of the history of that lady and her pension. We have sent for the original order and we find that that is the case. Nevertheless, here again I find a recognition by MAUGHAM, L.J., of the necessity of applying that well-known principle to cases of this kind. That being so, I do not think that we ought to disregard what happened in *Dewhurst's* case (5) and *Gissing's* case (6) in this court, and I cannot myself, with all respect, obtain any real guidance from the decision of FARWELL, J.

There is one other matter in this connection to which perhaps I ought to refer. It was suggested that unless a legal obligation could be found to make the contribution, the equitable principle would not apply because, it is said, it can only apply where there is a debt. But here, it seems to me, there is a direct obligation on the member to contribute. It says in the definition clause: "'Members' means persons who contribute to or are entitled to benefits from the fund." R. 12 says:

> The fund shall consist of the contributions of members and of the company.

Then r. 28 says:

> Every member, so long as he continues in the employ of the company, shall contribute to the fund in accordance with the tables set forth in the appendix.

There is an unqualified obligation to contribute. As a pendant to that there is r. 30:

> The company shall contribute every half-year to the fund out of their revenues a sum equal to the amount which during the same half-year has been contributed thereto by the members.

It is perfectly clear that the phrase "The company shall contribute" must import an obligation on the company to pay into the fund, and I cannot see how it can possibly be said that the precisely similar words in r. 28 imposing the obligation to contribute on the member do not mean the same thing. But it is said that the position is altered when we come to the intervening r. 29, a separate rule to the following effect:

> The contribution of every member shall be deducted from his salary and credited to the fund.

I do not agree with the view that that qualifies the obligation imposed by r. 28 in the sense of limiting the obligation to contribute to the particular machinery of deduction. It seems to me that it is merely providing a piece of machinery by which the member's obligation to contribute can conveniently be made effective. It imposes on the company the obligation to make, it imposes on the member the obligation to suffer, deduction, and by that means his contribution is made. I cannot read it in any way as cutting down the obligation in r. 28. Whether that be so or not, it seems to me that even if the only method of contribution provided for by the rule is that of deduction, that would not prevent the equitable principle from applying. When that principle is applied the recipient is deemed to have in his hands the money that he is claiming up to the amount of the deficiency in his own payments; precisely the same thing must apply to the present case even if the only thing that the member contracted to do was to pay by way of deduction. Look at it how you will, this member has not contributed enough. In so far as his contributions are deficient in amount, he has under-paid, under-contributed, and it would be, it seems to me, grossly inequitable that a man in that position could be heard to say: "Although I have not made the contributions by way of deduction which I ought to have made, I am now going to say that the application of the equitable rule is not permissible because that would involve making me contribute otherwise than by deduction, which is a thing I never contracted to do." That seems to me to be quite a wrong view of the way in which the equitable principle works. It is not forcing him to make an actual contribution otherwise than by way of deduction. If he comes to make a claim then he has to do what is right and bring the fund up to its right level before he can claim to participate in it. He is not bound to do it if the true view be that he is under no legal obligation and cannot be sued directly. He need not come to the fund and ask for anything. It is only when he comes to the fund that the equitable principle applies to him and, therefore, the application of the equitable principle does not mean that he is having an obligation imposed upon him to make a contribution in a way different from the limited way of deduction; it simply means that he cannot come and take money out without putting money in. For those reasons I am of opinion that the judge came to a wrong conclusion upon this aspect of the matter. That deals with the appeal.

The cross-appeal falls really into two halves, although, in my opinion, the answer is the same in each case: overtime and Sunday pay in the one group; the extra pay earned by the driver put back in the other. That, again, depends on the meaning of "salary or wages." It is said, on the one hand, that that phrase covers and means everything that the man receives in the way of payment, alternatively that it certainly includes the extra pay of the driver put back who is engaged occasionally or frequently to drive an engine. On the other side, it is said that the wage that must be regarded is the wage applicable to the man's grade, and that what one might call casual cash receipts of the character described do not fall within that expression. It is perfectly true that overtime pay and Sunday pay is a wage in the sense that it is contractual remuneration for services rendered in particular circumstances; but the question is whether it is a wage for the purpose of this scheme. Grouping together overtime and Sunday pay, they are not, as it seems to me, naturally described as wages in a context which calls for an answer to the question: What is this man's wage? The context does call for an answer to that question, as it seems to me, for this reason. First of all, as was very pointedly observed by counsel for the appellants, this is a superannuation scheme subject to quinquennial valuations by the actuary. One would expect, therefore, to find some firm basis of actuarial calculation rather than one which would fluctuate according to the quite accidental circumstances of whether a man or a number of men is or are employed overtime or on Sundays. One would not expect that the actuarial calculation would have to be based on such a shifting foundation. That consideration by itself might not carry us very far, but I find a very clear indication as to what was intended as a basis of ascertaining wages when I look at the provisions relating to the two classes of the fund. The draughtsman, unfortunately, dealt with those matters in a way particularly suitable for the case of the salaried staff, and the phrases that he used are not so easy to apply to the case of the wages staff. The importance is this. The fund is divided into two classes, and r. 18 provides that:

> Every officer or servant whose salary at the date of his joining the fund amounts to £80 per annum . . . shall belong to class I.

R. 26 provides:

> If and when the salary of a member in class II who is under 35 years of age shall be increased to or beyond £80 per annum, such member shall be transferred to class I.

In the case of the salaried staff, that is no doubt an easy matter, and it would mean that when a member of the salaried staff gets a rise in wages which takes him above the £80 limit he is transferred into class I. The task is to apply those provisions to the case of the wages staff who are paid by the day and at this date had not got a guaranteed week, as they now have. On what principle is it to be ascertained for the purpose of r. 18 whether a member joining ought to be put in class I or in class II? The question is: Did his salary at the date of joining amount to £80 per annum? Now "salary" includes "wages." The question, therefore, is: Did his wages at the date of his joining amount to £80 per annum? How is that to be ascertained? Counsel for the respondents says: "You must ascertain what he did in fact earn in the twelve months before he joined, including overtime, Sunday pay and all the other matters. If you find that his receipts exceeded £80, you put him in class I: if they were less than £80, you put him in class II." That might have been workable, although it is to be observed that a man might find himself put in class I by the purely accidental circumstance that for one year, and possibly the only year, of his service, a certain amount of overtime, or Sunday work, had qualified him for class I and not for class II. That seems a very unlikely method of dealing with this matter, and it seems to me that what is contemplated is something very much more stable in the form of a rate of remuneration. But when you turn to r. 26, the matter seems to me to become more clear. On what principle, I ask myself, is a wage-earning member to be transferred from class II to class I ? The answer of counsel for the respondents to that is : "Whenever in the twelve months preceding any given date it is ascertained that his receipts have in fact exceeded £80, he will then be automatically transferred." See what that involves. It involves a sliding and ever advancing period the results of which would have to be looked at day by day, because it may be that on July 1 a man during the previous twelve months had not earned £80, and when you come to July 4, and then proceed to calculate back for twelve months you may find that he has earned £80. Therefore you must go on from day to day in the case of every employee about whom there is any doubt and see what in any preceding twelve months day by day was in fact the amount of his earnings. It seems to me to be perfectly impossible to suppose that any intelligent person formulating a scheme of this kind would make such a provision. So far as wages or overtime is concerned, I do not find that overtime and Sunday pay fall naturally under the description of wages in such a context as we find here, because they are not what would be described in answer to a question "What is your wage ?" nor would a man, who had happened in one week to have received overtime pay which he had never received before, say : "I have had a rise in wages," nor would he say, to use the exact language of r. 26 : "My wages have been increased." He might say he had received an increased amount in wages, but the phrase is "be increased," which involves a different idea altogether. Those considerations appear to me to cover the case of the overtime and the Sunday pay.

It was argued similarly that certain other matters in the case of the shopmen should be taken into account, those mentioned in Sched. F to the Industrial Court's decision. With regard to those, I agree with the judge that such of them as are not expense allowances are properly described as allowances. They are allowances and nothing else, and nobody, I think, would describe them, any more than the authors of this decision describe them, as part of the wage. An allowance is not the same thing as wage and, indeed, Lord Atkin pointed out that fact in the citation made by Lord Finlay in *Sutton's* case (1). It seems to me there is a quite different idea at the bottom of "allowance" from that which lies at the bottom of the word "wage."

The position of a driver-put-back is that he has a special grade, and that grade carries a wage of 12*s*. a day. If he drives he gets the rate of pay appropriate to a driver of his standing. There again it seems to me that the extra money that he happens to earn by doing that class of work ought not to be brought into account in ascertaining his wages for the purpose of this scheme. In a sense, of course, and in a very true sense, it is his wage ; he has earned it, it is his remuneration. But it is no use considering the use of the word "wage" in the abstract. This is a special context and it seems to me again that, if you are going to examine what a man has in fact earned and take that as your test, precisely the same considerations apply as to rr. 18 and 26 and the £80 limit as to the case of overtime. I would like to point out that, if the driver-put-back is entitled to have those extra earnings brought into account when he happens to drive an engine, precisely the same results would follow in the case of a man, a fireman, who on occasions drives an engine and receives the pay appropriate to the driver of an engine. Those also would have to be brought in. It seems to me that none of that fits in with the language of rr. 18 and 26, which throw a flood of light on what the parties were considering was to be the scope of the word "wages." In addition to that, there is the important consideration which I have already mentioned, that this is an actuarially calculated scheme with periodical reviews, and I cannot see how any certain ground for actuarial calculations could be afforded save that of some static rate of wage without regard to these occasional and accidental earnings.

There is one last consideration and that relates to the history of this fund. The judge took the view that under the original scheme the references to "ordinary wage" made it quite clear that what was contemplated was the grade wage appropriate to the grade. It is said that he ought not to have done that because in 1906 and again in 1914 an entirely new set of rules was made in which that particular phrase and certain other phrases upon which the judge relied do not appear. I think it is a sound criticism that you cannot construe one document by reference to another. On the other hand, when you are dealing with a series of variations like this, it is, I think, legitimate to look at the position, as it stood before the alterations in order that you may realise what practical results would have been necessitated if a new set of rules introduced changes of the character suggested. In the present case, if the new set of rules introduced in 1906 had intended to bring in these extra payments as part of the basis of contribution, it would have involved an entirely different method of dealing from that which was provided under the original rules which referred to "ordinary wages." I am assuming here that that means, and I think it right to say that that means, the basic wage. It would have meant that directly the 1906 rules came into force everybody would have to start making calculations on a totally different basis. When they came to make their valuations the actuaries would have had to proceed on an entirely different hypotheses, because there would then be coming into the scheme additional contributions of a variable and unpredictable amount and there would be going out of the scheme larger pensions in the calculation of which those extra payments by way of remuneration would have to be taken into account. If the words of the new rule compelled one to say that such a sweeping alteration had taken place, one would, of course, have so to interpret them: but once one realises how great the change would have been, if the argument was right, one at any rate is entitled to hesitate before attributing to doubtful language a result of so revolutionary a character. I myself find sufficient in the rules themselves as they now exist to answer the question. My conclusion, I think, receives very strong support indeed from the considerations which I have just mentioned. I ought, perhaps, to add this, that had it been intended to introduce a new principle for ascertaining the wages, it is almost impossible to suppose that rr. 18 and 26 would not have been altered, because it must have been obvious to anyone that, if you were going to introduce that shifting and variable factor, the language of rr. 18 and 26 were completely unsuitable to meet the case.

That really concludes all that I wish to say save this. I do not agree with counsel for the appellants that one is entitled on a matter of construction to take into account the practice of the parties. In point of fact for many, many years, ever since this scheme was instituted in 1875, this question of overtime, Sunday pay and these other matters, the pay of the fireman who gets extra money for driving and the pay of the driver-put-back who gets extra money when he drives - all those matters have been dealt with on the footing that they ought not to be taken into account. If that be wrong, I cannot see any end to the confusion that would result because it would mean that every man from the very beginning of this scheme who received 1*s.* for overtime had made the wrong contribution and had got the wrong pension; and the same with regard to all these other matters. In fact, the tangle would be so disastrous that I cannot see how anything short of an Act of Parliament could possibly put the matter right. I have not allowed, at least I hope I have not allowed, those considerations to affect my mind in coming to my conclusion on the questions of construction. I merely refer to them because it is some consolation to know that the conclusion at which one has arrived is not one that will lead to such disastrous results.

Finlay, L.J.: I am of the same opinion and although I am, of course, conscious that the points raised are points of difficulty and that on one of those points we are differing from the judge, none the less the matter has been so completely covered in the judgment of Lord Greene, M.R., and I agree so entirely with that judgment, that I do not wish to add anything.

Morton, L.J.: I agree, and for the same reasons as those which actuated Finlay, L.J., I do not desire to add anything.

Appeal dismissed on the first three points and allowed on the fourth point. Cross appeal dismissed. Leave to appeal granted.

Solicitors: *W. H. Hanscombe* (for the appellants (defendants), London & North Eastern Ry. Co., and for the first six defendants (directors' committee men)); *Kenneth Brown, Baker, Baker* (for the respondents); *Layton & Co.* (for the three individual defendants (members' committee men)).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re BERKELEY, BORRER *v.* BERKELEY.

COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **December 12, 13, 1944.**]

Rentcharges and annuities—Annuity given free of income tax—Annuitant on death of testator entitled to income under marriage settlement—Will and four codicils—Testator in exercise of pre-existing power appointing gross income to annuitant by second codicil—Fourth codicil giving annuity to make up income from other sources to £5,000 net—Will confirmed—Alteration of priority of annuities and adding of security—Whether annuity "stated amount"—No subsequent variation of annuity by change of priority and adding of security—Statutory deduction for supplementary payments only—Finance Act, 1941 (c. 30), ss. 25, 27.

The first respondent, by virtue of a marriage settlement dated Nov. 6, 1924, became entitled upon the testator's death to certain income subject to tax. By his will, dated Nov. 10, 1936, the testator exercised a pre-existing power of appointment in favour of the first respondent by appointing to her an annual sum of £1,200 gross. He also gave her an annuity of £200 free of income tax, and, to the second respondent, an annuity of £1,500 free of income tax at the standard rate. The testator executed four codicils to his will, three of which were made before Sept. 3, 1939. By the second codicil the testator gave to the first respondent an annuity "of such amount as may in any or every year after his death be required to make up to the total sum of £5,000 clear of all death duties and income tax, the annual net income to be received by her in that year under his will," including the appointment and the income received under the marriage settlement, which he expressly confirmed. He directed that in calculating the annuity, the annuity of £200 was to be taken into account. The term "income tax" as used in the codicil was to include sur-tax. The fourth codicil, executed on Sept. 14, 1940, contained a confirmation of his will as altered by three previous codicils. It gave priority to the annuity of the first respondent over all other bequests, and contained provisions charging the annuities on property specified, thus securing them by that charge. It was contended for the first respondent that the provisions of the Finance Act, 1941, s. 25 (which imposed some part of the tax burden on the recipient of a tax-free annuity) did not apply because (i) the annuity given by the second codicil was not a "stated amount" since the amount was not definitely fixed by the provision and would vary from year to year, and (ii) the fourth codicil had, on a date after Sept. 3, 1939, varied the annuities in respect of priorities and security. The appellants contended that the annuity given to the first respondent was a "stated amount." Further, the full amount was liable to statutory deduction, and not the supplementary payment only, which was to be made under the second codicil to bring the income from other sources to the level of £5,000 net:—

HELD: (i) an amount described by reference to a formula and readily ascertainable by means of that formula was a "stated amount," precisely determining the liability, within the meaning of the Finance Act, 1941, s. 25.

Re Bird, Henn v. *Birch* (2), *Holmpatrick* v. *Ainsworth* (3) *applied.*

(ii) the mere giving of priority and the addition of security did not amount to a variation as required by the Finance Act, 1941, s. 25 (1) (*c*), when the amount and the tax-free direction were left unimpaired.

Re Sebag-Montefiore, Sebag-Montefiore v. *Alliance Assurance Co., Ltd.* (1) *applied.*

(iii) the only provision for payment of a "stated amount" free of income tax was the provision contained in the gift of the annuity itself. The stated amount was the difference between the upper limit of £5,000 and the amount of the income from the other sources, and the provisions of the Finance Act, 1941, s. 25, applied only to that difference.

[**EDITORIAL NOTE.** Two important points on the interpretation of the Finance Act, 1941, s. 25, are here considered. The first relates to the construction of the words "stated amount" and the court holds that the principle of *id certum est quod certum reddi potest* is applicable, so that an amount ascertainable by reference to a formula is a "stated amount" although it may vary in different years.

The second matter considered is the meaning of "variation" in sect. 25 (1) (*c*). Here the Master of the Rolls adopts his own language in *Re Sebag-Montefiore* (1) and *Dudley* v. *Dudley* (4), and holds that a variation sufficient to exclude the benefit of the section must be a variation of the provision contained in the original disposition for payment free of income tax. A variation of the amount is not sufficient and something more than a mere re-statement or confirmation of an existing obligation was contemplated by the legislature. In view of the lapse of time between the crucial date in sect. 25, Sept. 3, 1939, and the date of the Finance Act, 1941, July 22, 1941, any other construction would lead to great injustice.

As to Tax-Free Payments, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391; and for Cases, see DIGEST, Vol. 39, pp. 165-168, Nos. 562-593.

For the Finance Act, 1941, s. 25, see HALSBURY'S STATUTES, Vol. 34, pp. 119, 120].

Cases referred to:

*(1) *Re Sebag-Montefiore, Sebag-Montefiore* v. *Alliance Assurance Co., Ltd.*, [1944] 1 Ch. 331; [1944] 1 All E.R. 672; 170 L.T. 395.

*(2) *Re Bird (Deceased), Henn* v. *Birch*, [1944] Ch. 111; [1944] 1 All E.R. 132; 113 L.J.Ch. 79; 170 L.T. 39.

*(3) *Holmpatrick* v. *Ainsworth*, [1943] S.C. 75.

*(4) *Dudley* v. *Dudley*, [1944] 1 K.B. 264; [1944] 1 All E.R. 29; 113 L.J.K.B. 200; 170 L.T. 365.

(5) *Re Tredgold, Midland Bank Executor and Trustee Co., Ltd.* v. *Tredgold and Royal Society of Musicians of Great Britain (Incorporated)*, [1943] Ch. 69; [1943] 1 All E.R. 120; 112 L.J.Ch. 68; 168 L.T. 135.

Appeal of the defendants from an order of Cohen, J., dated May 19, 1943. The facts are sufficiently set out in the judgment of Lord Greene, M.R.

J. H. Stamp and *J. V. Nesbitt* for the appellants (defendants in the court below).

Wilfrid M. Hunt for the respondent Lady Berkeley (first annuitant).

M. G. Hewins for the respondent Sybil Jackson (second annuitant).

E. G. Eardley-Wilmot for the trustees.

Lord Greene, M.R.: This appeal raises several short points upon the application of the Finance Act, 1941, s. 25, to the will and codicils of the late Earl of Berkeley. His testamentary dispositions, with the exception of the fourth codicil, were all executed before Sept. 3, 1939, which is the crucial date mentioned in the section. The fourth codicil was executed on Sept. 14, 1940—that is to say, after the crucial date—and it contained a confirmation of his will as altered by the earlier codicils.

The question whether such a confirmation has the result of importing the relevant provisions of an earlier instrument into the confirming codicil was decided by this court in the case of *In re Sebag-Montefiore* (1), and so far as this court is concerned it is settled that where there is such a confirmation the relevant provisions are not to be regarded as having been made by the confirming codicil, but as having been made by the will or earlier codicil, as the case may be. Counsel for the respondent the Dowager Countess of Berkeley, wished to keep the point open as to the correctness of that decision, in case there should be an appeal to the House of Lords. The points that were argued before us can be best understood if first of all I refer to the relevant passages in the testamentary dispositions of Lord Berkeley. His will was dated Nov. 10, 1936. By cl. 2 he exercised a power of appointment conferred upon him by a settlement of June 8, 1888, in favour of his wife, the respondent Lady Berkeley, and appointed to her an annual sum of £1,200 without any deduction except on account of death duties and income tax. That, therefore, was an appointment of a gross sum of £1,200. He also by cl. 23 (*b*), gave to his step-daughter Sybil Deane Jackson, who is a respondent, free of all duties during her life an annuity of £1,500 free of income tax at the standard rate. By cl. 24 (*a*) he gave to his executors, if they should accept the office, one of whom was his wife, an annuity of £200 free of all duties and income tax. Under the will, therefore, Lady Berkeley became entitled to an annuity of £1,200 gross under the appointment and an annuity of £200 net.

The first codicil contains nothing relevant to the present questions. The second codicil was dated Dec. 3, 1938. Under cl. 1 the testator gave to Lady Berkeley during her life:

> . . . an annuity of such amount as may in any or every year after my death be required to make up to the total sum of £5,000 clear of all death duties and income tax the annual net income to be received by her in that year under my said will (including

> the appointment made by cl. 2 thereof) and under my marriage settlement (which I hereby confirm) dated Nov. 6, 1924.

In cl. 2 he provides that in calculating that annuity the annual sum of £200 given by cl. 24 of the will was to be taken into account. Then in cl. 3:

> The said annuity [that is to say, the annuity given by cl. 1 of this codicil] shall itself be free of all death duties and income tax.

Then in cl. 5 he gives directions as to the computation of the relief to be given to his wife in respect of income tax; and by cl. 6 "income tax" as used in the codicil was to include sur-tax. Under the marriage settlement of 1924 to which he refers, Lady Berkeley, upon his death, became entitled to certain income, subject, of course, to tax.

The meaning and effect of those dispositions are, in my opinion, quite clear. They are the bequest of an annuity. The amount of the annuity is to be ascertained by reference to the other income of Lady Berkeley which is specified in cl. 1, and the bequest in respect of which I apprehend duty would be payable is a bequest of an annuity sufficient to make the income of Lady Berkeley from those other sources up to £5,000 a year net; and, of course, that annuity itself was a net annuity and not a gross annuity. Therefore, it amounts to this: It is an annuity of such a sum as after deduction of tax will make up to Lady Berkeley the amount of her income from those other sources to a figure of £5,000. The fourth codicil contains certain provisions which I can summarise quite shortly. They affect the priority of the annuities, including the annuity to Miss Jackson. They provide in the first place in cl. 4 that the annuity given to Lady Berkeley was to be payable in priority to all other annuities and that the annuity payable to Miss Jackson was to be payable in priority to all other annuities except the annuity bequeathed to Lady Berkeley. Then there are certain provisions charging these annuities on property specified, thus securing them by that charge.

The questions which arise I will deal with in what seems to me the most convenient order. I do not propose to read the language of the section, nor do I propose to say anything, except in passing, about its manifest objects, because that has already been dealt with in the judgments delivered in *In re Sebag-Montefiore* (1). It is said in the first place that the section does not apply because the annuity given by the second codicil to Lady Berkeley is not a "stated amount." In my opinion, that argument is erroneous. The right of Lady Berkeley under the codicil is to receive an annuity and the amount of that annuity will be precisely ascertained at the appropriate time and as soon as it is ascertained the obligation of the trustees to pay it to her comes into operation. There is no difficulty in ascertaining what the amount is to be in any particular fiscal year. But in the argument presented to us by counsel for the respondent Lady Berkeley, he laid emphasis on the word "stated," and contended that that word can only be satisfied where the amount is definitely fixed by the provision in question and that, if the amount is one which has to be ascertained by reference to some formula which may produce a different amount in different years, it cannot be a "stated" amount. When one remembers what the manifest object of this legislation was, it would, I think, be true to say that such a construction would lead to an anomalous and quite unjust result. Covenants in deeds and provisions in wills providing for the making up of a person's income to a named figure are extremely common. So far as the mischief at which the Act was directed is concerned, the burden of increased taxation upon the person who is liable or the estate which is liable to pay an amount of that character is precisely the same as the burden upon the payor or the estate in the case where the actual figure is inserted in the document. If the legislature intended to differentiate the two cases and grant relief to the one and withhold it from the other, it was doing something for which no intelligible explanation could be given. But, in my opinion, construing this phrase in a reasonable way, no such force ought to be given to the word "stated." The document does state the amount, because it determines precisely the measure of the liability. The actual quantification is a pure matter of arithmetic, because all the factors will be known.

Counsel for the respondent Lady Berkeley argued that unless the word "stated" is to be given the meaning which he attributed to it, it is superfluous and the legislature might just as well have said "any amount." In order to construe this section in a sensible way. I would be prepared to construe it against the contention of counsel for the respondent Lady Berkeley, even if that were the result; but counsel for the appellants, in his reply, pointed out a case, and a quite obvious case, which could not be said to be a stated amount; for instance, a case where trustees are given a discretion to apply income, for example, in the maintenance of infants. There you would have a case where the amount to be paid could in no sense be called a stated amount, because there is no method of ascertaining it. It rests locked up in the minds of the trustees and the decisive factor which fixes the amount is the way in which the trustees decide to exercise their discretion. It seems to me that the principle of *id certum est quod certum reddi potest* is applicable to this case and where you have, as you have here, an amount described by reference to a formula and readily ascertainable by means of that formula, the amount is a stated amount.

That is the view which has been taken in earlier cases by UTHWATT, J., in *In re Bird* (2), and by LORD KEITH in the Scotch case of *Holmpatrick* v. *Ainsworth* (3). The latter was a case in which there was a covenant by a divorced husband to pay his wife:

> . . . such sum as will, when added to the net income arising from the trust fund in that year, leave a sum of £1,200 after deduction of income tax at the current rate.

One of the questions argued in the case was whether or not that was "a stated sum." The Lord Ordinary, LORD KEITH, said this, at p. 78:

> If the calculation falls to be made, as here, with reference to a constant, in the present instance £1,200, it can, I think, be said that there is an obligation to pay a stated amount. The statute does not say a fixed amount, or a definite amount, or an amount certain. It says a stated amount, and I think £1,200 less x [x represented the income from the trust fund mentioned] is a stated amount although the value of x may not be precisely known when the obligation is undertaken, and may vary from year to year. I think, indeed, it might be said that the whole or a proportion of a quite indefinite sum, as for instance a share of profits, could be regarded as "a stated amount," although the limit of liability in such a case must be quite uncertain . . .

and he refers to s. 27 (1) (*b*), the definition section in the Act, which provides:

> The expression "a stated amount" includes a stated fraction of the gross amount of any specified income, but does not include a stated fraction of the net amount of any specified income.

That clearly means this, that, if there is a covenant to pay free of tax, let me say, one-quarter of the income derived by the covenantor from a specified source, that would be covered by the section. Counsel for the respondent Lady Berkeley relies upon that interpretation clause, because he says it shows that income of that character would not, apart from the interpretation clause, be regarded for the purposes of the section as a stated amount. I cannot accept that argument. It appears to me that this particular part of the definition clause was inserted for the purpose of making it quite clear what did and what did not fall within the Act where there is a covenant to pay a fraction of specified income. The really important part of para. (*b*) is, I should have thought, the negative part which excludes fractions of specified income in the case where the fraction is the fraction of a net and not a gross income.

I might further point out that, if the argument is correct, further most remarkable results would follow. A man who had covenanted to pay a fraction of his income from some employment or profession would be entitled to the benefit of the section, although the income was quite unascertainable until after it was earned, and in consequence the amount payable under the covenant was left uncertain until the amount of the specified income was ascertained. I ask myself: Why should such a covenant be given the protection of the section and a covenant to pay a sum calculated by reference to a different type of income, also fluctuating in amount, be excluded? I can see no reason whatever for drawing any such distinction in justice or common sense, and I do not find myself compelled to adopt a construction which would lead to such results. I leave aside for the moment, in order to take it later in its logical order, the further question raised as to what in the present case is the stated amount to which the section refers and I will now deal with the next argument of counsel for the respondent Lady Berkeley, which was to the effect that the section did not apply because the fourth codicil had, on a date after Sept. 3, 1939, varied the provision contained in the second codicil. He says that under the fourth codicil the position with regard to these annuities was varied in two material respects, (1) in respect of priorities, and (2) in respect of security. This, he said, might in practice result in an improvement of the position of the annuitants, because it might be the case that apart from those provisions in the fourth codicil they would receive less than they otherwise would have done. That, he says, is a variation within the meaning of sect. 25 (1) (*c*). That paragraph, of course, lays down, as one of the requirements, that the provision for payment of a stated amount free of income tax should not have been varied on or after Sept. 3, 1939. In my opinion, that argument also fails. The thing that requires to be varied in order to exclude the operation of the section is a provision for the payment of a stated amount free of income tax. That provision in the present case, following *In re Sebag-Montefiore* (1), was contained in the second codicil. The fourth codicil does not vary it. It remains unaffected. All that has happened is that certain additional provisions have been imported which make no difference to the original provision, save that they give to it a certain security and certain priority. The question arises : Is a variation of that kind one of the kind referred to in the section ? In my opinion, it is not. Here again, by way of preface, I may point out the remarkable results which would follow if the argument were correct. It is to be remembered that the language of this section is directed not merely to provisions in wills, but to provisions in deeds, orders of the court, Acts of Parliament, and contracts ; and the word " provision " is, of course, a comprehensive word which is used in order to cover the dispositions contained in any of those documents or, in the case of contracts, if oral, then in the oral contract.

Let me test the argument by taking the case of a covenant. Let me assume a covenant made before Sept. 3, 1939, to pay a tax free annuity to A.B. In a later deed, dated after Sept. 3, 1939, the covenantor brings in certain security to secure the annuity. So far as he is concerned, he is just as much subject to the burden of the high taxation which this section was intended to adjust as if he had never entered into that second deed at all. The amount of cash which he would have to pay out of his pocket would be precisely the same ; and I can see again no reason whatsoever why the legislature should have said that the man who subsequently gave security should be excluded from the section and the man who did not give security should be benefited by its provisions. But, quite apart from that, the word " varied," in my opinion, is to be confined to a variation of the particular provision specified in subsect. (1), namely, variation of the provision of a stated amount free of income tax.

The words which I used in *Sebag-Montefiore* (1), were in reference to one of the points in that case, where a tax free annuity given in the will was increased to a larger sum by an annuity in a codicil executed after Sept. 3, 1939. The question was whether that increase of the original annuity was such a variation of the original disposition of the smaller annuity as to exclude the totality of the annuity from the benefit of the section. What I said was this, at p. 338 ([1944] 1 All E.R., at p. 675) :

> The " variation " referred to in the subsection must, I think, be a variation of the provisions contained in the original disposition for payment free of income tax. A mere variation in the amount of the tax-free sum does not appear to me to be sufficient and I can see no reason why the legislature should have said that it was. If mere increase of the amount is a variation, mere decrease also must be a variation.

MACKINNON, L.J., expressed the same opinion at p. 340 ([1944] 1 All E.R., at p. 676). It is said that those observations were not necessary to the decision and were mere *dicta*. I do not myself agree with that view ; but assuming that they were, I am nevertheless disposed to think that they are correct. In an earlier case in this court of *Dudley* v. *Dudley* (4), I said this, at p. 268 ([1944] 1 All E.R., at p. 32) :

> It might have been expected that the subsection would exclude from its operation any case where a covenant entered into before Sept. 3, 1939, had been recognised after that date to be still binding. It would naturally be thought that, if the parties had affirmed the covenant, after Sept. 3, 1939, that would be sufficient to take the case out of the subsection, because it could have been said that the parties, with the practical certainty of increased taxation before their eyes, had, nevertheless, affirmed the liability originally cast on the covenantor. The legislature, however, has not thought fit to word the subsection in that way, and to take a case out of it, a variation, and not merely a confirmation, is needed. A mere re-statement or confirmation of an existing obliga-

tion cannot be treated as a variation of the provision within the meaning of the subsection.

Since expressing that view, I have had occasion to consider this section again. My observations were based on the hypothesis that the legislature might reasonably have excluded from the benefit of the section a covenantor, to take that example, who after Sept. 3, 1939, had recognised his liability. On consideration, I have come to the conclusion that the legislature was not proceeding on that basis at all and the omission of any reference to confirmation proves that fact quite clearly. If subsequent recognition had been thought by the legislature to be sufficient to take a case out of the section, it would surely have said so, and it would have been a very curious result if a mere variation in amount could be regarded as taking the case out of the section because it impliedly recognised the obligation to continue tax free payments, whereas an express confirmation would not take it out. That led me to think that, as I said in *Re Sebag-Montefiore* (1), the variation which is referred to is not a variation regarded as, so to speak, an implied recognition of the obligation to pay tax free, but a variation of the tax free provision itself. It might be said that a variation of the stated amount without any variation of the tax free provision would satisfy the words; but, in my opinion, that leads to an extraordinary result, because, as I pointed out before, it would mean that, if a man in his subsequent codicil reduces an annuity or increases it, his estate would thereby lose the benefit of this section. It seems to me that the more one thinks of this and examines the results of the various views, the more likely does it appear that what I said and what MacKinnon, L.J., said was right.

I come, therefore, to the conclusion that the variation required is a variation of the tax free directions of the provision in question. But assuming that I am not right on that and that it is open to this court to think otherwise, I am clearly of opinion that the mere giving of priority and the addition of security do not amount to a variation where the amount and the tax free direction are left unimpaired. That disposes of the arguments that the section does not apply. It remains to consider the question what in the case of Lady Berkeley is the stated amount. Counsel for the appellants argued that the stated amount was the £5,000 net to which the income of Lady Berkeley is to be brought up under the second codicil. The contention on the other hand is that the stated amount for the purpose of the section is that unspecified but ascertainable amount which the estate has to pay out in cash in order to make up the income to £5,000 net. That sum I can refer to as "x." Is the stated sum £5,000 or is it "x"? In my opinion, it is quite clearly "x." "x," as I have pointed out, is the annuity which has been bequeathed, or, rather, "x" as grossed up is the annuity which has been bequeathed. "x" is the sum which the estate has to find and pay over. That is the sum in respect of which tax is leviable by the Revenue.

To take the case again of a covenant under a deed, if this annuity had been provided by way of covenant and if in any year the covenantor paid it out of income not brought into charge, he would be accountable to the Revenue in respect of the tax referable to it. The tax which would be referable to it would be the tax upon the sum which he actually paid as grossed up for income tax purposes and he would have to account for that tax to the Revenue. That is the payment which the covenantor would have to make to the covenantee. The covenant would be a covenant to pay the gross sum, but the covenantee would only receive the net sum and the Revenue would receive the rest. The relief given by the section so far as the covenantor is concerned would, one would expect, be quite plainly relief in respect of the actual payment which he is called upon to make under the covenant. If the view put forward by counsel for the appellants is correct, the relief that he would get would not be relief in respect of something which he pays; it would be relief in respect of £5,000 which *ex hypothesi* is not the payment which he covenants to make. The payment that he covenants to make tax free is "x"; and I can see nothing more inequitable than to grant to a covenantor relief from taxation so as to throw on to the covenantee part of the burden in respect of a sum which he is never paying at all.

This conclusion is, I think, supported by the language of sect. 25, subsect. (4). That says this:

> If, in the case of a payment to which subsect. (1) of this section applies, the relations

of the payee and payor are such that the payee is accountable to the payor for so much of any relief from income tax which he receives as is ascribable to the payment . . . then the liability of the payee to account is adjusted as mentioned in the subsection. Who is the payee and who is the payor ? In the case of a covenant, the payor is the covenantor, and the payee is the covenantee. In the case of a will, the payors are the trustees ; the payees the annuitants. What is the "payment" referred to ? That must be, surely, the actual payment. This section is dealing with hard facts, payment of hard cash, and the payment in the case I have put is quite clearly, I should have thought, the payment which in fact the covenantor or the trustees, as the case may be, are called upon to hand over to the annuitant, and in so far as the payee can recover income tax ascribable to that payment and is bound to account for it, then the provisions of the subsection apply. I cannot make this section work on any other construction than that which I have indicated.

Counsel for the appellants, however, argued that in the present case the stated amount is the £5,000. He said : Here is outside income. Here is a provision for paying in effect the income tax on that income. The provision for payment of that income tax is a provision for the payment of a stated amount, to wit, £5,000 free of income tax. I am afraid I cannot follow that argument. It is no fault of counsel for the appellants. If fault there be, it is mine. The section does not say "any provision for payment of income tax in respect of a stated amount." It speaks of a provision for payment of a stated amount free of income tax, and the only provision for payment of a stated amount free of income tax is the provision contained in the gift of the annuity itself. The fact that the *quantum* of that annuity is to be ascertained by reference to, among other factors, the tax deducted in respect of the other sources of income appears to me to be quite irrelevant. That is merely the formula by reference to which the amount of the annuity given by the second codicil is to be ascertained. As I have pointed out, the effect of the said second codicil is merely to give an annuity of such a gross amount as after deducting the income from other sources will leave a sum of £5,000 net, free of all income tax. That is a pure formula for ascertaining the amount. It does not alter the character of the gift as a gift of an annuity. The amount of the annuity appears to me quite clearly to be the "stated amount free of income tax" which the section is referring to.

The Scottish case to which I have referred deals to a certain extent with that question, too, because a precisely similar question arose in that case. The Lord Ordinary had decided that the stated amount was the difference between the upper limit of £1,200 and the amount of the income from the other sources. That was reversed on appeal to the Inner House ; but, as I understand the judgments, the ground upon which it was reversed was a very special one. It was this : The agreement in question contained a release by the husband in favour of his late wife of his life interest under the marriage settlement. By that release it was said he provided an income for his wife which she would not otherwise have had, and by a later clause in the deed he made the provision which I have already mentioned for an annuity to her sufficient to bring her net income from the trust fund up to £1,200. What the Lord Justice-Clerk said, at p. 83, is this :

> Now the plain fact is that, by the combined effect of arts. (1) and (2), of the indenture of agreement, there is "provided" to the pursuer £1,200 free of tax, and that every penny of this £1,200 and of the tax effeiring thereto is "provided" by the defender. The pursuer gets the trust income by virtue of the defender's surrender of it in her favour, and it is to be noted that this surrender affects the gross income and not the net income. The pursuer gets the balance of the £1,200 net by direct payment from the defender.

There is no necessity for us in this court to consider whether that is a conclusion which we ourselves would have arrived at, but the decision, based as it is upon that special provision of the document in question, affords no assistance to us in the decision of this case. There is in the dissenting judgment of LORD JAMIESON, who took a different view to his brethren, this passage which, with great respect, I adopt, as in agreement with my own views. What he said, at p. 96, was this :

> In short . . . there should be some equality of sacrifice. The net income from the

trust funds may vary to some extent from year to year. The nearer it approximates to the sum of £1,200, the less the defender will have to pay over to the pursuer, and the less he will have to account for to the Inland Revenue if the payment is not made out of income already brought into charge. Yet, if his contention were to receive effect, the pursuer would, regardless of the amount he had to provide as a supplement, suffer a constant reduction to twenty twenty-ninths of the sum of £1,200. On the other hand, if only the supplementary provision comes within the operation of the section, the burden will be shared by both pursuer and defender.

Leaving aside the particular provisions of that will and applying those words to the present case, they appear to me, if I may respectfully say so, to embody the utmost good sense and sound construction. Counsel for the appellants submitted an additional argument, based on this proposition. He said: When you look at the provisions of the testamentary dispositions of the testator you find that in fact the whole of the income from other sources which was to be made up under the second codicil to £5,000 had been provided by the testator. So far as regards the £1,200 annuity appointed to his widow, the testator had provided that under the settlement of 1888; as regards the income under his settlement upon his marriage with the present Dowager, there again he had provided that. The annuity of £200 again was provided by him under his will. The result, therefore, counsel for the appellants argued, was that by his testamentary dispositions he had provided a stated amount free of income tax, the stated amount being an amount made up of the income from the other dispositions and the supplementary payment to be made under the second codicil. The income from those other dispositions had been provided by the testator. In my opinion, that is putting a very strained construction upon these words. The fact is that the provisions under which that other income (except the £200) arose were quite separate and antecedent to the documents that we have to consider, which are the documents containing the provision of a stated amount free of income tax. The marriage settlement was one; the power of appointment was the other. The exercise of a pre-existing power of appointment does not appear to me to amount to a provision for the payment of a stated amount free of income tax. If that appointment is an appointment of a gross sum, how can it be said that it is a provision for payment of a stated amount free of income tax?—and I cannot see that you can, so to speak, run together all these documents, two settlements and the power of appointment, join them up with the provisions of the second codicil, and say "The whole of these together amount to the provision of a stated amount free of income tax." If that were legitimate, the most extraordinary difficulties might arise when you come to the question of dates, because you might get some part of a composite series of documents executed before and some after Sept. 3, 1939. The section, it appears to me, is a simple and intelligible section directed to the case where you find in a document a provision for payment of a tax free sum and then all you have to do is to look at the date of that document and the Act applies or does not apply, according to whether the document falls on one side or the other of the line.

That, I think, disposes of all the arguments that have been addressed to us; but when I referred to what I had said in the earlier case of *Dudley* v. *Dudley* (4), I should have added to my explanation of that case this consideration, that, if the legislature had proceeded on the footing that mere recognition, express or implied, of the existence of the tax free provision at a date after Sept. 3, 1939, should be sufficient to exclude the section, it would have led to this difficulty and this injustice, which explains quite clearly to my mind why it was the legislature did not proceed on that basis. The point is this: The crucial date laid down in the section, Sept. 3, 1939, was long before the coming into force of this Act of Parliament. That received the Royal Assent on, I think, July 22, 1941. No doubt there were many cases in which a person who had covenanted or a testator who had provided for the payment of an annuity had between Sept. 3, 1939, and the date when the Act came into force in some way or another acknowledged his liability. It would have been grossly unfair to have said to a man who had done that: You shall be deprived of the benefit of the section because, without having the faintest idea that any legislation of this kind would ever be passed, you acknowledged your covenant. That, I venture to think, is the reason why the legislature did not make express or implied recognition of a liability a thing which would operate to exclude the benefit of the section.

Those last observations should be read as part of what I had said earlier in the judgment. I conclude by saying this: When this matter came before the judge it was not open to argument—at any rate, it was not argued—on any of the points that I have mentioned, for the reason that the case of *Re Sebag-Montefiore* (1) had not then been decided by this court. Following the earlier decision of SIMONDS, J., in *Re Tredgold* (5), which he followed in *Sebag-Montefiore* (1), it followed that the Act had no application to this case, owing A to the confirmation of the will and earlier codicils contained in the fourth codicil. Accordingly, none of the questions which fall for our decision were matters which were debated before the judge who tried this case. The decision of this court in *Sebag-Montefiore* (1) has thrown all those questions open, and my decision upon them is that the appeal should be allowed and the appropriate declaration made as to what is the stated amount. I think there will have to be a declaration of that.

B FINLAY, L.J.: I agree.

MORTON, L.J.: I entirely agree with the conclusions which have been stated by LORD GREENE, M.R., and I do not desire to add anything in regard to the two questions whether there is in the second codicil a provision for the payment of a stated amount free of income tax and, if so, what is the stated amount. On these two questions I desire to add nothing. In regard to the C question whether the provision for the payment of a stated amount free of income tax is or is not varied by the fourth codicil in this case, I only desire to say this: I rest my conclusion entirely upon the facts of this particular case. In saying that I do not wish to intimate that I dissent in any way from anything which has fallen from LORD GREENE, M.R., but merely to intimate that the only matter on which I have formed a conclusion of my own is the question directly before us, namely, the question whether the fourth codicil does vary the D provision in the second codicil within the meaning of the Finance Act, 1941, s. 25; and on that point I entirely agree with what has fallen from LORD GREENE, M.R.

Appeal allowed; costs of all parties as between solicitor and client to be paid out of the estate. Leave to appeal granted.

Solicitors: *Garrard, Wolfe & Co.* (for the appellants); *Field, Roscoe & Co.* E (for the first respondent); *Culross & Co.* (for the second respondent); *Boodle, Hatfield & Co.* (for the trustees).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Applied. BARKER *v.* BARKER.
[1952] 1 All E.R. 1128.

HOWARD *v* HOWARD.

F [COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **November 30, 1944.**]

Divorce—Maintenance—Application to vary order—Decrease in husband's means—Husband a possible beneficiary under discretionary trusts of ante-nuptial settlement—Attempt to bring pressure on trustees to make an allowance to G *husband—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *ss.* 190 (2), 192—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (*c.* 63), *s.* 14.

The appellant was the respondent in divorce proceedings and the decree was made absolute on Jan. 18, 1943. At that time the appellant was earning £6 a week; he had an annual allowance of £150 from a great-aunt; and he was one of the possible beneficiaries under the discretionary trusts H of an ante-nuptial settlement made by the great-aunt. On the petitioner's application for maintenance and for variation of the settlement, an order was made whereby (*a*) the appellant should pay the petitioner during their joint lives or until further order £150 per annum; and (*b*) the ante-nuptial settlement was varied by directing the trustees to pay the petitioner out of the settlement funds the sum of £150 per annum during her life *dum sola et casta.* The order further varied the settlement by extinguishing the power conferred on the husband to appoint capital to his children by any marriage; but, apart from these two variations, the settlement remained in force and the discretion of the trustees remained unimpaired. Later, the petitioner re-married, thus losing her income under the settlement. The appellant was adjudicated bankrupt and received his discharge. He was, also, seriously ill and would not be able to work for some time. Moreover, he was informed by the trustees of the settlement that, for some considerable time, he would receive no payment under the discretionary trusts. His entire income, therefore, consisted for the time being of the annual allowance of £150 from his great-aunt. On May 11, 1944, the appellant applied to the court for an order that the order for maintenance should be discharged or modified by reduction to a nominal sum. The registrar ordered that the maintenance should be reduced to the nominal sum of 1*s*. a month, but, on appeal, the judge varied the order and allowed maintenance of £100 a year. It was stated by counsel on behalf of petitioner that the reason for such an order was to bring pressure upon the trustees of the settlement to make the appellant an allowance out of the settlement income :—

Held : (i) the court has no jurisdiction to make an order with a view to putting pressure on trustees who have a discretion.

(ii) in view of the appellant's financial position, the maintenance should be reduced to the nominal sum of 1*s*. a month, the appellant to furnish the petitioner every six months with a statement of his financial position to enable her, if necessary, to apply to have the order varied.

[**EDITORIAL NOTE.** This case discusses the jurisdiction of the Divorce Division to make orders under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, affecting discretionary trusts. It is held that the court has no jurisdiction to make an order for maintenance, the purpose of which is to force the trustees to exercise their discretion in a particular way. The court assumes, without expressing an opinion, that there is jurisdiction under sect. 190 to vary a settlement containing a discretionary trust by directing payment of income to one of the parties, although the effect is to take away the trustees' discretion in regard to that sum, but it would appear that this is equally an indirect interference with the discretion given by the settlement.

As to Orders for Maintenance, see HALSBURY, Hailsham Edn., Vol. 10, pp. 798, 799, para. 1269 ; and for Cases, see DIGEST, Vol. 27, pp. 502-505, Nos. 5379-5396].

Case referred to :

(1) *N.* v. *N.* (1928), 138 L.T. 693 ; Digest Supp.

Appeal by the husband, the respondent in divorce proceedings, from an order of Barnard, J., dated July 25, 1944, whereby he varied an order made by the registrar, on July 4, 1944, modifying the husband's obligation for the payment of maintenance to the wife under an order made on May 4, 1943. The facts are set out in the judgment of Lord Greene, M.R.

D. Armstead Fairweather for the appellant.

T. Elder Jones for the respondent.

Lord Greene, M.R. : This appeal raises a question of some importance with regard to the practice in the Divorce Division in settling maintenance to be paid by a divorced husband to his former wife under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14.

The wife obtained a decree of divorce in circumstances into which I do not think it necessary to go. There were cross petitions, and eventually the judge exercised his discretion in favour of the wife and granted her a decree on the ground of the adultery of the husband. I will refer to them for convenience as the husband and the wife. There was executed, upon the marriage, an ante-nuptial settlement dated Jan. 10, 1938, by which a great-aunt of the husband covenanted with trustees to pay a monthly sum of £37 10*s*. during the life of the husband. There was a provision for payment of a capital sum which when paid would bring the covenant for payment of the monthly sum to an end, and the income of that capital sum was to be applied in the same manner as the monthly sum itself. The capital of that sum when paid (and it has in fact been paid) was to be applied after the death of the husband for such of his children by any marriage as he should by deed or will appoint, and so forth. When the decree had been made absolute the wife applied for an order for maintenance. The means of the husband at that date are to be found in the report of the registrar dated Apr. 2, 1943. He was earning £312 a year gross, being at that time employed in a munitions factory at £6 a week. He also had an annual allowance of £150 from his great-aunt. There was also a possibility, perhaps a probability, that he would receive some payment from the trustees of the settlement. The trusts of the income under the settlement were as follows :

> The trustees shall hold the said monthly sum of £37 10*s*. during the life of the husband upon protective trusts and shall pay or apply the same to or for the benefit of the husband and of any wife whom he may marry and the child children or issue of the husband by any wife whom he may marry or any of them as the trustees in their absolute discretion may think fit.

On that application, which was an application for maintenance and also for variation of the settlement, the following order was made by PILCHER, J., on May 4, 1943. He ordered :

> . . . that the settlement be varied by directing the trustees to pay the wife for her life out of the funds of the settlement, as from Jan. 18, 1943, the date of the decree absolute, the annual sum of £150 less tax, payments being made monthly and *dum sola et casta* ; that the power conferred on the husband to appoint to his children by any wife be extinguished . . .

and the husband was ordered to pay or cause to be paid to the wife maintenance during their joint lives or until further order at the rate of £150 a year less tax, payable monthly as from Jan. 18, 1943, the date of the decree absolute. There are one or two things to be noticed about that order. First of all, by directing that £150 should be paid to the wife out of the income of the settlement, the discretion of the trustees was to that extent taken away from them. I do not find it necessary to enquire what the jurisdiction of the Divorce Division may be to deal in that way with a discretionary trust. I only venture to point out that, where there is a discretionary trust under which a variety of persons are potential beneficiaries and will become actual beneficiaries according as the trustees exercise their discretion, the result of taking away the trustees' discretion is necessarily to cut out those potential beneficiaries to the extent of the order from the possibility of enjoying benefits under the trust at the trustees' discretion. I will assume, however, for the purposes of this case, that the order was properly made, and I express no opinion as to whether or not the court had jurisdiction to make it.

The next point to notice about the order is that the only respects in which it varied the settlement were two : (i) by directing payment of the £150 to the wife—that affected income ; and (ii) by extinguishing the husband's power to appoint capital to his children by any wife. Subject to that, the settlement remained in force ; the discretion of the trustees remained unimpaired. That continued to be the position : they retained their power to exercise their discretion in regard to income to the extent of the whole of the income with the exception of the £150 mentioned in the order. The order for payment of £150 by the husband to the wife was quite clearly made upon the view that the husband would continue to receive from the trustees, if not the entire balance of the trust income, at any rate a substantial part of it, because otherwise the figures of his earned income and his allowance would appear to have made the sum allowed an excessive one. It is to be observed that in the report of the registrar this passage occurs :

> It therefore appears to me that this annual income of £502 [that is, the trust income] should at present be considered to be the husband's income . . . I am also submitting that for the present no order be made against the husband for the maintenance of the child—provided that the court can assure that the trustees in the exercise of their discretion will provide such maintenance out of the fund. It appears to me that there is a strong presumption that the trustees will pay the balance of the income to the husband.

On what that presumption was founded I do not know, nor at this stage is it necessary to enquire. It may be that down to that date the trustees had been making payments to the husband.

Since that order two things have happened. The husband has been adjudicated bankrupt and has received his discharge. The wife has re-married to an officer in the Armed Forces. The effect of that re-marriage was, of course, to terminate her right to receive the £150 out of the settled income because the order for that payment contained the words "*dum sola et casta.*" Her income has, accordingly, been reduced to that extent but her position has been improved by her re-marriage.

The application out of which this appeal arises was an application by the husband for an order that the order for maintenance should be discharged or modified by reduction to a nominal sum as from Dec. 22, 1943. The application was dated May 11, 1944. The grounds on which the application was made were these. The husband had suffered from a very severe illness and had to undergo a most severe operation. He had had to give up his employment for a long time, and, on the medical evidence which was before the court, it would be months before he would be fit to work again. The result of that was that his earned income of £6 a week, or £312 a year, came to an end. His income, therefore, at this date, consisted of the £150 allowance that was still being made to him by his great aunt. With regard to the settlement, the position, according to para. 6 of the husband's affidavit, sworn on May 11, 1944, was as follows:

> As regards the settlement funds the trustees have informed me that I shall receive no payment therefrom for a very considerable time as they have been allocated for the maintenance and benefit of my son, payment of medical fees and expenses and for my costs and disbursements of the divorce proceedings estimated at £1,500 . . . The child of our marriage is being maintained by the trustees of the settlement who pay the petitioner the net sum of £75 per annum for this purpose.

It appears, therefore, from that paragraph that the trustees, in the exercise of their discretion (which, as I have already pointed out, remains unimpaired by any order of the court and now extends, since the re-marriage of the wife, to the whole of the trust income) have determined for some indefinite period not to pay anything to the husband. That is an exercise of their discretion of which nobody can complain and with which no court would interfere.

Those were the facts which were before the registrar when the husband's application came before him, and he ordered that the maintenance as from July 4, 1944, the date of the order, should be reduced to the nominal sum of 1*s.* a month. Barnard, J., on appeal to him, varied that order and allowed maintenance of £100 a year less tax. That figure, when considered in relation to the income of the husband, means that a man with no income except a voluntary allowance of £150 is being ordered to pay £100 of that to his late wife who has now re-married. He has £50 left on which to live. That immediately invites the inquiry: How did it come about that the judge, in the exercise of his discretion, thought it right to make that order? It is perfectly true, of course, that these orders are discretionary, and it is only when sufficient circumstances appear that this court will interfere with the exercise of that discretion. But the mere facts here are very striking and, as I say, suggest an inquiry as to the principle upon which the judge acted. It appears that the wife's costs of the divorce proceedings have not been paid. A proof was put in in the bankruptcy of the husband. Whether any and what dividend was paid upon it I do not know, but in any event there still remains owing by the wife to her solicitors a substantial sum for costs; and it is fairly plain from what we have been told that the wife really wants to get this money in order that she may pay her solicitors. I do not allow my mind to be influenced by that circumstance because there is another and much more serious aspect of this case, as it seems to me, and it is this. Counsel for the wife informed the court that the basis of the judge's decision was this. He appreciated that, by taking £100 out of the voluntary allowance of £150 the result would be that only £50 would be left. But he took the view that, if he made an order of this kind, the effect would be to bring pressure upon the trustees to make to the husband an allowance out of the settlement income. If that was the object of this order—and I have difficulty in seeing what other justification for the order could be suggested—in my opinion, it was quite wrong in principle. Trustees who have a discretion are bound to exercise that discretion, and, if they do so, nobody can interfere with it. In my opinion, there is no jurisdiction in the Divorce Court to make an order which will leave the husband in a state of starvation with a view to putting pressure on trustees to exercise their discretion in a way in which they would not have exercised it but for that pressure. Under discretionary trusts (as, indeed, under this trust), other persons are potential beneficiaries. In many such trusts the range of potential beneficiaries is a very wide one. Here it extends to any future wife that the husband may marry and the children of any future marriage. The settlement has not been varied in that respect. On what ground should pressure be put upon the trustees to exercise their discretion in such a way as to pay to the husband, in order that he may pay maintenance to his wife, sums which, in their discretion, they would not otherwise have paid to him ? It seems to me to be just as bad as would be the case in the example which MACKINNON, L.J., put in the course of the argument—the case of a man whose own means are comparatively small being ordered to pay a sum far in excess of what he could be ordered to pay out of those means merely with a view to putting pressure on a rich relation to support him. That is not the scope of sect. 190 of the Act. What has to be looked at is the means of the husband, and "means" means what he is in fact getting or can fairly be assumed to be likely to get. It is, of course, legitimate (as was done in this case) to treat a voluntary allowance as something which the court can, in proper circumstances, infer will be likely to continue and make an order upon that basis. If and when the allowance is cut off, the husband can come back and apply to have the order modified. Similarly, in the case of a discretionary trust, if the court finds that the husband is in fact being made regular payments under such a trust, the court is perfectly entitled to make an order on the footing that those payments will in all probability continue, leaving it to the husband to come back to the court if at some future date they are stopped. In this case, however, the trustees have exercised their discretion and under that exercise of their discretion, the husband will not get one penny—a thing which very frequently happens under these discretionary trusts. Trustees, for very good reasons, often do not give money to the husband ; it is the commonest occurrence. The only object of this order, as we are told, was to induce the trustees to change their decision as to the proper disposition and administration of this trust income. The trustees, if they were well advised, would say : "We have exercised our discretion and we refuse to change it. If and when circumstances alter we shall take those circumstances into account and exercise our discretion in a way suitable to the circumstances as we see them." If they do that, the husband is going to be left with a voluntary allowance of £150 out of which he has to pay £100 to his wife, who has re-married.

In my opinion, the practice, if it be a practice, indirectly to put pressure on trustees in this sort of way to commit a breach of their duty and to exercise their discretion in a way in which they do not wish to exercise it, is wrong. I say nothing as to the jurisdiction of the court to make variation orders in the matter of discretionary trusts. I will assume that such orders can properly be made. If that be the case, on an application to vary a settlement the difficulty can perfectly well be avoided by varying the settlement so as to make a sum payable to the husband and then treating that sum properly as part of his income and making an order for maintenance on the basis that it does form part of his income. Nothing of the kind has been done here : the discretion of the trustees has not been affected. The result is that they are bound by law to exercise their discretion properly, and it is not right that the court should endeavour to put pressure upon them by making an order so stringent against the husband that he will have only £50 left upon which to live.

The result is that the appeal should be allowed and the order of the registrar restored.

There is one matter, however, which I think I should mention. I have already pointed out that if, when an application of this kind comes before the court, it is found that the husband is enjoying, either in meal or in malt, benefits which can fairly be regarded as forming part of his normal income—if, for instance, he is being paid a sum of money out of the income or if the trustees are paying his tailor's bills or his butcher's bills – the court would be perfectly justified in saying : "This allowance has been *de facto* enjoyed by the husband ; there is nothing to suggest it will not be continued, and we shall assume until circumstances change that that is part of his income and we shall bear that in mind in settling the amount of the maintenance." That being so, the wife would be entitled, if she discovered that such payments were at some future date being made, to come back to the court. Whether she ought to have the order varied in that event must depend entirely on the circumstances as they then exist ; and, if she chooses to make an application she must, of course, make it at her own risk. In order to see that the wife is supplied with such information as will enable her to know what the husband is getting by way of benefit, counsel on behalf of the husband is prepared to undertake to furnish periodically to the wife, at six monthly intervals, a statement of all benefits (if any) which he is receiving out of the income from the trustees, stating the nature of those benefits. If he gives the wife that information she will then be in a position to decide whether or not it is worth her while to attempt to have this order varied. Nothing that I say must suggest for one moment that such A an application would be justified : whether it would be must depend on the circumstances at the time. Therefore, if on July 31 and Dec. 30 such a statement is furnished, the wife will be in a position to review her situation. Counsel for the husband is prepared to give an undertaking to that effect and it will be embodied in the order.

The result, therefore, is that the decision of the registrar will be restored, but the order of this court will be prefaced by that undertaking. B

MACKINNON, L.J. : I agree. The power of the court, after a decree of divorce, to vary settlements with the object of providing alimony was first conferred by the Matrimonial Causes Act, 1859, s. 5, which was replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. That refers in terms to nuptial settlements made "on the parties." I am inclined to think that this refers to settlements under which the late spouses—or one of C them—are *cestuis que trustent* and, therefore, entitled to call upon the trustees to account to them or him or her. A settlement by the terms of which the trustees may at their discretion use the capital or income for the benefit of persons they may select would not seem to be such a settlement merely because the spouse or spouses is or are within the class of possible beneficiaries whom the trustees in their discretion are entitled to select. But as this question has D not been fully explored in the argument before us I do not wish to be taken as expressing a definite opinion upon it.

DU PARCQ, L.J. : I also agree that the appeal should be allowed. I think one is forced to the conclusion that the judge has taken a wrong view of the powers of the court. I entirely agree with LORD GREENE, M.R., that it is wrong to make an order with a view to putting pressure upon trustees who E have a discretion. Generally speaking, it is necessary to look at what the husband has or is earning in the way of income. There is certainly this exception that, if the husband could have more in the way of income if he liked to make an effort to get it, the court will have regard to what he could have if he liked. That was the old rule of the ecclesiastical courts, and it seems to me a rule of common sense when one is now considering what order should be made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2). Dealing F with the old practice, LORD MERRIVALE, P., in *N.* v. *N.* (1), said, at p. 697 :

> The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term "faculties" [that is the term used in the old days] describes the capacity and the ability of the respondent to provide maintenance.

That, of course, is a very different thing from saying that one looks to see what G he might have if other people who have a discretion in the matter choose to exercise it in his favour. To attempt to put pressure upon trustees who have such a discretion I agree must be quite wrong.

Appeal allowed.

Solicitors : *Ralph Bond & Rutherford* (for the appellant) ; *Gordon, Dadds & Co.* (for the respondent). H

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re COCHRANE, COCHRANE AND ANOTHER *v.* TURNER AND H.M. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Uthwatt, J.), **December 7, 1944.**]

Estate Duty—Pre-nuptial settlement by husband—Provision for application of settled income to household expenses—Income used by wife for personal purposes only—Husband's acquiescence in settled income used for wife's personal purposes—Husband's life interest in settlement reserved—Customs and Inland Revenue Act, 1881 (*c.* 12), *s.* 38—*Customs and Inland Revenue Act,* 1889 (*c.* 7), *s.* 11—*Finance Act,* 1894 (*c.* 30), *ss.* 1, 2 (1) (*c*).

By a pre-nuptial settlement dated Sept. 23, 1884, the settlor settled on trust certain investments producing an income of £400 a year. The trustees were to pay the income to the wife for her life and after her death to the husband (settlor) for his life and thereafter for all the children of the husband (settlor) from any marriage. The settlement contained the provision that the income so derived was to be applied by the wife to current household expenses. The wife had no income other than that from the settlement. From 1918 to 1940 she kept two banking accounts—" A " and " B ". Into the " A " account she paid in money given to her by her husband at the rate of £3,000 a year for all current household expenses. Into the " B " account income from the settlement was paid in and used by the wife exclusively for personal purposes. The husband died on Nov. 22, 1941, and the wife six months later. It was contended by the Revenue that, on the construction of the settlement, the settlor had reserved an interest in the trust fund for his life and that, therefore, estate duty became payable in respect of the trust fund on his death. It was contended by the settlement trustees that the husband by allowing his wife to meet all household expenses out of " A " account released the moneys paid under the settlement to her personal use, thereby abandoning his interest and creating a life interest for his wife :—

HELD : (i) although by the terms of the settlement moneys received by the wife were to be used for current household expenses and were, in fact, applied to personal expenses only, the husband by his acquiescence did not abandon his rights to have the moneys applied as stipulated, had circumstances required him to do so.

(ii) since the husband had the right to require his wife to apply the income from the trust funds to any household expenses incurred by him during their joint lives, and since the husband was entitled to the whole of the settled income for the rest of his life if he survived, there was, therefore, by the settlement reserved to the husband an interest for life within the meaning of the Finance Act, 1894, ss. 1, 2 (1) (*c*), and estate duty became payable.

[**EDITORIAL NOTE.** This case concerns an unusual provision in a pre-nuptial settlement, whereby the wife's income under the settlement was applicable in payment of the household expenses. It is held that this creates a trust or charge in favour of the husband, giving him an interest in the whole income, which, taken together with the further right of the husband to the whole income for life on surviving his wife, amounts to the reservation of an interest for life within the Finance Act, 1894, s. 2. A curious feature of the case is that, to the husband's knowledge, the wife's income had never in fact been used for payment of household expenses, but this is held not to amount to a release of the husband's rights under the settlement.

AS TO SETTLEMENTS WITH RESERVATIONS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 240, 241, paras. 230, 231 ; and FOR CASES, see DIGEST, Vol. 21, pp. 13-15, Nos. 61-72.]

Cases referred to :

(1) *Gage* v. *Acton* (1699) 1 Ld. Raym. 515 ; 7 Digest 234, *760* ; *sub nom. Cage* v. *Acton*, 12 Mod. Rep. 288.

(2) *A.-G.* v. *Heywood* (1887), 19 Q.B.D. 326 ; 21 Digest 13, *63* ; 56 L.J.Q.B. 572 ; 57 L.T. 271.

(3) *A.-G.* v. *Farrell,* [1931] 1 K.B. 81 ; Digest Supp. ; 99 L.J.K.B. 605 ; 143 L.T. 639.

ADJOURNED SUMMONS taken out by the trustees to determine (1) whether estate duty was payable on a pre-nuptial settlement in which the settlor's interest for life in the settlement was reserved ; (ii) whether the settlor's acquiescence in his wife's use of settled income for purposes other than those stipulated amounted to a release of his interest under the settlement. The facts are fully set out in the judgment.

Hubert A. Rose for the plaintiffs.

Harold Lightman for the defendant.

J. H. Stamp for the Attorney-General.

UTHWATT, J.: In the year 1884, A. O. Cochrane (whom I will call "the husband") then a widower with two living children, married Adelaide Sophia Coleman (whom I will call "the wife") then a spinster of full age, and shortly before the marriage a settlement dated Sept. 23, 1884, was made between the husband of the first part, the wife of the second part and trustees of the third part. By the settlement after reciting that upon the treaty for the then intended marriage it had been agreed that certain investments (therein called "the trust fund") should be settled by the husband and that the trust fund had been transferred to the trustees, it was agreed and declared that the trustees should hold the trust fund upon trust to pay the income to the wife during her life and after her death to the husband for his life, and after the death of the survivor upon trust for all the children of the husband by any marriage who should attain 21 or being female marry, in certain proportions. Powers of maintenance and advancement were given to the trustees. The settlement then contained the following provision:

> And it is also agreed and declared that the income arising from the said trust fund to be paid by the trustees or trustee to the said Adelaide Sophia Coleman during her life shall be expended by her on current household expenses or management.

The settlement contained certain other provisions including a provision for its avoidance if the proposed marriage did not take place within 12 months.

The husband died on Nov. 22, 1941, and the wife some six months later. The Crown, arguing that as a matter of construction of the settlement the clause which I have quoted gave the husband an interest in the trust fund for his life, claims that estate duty became payable in respect of the trust fund on the death of the husband under the Finance Act, 1894, s. 2. That section so far as relevant provides that property passing on the death of the deceased shall be deemed to include (*inter alia*) property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, and as amended and re-enacted by the Finance Act, 1894, ss. 1, 2 (1) (*c*). That section as amended and re-enacted so far as material runs as follows:

> The real and personal or moveable property to be included in an account shall be property of the following descriptions, [and then] (*c*) Any property passing under any past or future settlement (including any trust whether expressed in writing or otherwise) made by any person dying after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds of sale thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof.

Before dealing with the construction of the settlement there are two matters to which it is convenient to refer.

As the law stood at the date of the marriage the operation of the pre-nuptial contractual obligation between the intended spouses was by the fact of marriage suspended during the coverture. This was the case in equity as well as at law, even though the bargain was made in contemplation of coverture (*Gaye* v. *Acton* (1)). But the validity and effect of any charge or trust in favour of the intended husband affecting the property of the intended wife a charge or trust which if it arose in this case at all arose on the making of the settlement—would not be touched by the circumstance that during coverture, the contract in which the charge had its origin remained in abeyance. Marriage did not affect pre-nuptial dispositions of property made by the intended wife.

The second matter is this. The married life lasted 57 years. The wife had no separate fortune or any source of income other than the settlement. There is no evidence that during any part of the married life any part of the wife's settlement income was applied in discharge of any household expenses. In amount that income was of the order of £400 by the year gross. The contribution that this income might make to household expenses was indeed meagre, for from the date of the marriage until practically the end of his life the husband a wealthy man, maintained a comfortable establishment. The indoor servants numbered nine and there was as well an outdoor staff. The evidence shows that since 1918 at any rate till 1940 two accounts—an " A " account and a " B " account—were kept at the bank by the wife. The " A " account was fed by the husband normally at the rate of £3,000 a year. That account was, save in one instance, used exclusively by the wife for meeting all current indoor household expenses, the outdoor expenses being discharged by the husband. To the " B " account there was paid the wife's settlement income and the moneys so paid were used by her exclusively for her personal purposes. In the year 1940 it so happened that the wife drew £970 out of the " A " account and spent it on her private purposes. On the matter coming to light the £970 was, with the consent of the husband and wife replaced out of moneys standing to the credit of the " B " account. In these circumstances I was asked to draw the inference that assuming the quoted provision had the result of creating a trust or charge in favour of the husband, the husband abandoned or released his interest. The facts may permit this inference but I do not draw it.

Direct evidence of intention to abandon or to release is absent. The provision in question is not common form and is I apprehend an unusual one and, unlike most provisions in formal settlements, reflects the mind of the settlor and not the habits of his draftsman. It never was a real provision for the household expenses of the spouses and the penniless wife's personal needs had somehow to be met. The obvious inference is that the husband would pray in aid the benefits it gave him only in case circumstances should require. There is no evidence of any occasion arising that called for a reconsideration of the position created by the provision. The husband's long acquiescence in the wife's use of the income, to my mind, merely marks the fact that there was no need for the husband to rely upon it, and does not suggest that the husband gave up his rights. His acquiescence contained no promise as to the future. The sword remained in its sheath ; it was not thrown away.

I turn now to to the construction of the provision in question. In form it is not merely an agreement but a declaration with the result, in my opinion, that a disposition of the subject matter to which the clause relates—the wife's income—as well as a contract in relation to that subject matter might well be covered. The next point is as to the parties to the bargain involved in that agreement and declaration. It is obviously a bargain by the wife and, in my opinion, it is a bargain by the wife with the husband alone. The provision is indeed patient of the construction that it is a bargain with the trustees as well as the husband but the subject matter to which the bargain is expressed—internal domestic affairs—negatives any intention that the bargain was to be enforceable by the trustees. Thirdly, in my view, the current household expenses referred to are the current household expenses of the matrimonial home—that is to say, expenses of the kind specified arising during the joint lives of the parties, whether incurred by the husband or by the wife. It is true that the income applicable to the purposes specified is not confined to income arising during joint lives but sufficient effect is given to the terms of the provision by treating income arising to the wife after the husband's death as applicable to expenses incurred during joint lives. The last question of construction of the settlement is whether a trust of the income or a charge on the income is created which enures for the benefit of the husband. It was argued on behalf of the subject that no trust or charge on the wife's income in favour of the husband was intended or created. In my view it was. Ascertained property was made applicable for a specific purpose in relief of the husband. That is sufficient to create a trust or charge in favour of the husband.

The husband's interest under the settlement can now be exactly stated. He had a right to require that any current household expenses incurred by him during the joint lives should be met out of the settlement income (the wife having the right also to apply the same income towards household expenses incurred by her) and this right extended to and gave him an interest in the whole income (cf. *Attorney-General* v. *Heywood* (2) ; *Attorney-General* v. *Farrell* (3)). Second, if he survived the wife, he was entitled to the whole income for the rest of his life. The husband's interest under the settlement can only be ascertained by taking the two rights together. That interest was as regards its duration a life interest for the life of the husband. In one way or another the interest attached to the whole settlement income during the husband's life. The possible change in its character during the husband's life is in my view immaterial. There was, therefore, by the settlement reserved to the husband an interest for life within the meaning of the statutory provision which I have quoted.

Upon this construction of the settlement it was not suggested that the trust fund did not, at the date of the husband's death—the date as at which the account called for by the old provision had to be made—fall within the description "property passing under" the settlement as used in the statutory provision. It is unnecessary for me, therefore, to express any concluded opinion on the contention of the Attorney-General that the phrase "passing under the settlement" means "regulated by the settlement" at the relevant date. I only observe that in my view he was right in drawing a distinction between the phrase occurring in the provision under consideration—"any property passing under any past or future settlement" and the phrases "any property which passes on a death" and "any property passing on a death," the usual phrases in the Finance Act, 1894—and his contention is considerably aided by a consideration of the circumstances other than the reservation of a life interest referred to in this particular provision which may bring it into operation. In my opinion, therefore, estate duty became payable on the death of the husband in respect of the trust fund.

Declaration accordingly.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Belk & Smith*, Middlesbrough (for the plaintiffs and defendant); *Solicitor, Inland Revenue* (for the Attorney-General).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

Re X——'S SETTLEMENT.

[Chancery Division (Vaisey, J), **November 13, 1944.**]

Infants and children—Wards of court in England—Father domiciled Scotsman—Divorce proceedings pending in Scotland—Father's application for leave to apply to Scottish court for custody of children—No conflict of jurisdiction—Orders complementary.

On July 28, 1944, the applicant, a Scotsman, instituted proceedings in the Court of Session for the dissolution of his marriage and for the custody of the two children of the marriage. Without his knowledge, his wife had made a settlement of £50 on the children who, by their next friend, brought an action in Jan., 1944, for the execution of the trusts of that settlement. The applicant was then informed by his wife's solicitors that the children had been made wards of the court; and in an application by summons in Sept., 1944, he asked for liberty to apply in the divorce proceedings pending in the Court of Session in Scotland for the directions of that court as to the custody, maintenance and welfare of the children. The affidavit supporting the application stated that the Scottish court might feel a difficulty in exercising its jurisdiction in view of the present proceedings:—

Held: the application could not be granted. The jurisdiction in regard to infants in need of care and protection was exercised for and on behalf of the Sovereign as *parens patriae* by the courts of England and the courts of Scotland concurrently and their orders would, therefore, be complementary and not contradictory in character.

[**EDITORIAL NOTE.** It is here held that there is concurrent jurisdiction in the English and Scottish courts, acting on behalf of the Sovereign as *parens patriae*, to make orders for the care and protection of infants. There is no question of conflict in such a case, and the court therefore refuses the application for leave to make applications in the Scottish courts, relating to the infants, as unnecessary and discourteous to the Court of Session.

As to Wards of Court, see HALSBURY, Hailsham Edn., Vol. 17, pp. 717-721, paras. 1470-1474; and for Cases, see DIGEST, Vol. 28, pp. 335-348, Nos. 2017-2188.]

Cases referred to:

(1) *Gynn* v. *Gilbard* (1860), 1 Drew. & Sm. 356; 28 Digest 337, *2044*.

(2) *Stuart* v. *Bute* (*Marquis*), *Stuart* v. *Moore* (1861), 9 H.L.Cas. 440; 28 Digest 337, *2045*; 4 L.T. 382.

(3) *Re B's Settlement, B.* v. *B.*, [1940] Ch. 54; Digest Supp.; 109 L.J.Ch. 20.

APPLICATION by adjourned summons to enable the Scottish court to exercise its jurisdiction over the custody of the applicant's children who had been made wards of court in England. The facts are fully set out in the judgment.

J. Neville Gray, K.C., and *B. S. Tatham* for the plaintiffs.

Raymond Jennings for the defendants.

VAISEY, J.: The application upon which I am now delivering my judgment was heard by me in chambers on Nov. 7 and 8. The action in which the application is made, likewise the application itself, relates exclusively to the affairs of two infants, brother and sister, the only children of their parents, the boy being aged nearly 11 years, and the girl about 9½. In accordance with the practice in such cases, the hearing was in private, but, for reasons which may appear, I have decided to state my conclusions in open court, yet so as to avoid disclosing at this stage the identity of the persons concerned.

The matter stands thus. The father and mother of the infants have unfortunately become estranged. Hitherto their differences have not to any serious extent involved the children, for whose well-being both parents would appear to be genuinely solicitous. On Dec. 26, 1943 (the parties being then already seriously at variance), the mother, without the knowledge of her husband, executed a deed of settlement, by which her solicitor and another person were constituted trustees for the two infants of a nominal sum of £50, and on Jan. 12, 1944, she caused the present action to be commenced by a writ asking for the "administration" (meaning presumably the "execution"), of the trusts of that settlement, the two infants by a next friend, who was in fact a nominee of the mother, being plaintiffs, and the two trustees of the settlement being defendants. This is, of course, the time-honoured way of giving to an infant the status of a ward of this court; (see *Gynn* v. *Gilbard* (1)), but it is to be observed that in this case no step of any kind has been taken in the action, either for the benefit of the infants or otherwise, besides and except the application with which I am now dealing. I should mention that on the day following the issue of the writ the father was informed by the mother's solicitors, and so learnt for the first time, that the children had been made wards of this court.

I pause here to say that the father is a Scotsman, and that the matrimonial domicile of the parents is undoubtedly Scottish. The paternal grandfather of the infant is, indeed, a person of considerable consequence and wealth in Scotland, possessing large estates there to which the father, and in due course the male infant, will presumably succeed. I need not enter into details. Suffice it to say that the family "belongs," speaking colloquially, to Scotland, though not so as to preclude the probable spending of considerable portions of their lives in England, in which connection I may mention the intention of the parents that the boy shall be educated at Eton.

Now, the mother was, in my judgment, perfectly entitled to institute this action, which may well prove useful hereafter, as enabling either parent at any time and without delay to have recourse to this court whenever its assistance is needed, or may properly be invoked, for the protection or benefit of its wards. It is, however, extremely regrettable that she took that step without any previous discussion with, or notice to, the father, thereby inevitably creating an impression that she was merely making a tactical move.

On July 28, 1944, the father instituted an action in the Court of Session in Scotland, seeking, first, the dissolution of his marriage on the ground of his wife's alleged adultery and, secondly, asking for the custody of the infants "with leave to either party to apply to the court thereanent down to" a specified date, which is, in fact, the sixteenth birthday of the younger infant. This second ground of relief is, of course, to some extent connected with the first ground, but it is a mere truism to say that it rests and depends upon an issue which is essentially different, namely, the issue of what is to the best advantage and most conducive to the true welfare of the infants themselves (see the Guardianship of Infants Act, 1925, s. 1, which applies to Scotland equally with England). The condescendence in the action, after allegations relevant to the matter of the divorce, proceeds to set out some of the father's ideas and wishes on the subject of the children's upbringing. It refers to the pendency of the present action, and then reads as follows :

> About the end of March, 1944, the pursuer [that is, of course, the father] ascertained that, in view of the proceedings in the Chancery Court, it was impossible for the children to leave or be taken from England to Scotland without the permission of the Chancery Court. He believes and avers that it is not in the best interests of the children that they should be precluded from visiting Scotland either of their own free will or in accordance with his wishes.

Now, with all respect to the pleader, this is hardly a fair representation of any situation that is in the least degree likely to arise in such a case as this. There is not, so far as I can see, the slightest chance of the children being precluded from visiting Scotland, and as to the requirement of this court's permission, the circumstances are such that this court might well give a general permission for them to move freely between England and Scotland, and the innuendo, if such it be, of the pleading, that this court would somehow be prejudiced in favour of their remaining in England and be likely to obstruct their visiting Scotland, is utterly and completely baseless. However, the father goes on :

> He accordingly desires, in the whole circumstances, that the custody of the children should be awarded to him in this action.

That is, in the action in the Court of Session, which, as I understand, is likely to come on for hearing at an early date, and I think I was told that it had been kept back to await the result of the present application, the nature of which I must now explain.

The application was made by a summons in the action issued on Sept. 8, 1944, the father being the applicant. It asks for the following relief :

> (i) That the applicant may be at liberty to apply in proceedings now pending in the Court of Session in Scotland for the dissolution of his marriage and for directions of such court in relation to the maintenance, education and welfare of the infant plaintiffs, and that the applicant may be at liberty to carry into effect any directions which such court may think fit to give in relation to the matters before it. (ii) Or that such other order may be made in the premises as to this honourable court may seem meet.

Now, it certainly seems rather strange that a domiciled Scotsman should come and ask my leave to make an application in the courts of his own country, and still more so when the application which he asks my leave to make is one which he has made already. At the hearing, the applicant, by his counsel, suggested an alternative form by which, to put it shortly, I am asked to give to each parent permission to make applications in relation to the infants in Scotland, whether in the proceedings there pending or otherwise, notwithstanding the pendency of the present proceedings in this country.

I have already adverted to a passage in the father's condescendence, for the expressions in which the pleader is no doubt primarily responsible, but the father himself in the affidavit sworn by him in support of his application makes certain statements to which I think it is necessary for me to make some reference. He says :

> I am advised by my Scottish solicitors and believe that the Court of Session has jurisdiction to deal with the custody, maintenance and welfare of my children in the pending divorce proceedings, but that in view of these present proceedings such court might feel a difficulty in exercising such jurisdiction.

Referring to the latter part of that statement, I must say that this kind of vague hearsay is not, in my judgment, the proper way in which to inform this court of a point of Scottish law and practice, and I do not see that I can pay any particular attention to it. I certainly do not conceive it to be any part of my duty to presume to instruct the judiciary of Scotland as to the degree or measure of the regard which ought in that country to be paid to the particular circumstances in which these infant children are placed as wards of this court. It may be that the pendency of the Scottish action places them in a somewhat similar position in the eyes of the Scottish court. Then the father further says :

> I respectfully submit that it would be for the benefit of my children that their future custody and upbringing should be dealt with by the Court of Session as the court of their domicile, rather than by this honourable court, and that the duplication of pro-

ceedings is an inconvenience and expense which cannot benefit anyone. As to that, I can only say that if this had been an application in which that issue, the issue of the *forum conveniens*, had been properly raised, which it is not, I might have had to deal with it. As it is, I say nothing whatsoever about it. I cannot, however, pass by without comment the implication that this court is likely to take less care than would the courts in Scotland to ensure that the Scottish associations of these children must be most fully and scrupulously maintained and preserved.

I do not see my way to grant to the applicant the relief which he seeks by this summons or any modified form of such relief. I am indeed not quite sure that it would not be discourteous to the courts of Scotland, at least in appearance, if I were to do so. If the father pursues his present application with regard to the custody of the children or makes any other application in Scotland concerning them, and if the courts of Scotland should think proper to make, and if they do make, any order or orders in regard to those children, then such order or those orders will, as I understand the matter, most certainly receive in the courts of this country the fullest respect and attention, in accordance with the principles laid down by the House of Lords in the case of *Stuart* v. *Bute* (2) (See also and compare *Re B's Settlement* (3).) This court has not made, it has not even been asked to make, any order whatsoever in regard to these infants. Had it done so, its order would have received a corresponding measure of respect and attention in the courts of Scotland; of that I entertain no doubt whatsoever. The care and protection of infants who, by reason of the dissensions of their parents or otherwise, are in need of care and protection is exercised for and on behalf of the Sovereign as *parens patriae* by the courts of England and the courts of Scotland concurrently, with the sole desire of seeing that this important duty is effectively discharged. Conflict between those two courts is entirely out of the question. Each acts in the manner which it considers right as occasion arises. Neither court is avid of jurisdiction, and neither court will disclaim the jurisdiction with which it is entrusted. In the present case it may—I do not say that it will, be for the benefit of the infants that orders should be made in the courts of both countries; but if so, such orders will always be complementary and not contradictory in character.

I am quite prepared to assume that the father's application was, in part at least, actuated by a desire to avoid any appearance of disrespect to this court, but the only order which I shall make on his application is that the costs of the plaintiffs, that is, the infants, and of the defendants, that is, the trustees, shall be their costs in the action. I make no order as to the costs of either the father or the mother. The attention of the courts in Scotland will, no doubt, be drawn to what I have said and, so far as I am concerned, there is no objection to the lifting in those courts of the veil of anonymity behind which, on this occasion, I have concealed the identity of the parties.

Application refused.

Solicitors: *Maples, Teesdale & Co.* (for the plaintiffs); *Gordon, Dadds & Co.* (for the defendants).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

CUTLER *v.* WANDSWORTH STADIUM, LTD.

[COURT OF APPEAL (Finlay and Morton, L.JJ.), **December 11, 1944.**]

Injunction—Interim injunction—Undertaking in lieu of injunction to admit bookmaker to greyhound racing track until further order—Dissolution of injunction granted on similar terms in another action against the same defendants by Court of Appeal—Application for variation of undertaking—Application wrong in form—Betting and Lotteries Act, 1934 (c. 53), *s.* 11 (2) (*a*).

The plaintiff, a bookmaker, was granted an *ex parte* injunction restraining the defendants and their agents from excluding him from their greyhound racing track on days on which dog races were run, and also from allotting to him a pitch specially appropriated for his use. On a subsequent application, the defendants gave an undertaking to admit the plaintiff to their track until the trial of the action or until further order. Later, in a similar action by another bookmaker, the Court of Appeal held that an injunction granted against the defendants in terms analogous to their undertaking in this action was too wide having regard to the Betting and Lotteries Act, 1934, s. 11 (2) (*a*), which provides that the occupier of a licensed track should not, so long as a totalisator is being lawfully operated on a track, exclude any person from the track by reason only that he proposed to carry on bookmaking on the track. The defendants then applied for a variation of their undertaking contending that the judgment of the Court of Appeal A in the similar case made it plain that the terms of their undertaking were far too wide and that no further steps in the action itself had been taken :—

HELD : the application for variation of the undertaking was wrong in form, and even if it were to be treated as an application for release from the undertaking, it must be supported by proper evidence. Neither the effluxion of time nor the judgment of the Court of Appeal in another action concerning the dissolution of an injunction framed in similar terms were B matters to be relied upon.

[**EDITORIAL NOTE.** This is an interesting decision on the nature of undertakings. It is held that an undertaking in lieu of an injunction is given voluntarily, by a litigant, and an application to vary it is misconceived. The only way in which it can be varied is by an application for release, followed by the giving of a fresh undertaking in different terms.

AS TO THE EFFECT OF AN UNDERTAKING, see HALSBURY, Hailsham Edn., Vol. 18, C p. 126, paras. 186, 187 ; and FOR CASES, see DIGEST, Vol. 28, pp. 520, 521, Nos. 1268-1281.]

APPEAL from an order of CASSELS, J., dated Dec. 1, 1944, refusing an application to vary an undertaking in lieu of an interim injunction given by the defendants in the action. The relevant facts and arguments are set out in the judgment of MORTON, L.J. D

R. T. Paget for the appellants (defendants).

P. M. O'Connor for the respondent (plaintiff).

MORTON, L.J. : This is an appeal from an order of CASSELS, J. It was an order made upon an application by the defendants in the action, the Wandsworth Stadium, Ltd., in the following terms that a certain undertaking already given by the defendants be varied by omitting the words " to admit the plaintiff " and substituting therefor " not to exclude the plaintiff from their track by E reason only that the plaintiff proposes to carry on bookmaking on the track."

The history of the case, so far as it can be stated, is as follows : Two actions were brought against the defendants. Each of them was brought by a bookmaker. The first action, and this is the action by reason of which this appeal comes on, was an action by one Cutler, and the second action was an action by one Pearson. Proceeding with the history of Cutler's F action, he applied for an *ex parte* injunction to PILCHER, J., who granted injunctions, substantially, we are told, though we have not seen the order, in the terms asked for. Para. 5 of the writ claimed an injunction restraining the defendants and any person acting on their behalf from excluding the plaintiff from the greyhound racing track of the defendants on days on which dog races are run. Para. 7 claimed an injunction restraining the defendants and anyone on their behalf from allotting or attempting to allot to the plaintiff a pitch G specially appropriated for the use of the plaintiff. The matter subsequently came before OLIVER, J., on June 6, 1944, and upon that occasion the defendants gave an undertaking in the following terms :

> The defendants, Wandsworth Stadium Limited, and their agents and servants undertaking to admit the plaintiff to the Wandsworth Stadium until trial of the action or until further order.

It is obvious that that undertaking was given in very wide terms indeed, and H it occurs to one that the giving of such an undertaking might make it difficult for the defendants in certain circumstances to maintain order in their stadium. However, the undertaking was given.

An application by the plaintiff, Pearson, in the other action also came before OLIVER, J., and that was ultimately heard on June 29, 1944, and OLIVER, J., dissolved the injunction granted by PILCHER, J., in part, but he continued the injunction granted by PILCHER, J., which in effect restrained the defendants from excluding Pearson from their track on dog racing days. From that order, again in the action by Pearson, there was an appeal to the Court of Appeal and the Court of Appeal, we are told—and the judgment has been read to us—thought that the injunction was granted in terms which were far too wide. Reference was made to the Betting and Lotteries Act, 1934, s. 11 (2) (*a*), which is as follows:

> The occupier of a licensed track (*a*) shall not, so long as a totalisator is being lawfully operated on a track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track . . .

The Court of Appeal drew attention to the very marked difference between the wide injunction which had been granted by Pilcher, J., and the limited terms of the subsection which I have just read and dissolved the injunction granted by Oliver, J.

The defendants in the action by Cutler applied to have the undertaking which they had already given varied. That application was refused by Cassels, J., and it is said before us today on appeal that he was wrong in so refusing. It is said, although no evidence has been filed by the defendants on this application, that the undertaking which they have given ought to be varied by the court on two grounds. First of all, it is suggested that the judgment of the Court of Appeal in the Pearson case has made it plain that the undertaking given was in too wide terms. Secondly, it is said that time has elapsed. The statement of claim in the action was delivered on July 31, 1944, and it is said that no further step has been taken in the action. That has not been put in evidence and there are no documents suggesting that either party has applied to the court in the action.

In my judgment, the order of Cassels, J., was right. In the first place, the court does not vary an undertaking given by a litigant. If the litigant has given an undertaking and desires to be released from that undertaking, the application should be an application for release, and an application supported by evidence showing why the litigant should be released from the undertaking which he has given. The undertaking in this case was given until the trial of the action or further order and an order of the court was, of course, necessary before the giver of the undertaking could be released. Litigants are not ordered to give these undertakings; they choose to give them, and an application to have an undertaking already given varied is wholly wrong in form. For that reason alone, the decision of Cassels, J., was, in my judgment, perfectly right. But I may add this, that even if we were to treat the application as being in substance an application for a release from the undertaking coupled with the offer of a different undertaking, it seems to me that such an application ought to have been supported by evidence. It is not enough merely to rely on the fact of effluxion of time since the delivery of the statement of claim, nor is it enough to rely on the fact that the Court of Appeal in another action has taken the view that the injunction granted was granted in too wide terms. I do not see that these are matters which should be brought to the attention of the court, but, in my view, that would not be enough. No doubt the defendants are in an unfortunate position at the moment, and saying as I do that, in my view, this appeal should be dismissed, I do not desire in any way to prejudice any application which the defendants may think fit to make for a release from their undertaking on some future occasion.

Finlay, L.J.: I only add this, that when the order of Cassels, J., is looked at, it becomes obvious, as was right—and, indeed, hardly any argument to the contrary was addressed to us—that what was suggested was that something might be done. If proper steps are taken, the matter may come before the court again. The order of Cassels, J., was right and I agree with all Morton, L.J., has said.

Appeal dismissed with costs.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the appellants); *S. Seifert & Co.* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

NORAH READ *v.* J. LYONS & CO., LTD.

[Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.), **November 2, 3, 6, 7, December 14, 1944.**]

Negligence—Dangerous article—High explosive—No escape from premises—Bursting of high explosive shell injuring employee—Rule in Rylands v. *Fletcher.*

The appellants were operating, on behalf of the Ministry of Supply, a factory for the manufacture of high explosive shells and the respondent who was not employed by the appellants, had been directed by the Minister of Labour and National Service to work there as an inspector. In the course of her employment, the respondent was injured by the explosion of a shell. The cause of the explosion was not discovered, but there was no negligence on the part of the appellants. The respondent brought an action for damages against the appellants. The questions for the decision of the court were (i) whether, in the circumstances of the case, the respondent had a cause of action at common law, and (ii) assuming that she had, was her right to recover barred on the principle of *volenti non fit injuria.* It was contended on behalf of the respondent that the appellants were under a strict liability to the respondent since high explosives are things dangerous in themselves and the rule in *Rylands* v. *Fletcher* (1) applied although the injury to the respondent occurred on the appellants' premises and not through any escape therefrom of the dangerous thing :—

Held : the doctrine of strict liability laid down in *Rylands* v. *Fletcher* (1) does not apply to accidents incidental to the process of manufacture occurring to persons present on the premises whether as servants, invitees or licensees. Since the respondent had no cause of action at common law, the question of *volenti non fit injuria* did not arise.

Decision of Cassels, J. ([1944] 2 All E.R. 98) *reversed.*

[**EDITORIAL NOTE.** This case is of great importance for its discussion of the limits of the doctrine of *Rylands* v. *Fletcher* (1). That doctrine, as formulated by Blackburn, J., in 1866, establishes a place in modern law for what has been called the "mediaeval principle of liability," and, as expressed by Lindley, L.J., in *Green* v. *Chelsea Waterworks Co.* (11), "is not to be extended beyond the legitimate principle on which the House of Lords decided it." The argument here is that the real principle of *Rylands* v. *Fletcher* (1) is not escape from the defendants' land, but escape from the defendants' control, so that there may be liability in the case of injury resulting from non-natural user of the land to persons actually on the land. This argument the court conclusively rejects, as it was rejected by Lewis, J., in *Howard* v. *Furness Houlder, Ltd.* (15).

The important question of whether the use of land in time of war for the manufacture of explosives is a natural user does not strictly arise, in view of the rejection of the application of *Rylands* v. *Fletcher* (1), but on this point the court holds itself bound by the *Rainham* case (2), where such manufacture was held to be a non-natural user.

The second matter discussed in this case is whether there is in English law any rule of absolute liability such as is dealt with in the American "Restatement of the Law" under the heading of "Miscarriage of Ultrahazardous Activities Carefully Carried On." This the court rejects on the principal ground that the English law of torts is concerned with the "acts" of the defendant, not his "activities." The conduct of an "activity" is, strictly, neutral, importing no liability and, furthermore, any such rule would make the person carrying on the activity an insurer of every person who might be hurt.

As it is held that the respondent had no cause of action the question of the application of the doctrine of *volenti non fit injuria* to persons directed to work under the Essential Works Order became unnecessary to be decided, but all the members of the court indicate their agreement with the view expressed by Cassels, J.

As to Rule in Rylands v. Fletcher, see HALSBURY, Hailsham Edn., Vol. 24, pp. 46, 47, para. 83 ; and for Cases, see DIGEST, Vol. 36, pp. 187-199, Nos. 311-387.]

Cases referred to :

*(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg. S.C. sub nom. Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265.

*(2) *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 ; 36 Digest 192, *332* ; 90 L.J.K.B. 1252 ; 126 L.T. 70.

(3) *The Winkfield*, [1902] P. 42 ; 37 Digest 160, *45* ; 71 L.J.P. 21 ; 85 L.T. 668.

(4) *Bamford* v. *Turnley* (1862). 3 B. & S. 66 ; 36 Digest 169, *111* ; 31 L.J.Q.B. 286 ; 6 L.T. 721.

(5) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H.L. Cas. 642 ; 36 Digest 169, *115* ; 35 L.J.Q.B. 66 ; 12 L.T. 776.

(6) *Hodgkinson* v. *Ennor* (1863), 4 B. & S. 229 ; 44 Digest 38, *276* ; 2 New Rep. 272 ; 32 L.J.Q.B. 231 ; 8 L.T. 451.

(7) *Williams* v. *Groucott* (1863), 4 B. & S. 149 ; 2 Digest 218, *133* ; 2 New Rep. 419 ; 8 L.T. 458 ; *sub nom. Groucott* v. *Williams*, 32 L.J.Q.B. 237.

(8) *Baird* v. *Williamson* (1863), 15 C.B.N.S. 376 ; 34 Digest 724, *1063* ; 3 New Rep. 86 ; 33 L.J.C.P. 101 ; 9 L.T. 412.

(9) *Smith* v. *Kenrick* (1849), 7 C.B. 515 ; 36 Digest 157, *8* ; 18 L.J.C.P. 172 ; 12 L.T.O.S. 556.

(10) *May* v. *Burdett* (1846), 9 Q.B. 101 ; 2 Digest 237, *240* ; 16 L.J.Q.B. 64 ; 7 L.T.O.S. 253.

*(11) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L.T. 547 ; 38 Digest 23, *125*.

(12) *Northwestern Utilities, Ltd.* v. *London Guarantee & Accident Co., Ltd.*, [1936] A.C. 108 ; Digest Supp. ; 105 L.J.P.C. 18 ; 154 L.T. 89.

(13) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 ; 36 Digest 35, *208* ; Har. & Ruth. 243 ; 35 L.J.P.C. 184 ; 14 L.T. 484 ; *affd.* (1867), L.R. 2 C.P. 311.

(14) *Rickards* v. *Lothian*, [1913] A.C. 263 ; 36 Digest 28, *143* ; 82 L.J.P.C. 42 ; 108 L.T. 225.

*(15) *Howard* v. *Furness, Houlder Argentine Lines, Ltd., & Brown, Ltd.*, [1936] 2 All E.R. 781 ; Digest Supp.

(16) *Grayson (H. & C.)* v. *Ellerman Line, Ltd.*, [1920] A.C. 466 ; 36 Digest 116, *780* ; 89 L.J.K.B. 924 ; 123 L.T. 65.

*(17) *Honeywill & Stein, Ltd.* v. *Larkin Bros.* (*London's Commercial Photographers*), *Ltd.*, [1934] 1 K.B. 191 ; Digest Supp. ; 103 L.J.K.B. 74 ; 150 L.T. 71.

(18) *Quinn* v. *Leathem*, [1901] A.C. 495 ; 30 Digest 183, *504* ; 70 L.J.P.C. 76 ; 85 L.T. 289.

(19) *Ponting* v. *Noakes*, [1894] 2 Q.B. 281 ; 2 Digest 65, *415* ; 63 L.J.Q.B. 549 ; 70 L.T. 842.

(20) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1 ; Digest Supp.

(21) *Aldham* v. *United Dairies* (*London*), *Ltd.*, [1940] 1 K.B. 507 ; [1939] 4 All E.R. 522 ; Digest Supp. ; 109 L.J.K.B. 323 ; 162 L.T. 71.

APPEAL by the defendants from a decision of CASSELS, J., reported [1944] 2 All E.R., at p. 98. The facts are fully set out in the judgment of SCOTT, L.J.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Valentine Holmes* for the appellants.

Gilbert J. Paull, K.C., and *J. H. C. Goldie* for the respondent.

SCOTT, L.J.: This case is elemental. It goes to the roots of the common law. It has been well argued on first principles by counsel for the plaintiff (who got judgment below from CASSELS, J., and is, therefore, respondent before us), and it cannot be decided without considering first principles, and to some extent looking into the historic origins and development of our law of torts. That consideration is both due to him and also necessary for our decision, although the main argument for the Crown was based on the scope of *Rylands* v. *Fletcher* (1) and more recent decisions.

The respondent was injured by the explosion of a shell in a shell-filling factory which was being operated by the appellant company on behalf of the Ministry of Supply. She was not a servant of the appellants, but was lawfully present as an inspector appointed and paid by the Ministry of Supply. The appellants were not guilty of any negligence, but CASSELS, J., gave her £575 2*s.* 8*d.* damages. There were below, and still are, two issues: (i) whether in the circumstances of the case the respondent had a cause of action at common law; and (ii) assuming that she had, was her right to recover barred on the principle of the maxim *volenti non fit injuria*? I will deal with the first and main question first. The action is not expressed as an ordinary action of negligence. Negligence is not alleged in the statement of claim. The defendants are alleged to have been "occupiers" of the factory and to have known that explosive shells are dangerous. That is all. The defence denies that the defendants were "occupiers," and pleads that they were merely agents and managers of the Ministry of Supply; and it further submits that the statement of claim discloses no cause of action. In addition, the defence of *volenti non fit injuria* is pleaded. The facts are not in dispute. The appellants' position in the factory was that they were there under the terms of an agreement with the Minister of Supply dated Jan. 29, 1942, by which they were made his "agents and responsible managers" and were required to carry on the factory on his behalf and under his orders and directions. The site, factory, plant and materials were his property. The employees, though engaged by the appellants, were only "deemed to be" their employees for the purpose of the agreement. By cl. 10 (*b*) the Minister indemnified the agents against claims by third parties, such as that in the present case. The respondent's duty to the Minister was to inspect; she was in no contractual relation with, and owed no duty to, the appellants; but she was lawfully present in the factory when the shell exploded, because she was there pursuant to the Minister's orders. It was common ground below and before us that all operatives and factory staff, even though deemed to be employed by the appellants, were in fact servants of the Minister just as much as all inspectors, like the respondent, who were not even deemed to be employed by the appellants; and further, that all alike were subject to and controlled by the compulsory restrictions of the Essential Works Orders made under the Defence (General) Regulations, 1939.

The cause of the explosion remains a mystery; but it is common ground that the appellants were guilty of no negligence in the ordinary sense of that word; that is to say, neither they nor anyone acting or purporting to act on their behalf was guilty of any want of due skill, care, or foresight, by way either of commission or omission. The judge, however, held that the appellants came under a rule of "strict liability" and that the respondent was entitled to recover. There is no appeal on the amount of damages.

Before CASSELS, J., and before us, counsel on behalf of the respondent put his case on two grounds: (i) on a very far-reaching submission that a proposition formulated in RESTATEMENT OF THE LAW OF TORTS, published in recent years by the American Law Institute, truly expresses a principle of the common law of England, and that that proposition covers this case; and (ii) as an alternative to his first submission, on the ground that the case comes within the narrower principle of *Rylands* v. *Fletcher* (1). I will discuss his wider submission first. Counsel for the respondent did not rely on the book as authority in this court, but cited the proposition as expressing his own submission. Of the book I speak with the highest respect as a statement of the trend of decisions in American law; I only discuss its propositions in relation to English law. The relevant passage appears in Vol. III, p. 41, s. 519. It is worth noting that on p. 47 it is called a rule of "absolute liability," not merely of "strict liability," the appropriate term in English law, for the *Rylands* v. *Fletcher* (1) type of liability. It follows after the chapter on liability for animals, with which Vol. III begins; the whole theory of negligence proper having been disposed of in Vol. II. It runs as follows:

> ' 519. Miscarriage of Ultrahazardous Activities Carefully Carried On. Except as stated in sects. 521-524, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

Even assuming that that rule may in some circumstances be in conformity with English law (upon which for the moment I express no opinion), it is to be observed that the American Law Institute attaches to the universality of their rule certain important exceptions or qualifications. Counsel for the respondent did not refer to them, but the rule is only propounded as applying subject to those limitations. Sect. 520 runs thus:

> Definition of Ultrahazardous Activity. An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.

So far as the accident in question is concerned, the appellants' activity may fall within para. (a); but para. (b) raises the question whether during war the manufacture of munitions might not be regarded as an activity "of common usage" so as to make it an exception to the liability of "ultrahazardous activities" predicated by sect. 519. A further qualification is made by sect. 521:

> Ultrahazardous Activity Carried on in Pursuance of a Public Duty. The rule stated in sect. 519 does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

That exception at once raises the question whether a munitions factory carried on, as this one was, by a company as agent for the Minister of Munitions during war, pursuant to the Minister's directions, and under Government licence (cl. 10 (*a*) of the agreement), is not taken wholly out of the primary rule contained in sect. 519, even assuming that section to be, as counsel for the respondent contends, a correct statement of a general principle of English common law. In that context the American comment following sect. 521 is of interest. It is as follows:

> *a.* A public official a part of whose duties is to make or store high explosives in large quantities is not subject to the absolute liability imposed by the rule stated in sect. 519. Therefore, he is not liable unless he is negligent in the manufacture or custody of the explosives or has selected a place for storing them which makes their storage unnecessarily dangerous in the event of an explosion.

I cannot suppose that counsel for the respondent is seeking to rely on the main rule without accepting its limitations, for the limitations are essential features, and, indeed, where applicable, conditions of the rule itself. Assuming the Restatement to be a correct exposition of American law, an American court would, in my opinion, clearly decide the present appeal in favour of the appellants on the ground that, if they were in fact carrying on "the ultrahazardous activity," they were doing so solely "in pursuance of a public duty imposed" on the company "as a public officer." Whether in war-time munition-making would in the U.S.A. be adjudged a "matter of common usage" within sect. 520 I know not; and whether it ought in law so to be treated in England I postpone for the moment, as a somewhat similar question arises in regard to one of the rules in *Rylands* v. *Fletcher* (1) if that case, contrary to the contention of the Crown, is susceptible of application to the present case.

I confess to judicial sympathy with the endeavour of counsel for the respondent to bring under one generic principle some of the rather heterogeneous torts with which English legal history has presented us later-day lawyers. For the same reason my first reaction was to be critical of three contentions put forward for the Crown: (i) that the principle underlying the strict liability imposed by our common law in the three types of cases about animals is different in each of the three types; (ii) that the principle of *Rylands* v. *Fletcher* (1) is different from all the first three, in that it only arises where the water or filth escapes from the defendant's land and does damage outside it; and (iii) that nuisances of smoke and smells have no generic similarity to the other types. Historic differences in the forms of action, which gave birth to the various rights, have undoubtedly left a legacy of differences in the substantive law of to-day; but none the less there may be some element of unifying principle common to all the above torts, whether the original form was trespass, trespass on the case, case, or nuisance; although it does not by any means follow that that unifying element would entitle the plaintiff, in such a case as the present, to succeed merely by bringing herself within any one principle of law underlying all the specific causes of action to which I have referred. That there is one such unifying element in all torts was, I think, established by the illuminating analysis of O. W. Holmes, The Common Law, Lectures III and IV, published in 1881; but that element falls far short of the comprehensive and universal rule enunciated in the American Restatement of the Law of Torts, s. 519; and it is not one which would by itself, in my opinion, give the respondent a cause of action in English law entitling her to hold her judgment in the present appeal.

I will deal first with the self-contained proposition of the American Restatement of the Law of Torts, s. 519, on which counsel for the respondent relies. My first criticism of it is that our law of torts is concerned not with activities but with acts. It is the act of the defendant which entails liability upon him for the harm happening to another, whether the act be one of commission or omission. It is not to his profession or his trade that the eye of the law looks in its search for general rules in the law of torts. I limit the observation thus, because for exceptional purposes of public policy the common law does look at professions or trades. To protect the traveller, the law imposed on the innkeeper a strict liability for the safe custody of the traveller's luggage and horses. So the custom of the realm, or, in other words, the common law, imposed a similar liability on the common carrier, and the common farrier. But in each of the above causes of action the resultant rule might be expressed in modern terminology as a term of the contract implied in law. These instances, therefore, of the regard by the law of the defendant's "activity" are not exceptions to the general axiom which I have ventured, that the law of torts is concerned not with the activity but with the act of the defendant. That the plaintiff might declare alternatively on the case or in *assumpsit* does not affect my reasoning. That it is the act of the defendant which matters is made plain throughout Holmes, The Common Law, Lectures III and IV; *e.g.*, see the bottom of p. 111:

> The standard which the defendant was bound to come up to was a standard of specific acts or admissions, with reference to the specific circumstances in which he found himself.

So it is also in the analysis of the principles of civil liability in Holdsworth, History of English Law, Vol. VIII, Book IV, ch. V, sect. 6, pp. 446-459, 464-472. Holmes himself recognised that the "ultrahazardous" attribute of an act (his word on p. 103 is "extrahazardous") is a relevant characteristic, which in certain circumstances may entail liability for the actor without any proof of conduct amounting to negligence in the common legal sense of that term. In such a case his view was that the ground of liability is that the actor ought to have foreseen the likelihood of the harm resulting; but it is the act not the activity which concerns the law. The argument of those lectures is that the theory of torts must be sought somewhere in the debatable land between the crude mediaeval rule that (subject to certain qualifications) the actor acts at his peril, and the ethical view of Austin on Jurisprudence that the liability rests entirely on moral blame. In his historical analysis Holmes examines many quite diverse torts to be found in the books, whether wearing the clothes of trespass, of nuisance, or of negligence, and even those affected by intent or malice. At pp. 102, 103 of The Common Law he says:

> But a more exact scrutiny of the early books will show that liability in general, then as later, was founded on the opinion of the tribunal that the defendant ought to have acted otherwise, or, in other words, that he was to blame . . . The principal authorities are the shooting cases, and, as shooting is an extrahazardous act, it would not be surprising if it should be held that men do it at their peril in public places. The liability has been put on the general ground of fault, however, wherever the line of necessary precaution may be drawn.

The conduct of such an "activity" as is the subject of the American Restatement of the Law of Torts, s. 519, is, in my opinion, wholly neutral; of itself it imports no liability. Apart from (i) cases of nuisance, in all of which the question of land arises, and (ii) cases where the plaintiff's rights of property or possession are infringed, whether relating to land, or to chattels, and (iii) trespass to the person (leaving aside highway accidents) I believe it to be true to say that, when the defendant does a particular act and harm results, liability arises only if the likelihood of that result to somebody ought to have been foreseen. The farmer may keep his cattle, if he does not let them cross his neighbour's boundary; the zoological gardens may keep their tiger, if they do not let it get loose; the owner of a dog which has already had its one bite may still keep it, if he does not let it bite a second person. In all of these cases the strictness of the rule of duty may be justified on the ground that the defendant was the person who had it in his power to prevent harm, and, as a prudent, reasonable man, ought to have foreseen the likelihood of harm if he let the harmful things escape from his control. If the defendant does so allow his control to lapse, it is his voluntary act, whether of commission or omission, which causes the plaintiff's damage. So the Rylands of to-day may maintain on his land his reservoir of water artificially introduced on his land, if he does not let it escape. As it was the act of the defendant for which our early law put him in peril, so it has continued in most, if not all those actions of tort, enforceable to-day, which do not depend on the moral or quasi-moral characteristics of the defendant's conduct, such as malice, intent or negligence. Other considerations arise where contract enters in, as in bailment, or the custom of the realm, as in the case of innkeepers, or common carriers. In those special relationships the law fixes upon the defendant a positive duty to keep safe the chattel entrusted to his possession by the plaintiff, and creates a cause of action for a failure, *i.e.*, for an act of omission, because there is a pre-existing duty; but the "activity" of the defendant is only relevant historically, in that it explains how the rule of law grew up. The substantive rights of action which English law recognises to-day do not justify the wide American proposition as applied to existing law; nor is light thrown on them by it. I know of no generic rule of English law which imposes on a person carrying on a dangerous activity, whether it be positively, comparatively or superlatively dangerous, a liability to all and sundry who happen to be damaged in person, chattels or land, merely because the activity was dangerous.

I believe that in every case in the books where the plaintiff has been able to recover without proof of actual negligence, there will be found some definite ground of liability over and above that of "dangerous activity." There are several reasons of principle why it would be wrong to predicate strict liability as attaching to such an "activity." (i) The rule makes the person who carries on the "activity" an insurer of every person who may be hurt thereby. It would give a right of action not only to all persons outside the premises where the activity is carried on, but also to all persons inside the premises, whether servants, or strangers coming there as invitees, or perhaps even as licensees, unless they had by contract or the doctrine of *volenti* agreed to take the risk. Common employment, be it observed, would be no defence to an action by a servant, because *ex hypothesi*, the action would not be based on the negligence of a fellow servant; and such an extension of the ambit of liability is, alone and of itself, a conclusive reason why a judicial decision adopting it would exceed the recognised limits of judicial jurisdiction to "legislate." In other words, it shows that the American proposition is not wholly consonant with English law. (ii) As that proposition purports to put the defendant under strict liability for every consequence in fact resulting from the escape of the mischievous thing, it follows that, however long the chain of causation may be in time or space, the ultimate sufferer will have his cause of action equally with the first; for the doctrine of remoteness of damage has no relevance. This does not logically disprove the supposed general principle; but it ought to make us think twice about it. (iii) There are many extrahazardous activities in civilised life—many more to-day than there were when the common law rules of strict liability took shape; but, although at the back of the judicial decisions out of which our common law gradually grew there always was the contemporaneous view of public policy in the minds of our judges, yet there has emerged no such general view of legal responsibility universally attendant upon every ultrahazardous activity. Coal mining always was, and still is even to-day with all the safeguards of modern science and statutory regulations to ensure safety, an ultrahazardous activity—on that the annual statistics of injuries are conclusive; so are the multitude of manufacturing businesses and public utilities, but there is no decision recorded in any of the common law reports, however ancient or however modern, that the conduct of any one of those extra-hazardous activities was ever thought to involve, of itself and without any other ground being present, a liability for harm incidentally caused by the activity. Nor is there any hint of any recognition by Parliament in its Coal Mines Regulation Acts, or Factory Acts, of any such liability at common law as would have existed if the wide principle formulated in Restatement of the Law of Torts, s. 519, had been English law. On the contrary, innumerable statutory duties have been imposed by Parliament as new safeguards, which would, on that hypothesis, have been merely declaratory of the common law, or at least would have been expressed differently. Perhaps a sufficient answer to the invitation of counsel for the respondent to hold that the naked proposition of sect. 519 is English law, is that the judges must leave something for Parliament still to do.

It is, however, futile to discuss the primary American proposition unless we at the same time consider the American qualifications of it. Of those, I have quoted two which are germane to, and have been discussed in connection with, the *Rylands* v. *Fletcher* (1) principle of "strict liability." The second of them I should be disposed to regard as consistent with English law, and applicable to the facts of the present case, if they are (as I incline to think) distinguishable from the facts in *Rainham Chemical Works, Ltd.* v. *Belevedere Fish Guano Co.* (2) The first is the condition that to entail such "strict liability" the ultrahazardous activity must not be a "matter of common usage": sect. 520 (b). That is akin to the second aspect of the rule in *Rylands* v. *Fletcher* (1), which received emphasis from Lord Cairns, L.C. (at p. 339), in the House of Lords, namely, that the user of the land must be "non-natural." Where to draw the dividing line between "natural" and "non-natural" may usually be easy in wild moorland or even land under agriculture ; but to draw it in an urban area, and *a fortiori* in an industrial area, would seem to me in its nature a difficult task of legal definition. The solution, however, of that problem has to-day in English law to be achieved within the limits of decided cases, and I do not think this court can properly discuss it in the present case. The topic belongs, however, to the alternative argument of counsel for the respondent. The second qualification, *i.e.*, as to the appellant company acting "in pursuance of a public duty . . . as a public officer" (sect. 521) has a direct bearing on the present appeal if it is consonant with English law. The point was not put quite in that form by counsel for the Crown, but it was involved in the plea that the appellant company was a mere agent of the Minister ; and it was certainly involved in our consideration of the argument for the respondent. If the major submission of counsel for the respondent, in terms of the American Restatement of the Law of Torts, s. 519, were held to be English law, the question would arise whether sect. 521 is a good answer to it.

The appellant company, in doing everything it did, was, in my opinion, performing a public duty. I arrive at that conclusion by considering both what its functions were and in what capacity it was acting. The governing circumstance was its relationship to the Minister of Supply, as defined by the agreement of Jan. 29, 1942 ; but regard must also be had to war-time statutory duties imposed on it and all persons working within the factory, whether for the purpose of operating the activity there carried on or for inspection, as in the case of the respondent. Taking all the facts into consideration, I should, if sect. 519 were English law, hold that the company was a "public officer" performing "a public duty," to use the American expression ; so that no liability would attach in respect of the "ultrahazardous activity." But if, as I hold, sect. 519 is not sufficiently consistent with English law to entitle the respondent to hold her judgment, it will be necessary to reconsider the applicability of the defence afforded by sect. 521 after considering her claim to hold the judgment under what is English law.

I, therefore, come to the alternative contention for the respondent, that, apart altogether from the wide American proposition about ultrahazardous activities, she is entitled to hold her judgment on the ground that it is covered by the principle of *Rylands* v. *Fletcher* (1). The argument in support of it is that it is an error to regard the duty to prevent an escape, on which the strict liability of *Rylands* v. *Fletcher* (1) rests, as limited to an escape from the defendant's land. It happened in that case, says counsel for the respondent, to be such an escape, but the real principle is escape from the defendant's control ; if that happens, he says, whether the harm is done inside or outside the defendant's land does not matter, the liability accrues. That contention, he submits, is well-founded in regard to every one of the similar causes of action grouped together in the passage of the judgment of Blackburn, J., which was expressly approved in the House of Lords. But that common feature is not enough to establish liability. It may be true that in every one there was escape from control, but it does not follow that that feature was in each case the *ratio decidendi*, or that no other concomitant fact was needed to entitle the plaintiff to judgment. Escape from control was a link in the chain of causation which ultimately led to the mischief for which the plaintiff sued ; it was thus one material fact in establishing the plaintiff's case, but that fact alone, although material as a link, was not the real ground of the defendant's liability. In every one of the torts in the group it was only, at the highest, one of the facts material to the cause of action, in the sense that without it liability would not have resulted.

His appeal to the other causes of action in the list of Blackburn, J., does not help counsel for the respondent ; therefore, they are neutral for the purpose of his argument. There is, indeed, another feature common to them all which comes much nearer to the legal reason for liability, but does not create it, namely, that the harm to the plaintiff was a probable consequence of the defendant's act, which he knew or ought to have known was likely to occur to anybody in the position of the plaintiff, and, therefore, ought to have foreseen. This feature on the one hand may often, or possibly in one sense always, be a *sine qua non* of liability in tort (for intent and malice are merely, so to speak, intensifications of that foreknowledge) ; but, on the other hand, even foreknowledge, not amounting to negligence, does not, alone and of itself, suffice in English law to create liability; some other feature is needed, such as an interference with a definite right of the plaintiff, or a failure by the defendant to discharge a positive duty to the plaintiff, a failure which may take the form either of negligence, or intent, or malice or dishonesty. It is the combination with actual or presumed foreknowledge of the probable result of other features, differing from tort to tort, which gives birth to the cause of action. This foreknowledge of the defen- A dant as a common aspect of torts was brought out with illuminating clearness over 60 years ago in O. W. HOLMES, THE COMMON LAW, Lectures III and IV, which began thus, at p. 77:

> The object of the next two lectures is to discover whether there is any common ground at the bottom of all liability in tort, and, if so, what that ground is. Supposing the attempt to succeed, it will reveal the general principle of civil liability at common law.

"The general principle" does not mean that its presence suffices to constitute B every different cause of action in tort, but that it is a common characteristic present in all torts. At pp. 79-82, HOLMES states the opposing views to which I have referred, that the actor acts at his peril (what HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. VIII, p. 446, calls "the mediaeval principle") *versus* the moral view of AUSTIN ON JURISPRUDENCE, and finds his *via media* in the duty of foresight measured by the prudent, reasonable and normal man. He C explains how his canon of the foresight of the prudent reasonable man was developed by our courts out of the competing claims of the mediaeval principle and moral culpability. At pp. 116, 117, he refers to *Rylands* v. *Fletcher* (1), and speaks, at p. 116, of the principle of *Rylands* v. *Fletcher* (1) being "derivative" from "the liability for animals" (meaning there, I think, cattle-trespass). At pp. 125, 126, he discusses the growth of law through judicial regard to "the existing average standards of the community". At p. 146, he finds his basis D of classification of torts "so far as tradition has not swerved the law from a consistent theory," "in knowledge of circumstances accompanying an act or conduct indifferent but for those circumstances." At p. 154, he discusses the strict liability attaching to animals known to be dangerous, pointing out:

> . . . there is usually no question of negligence in guarding the beast. It is enough in most, if not in all, cases, that the owner has chosen to keep it. Experience has shown that tigers and bears are alert to find means of escape, and that, if they escape, they E are very certain to do harm of a serious nature. The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community.

At p. 158, after discussing the circumstances in which liability may attach to one who rides an unruly horse and citing *Hammack* v. *White* (3) (no liability without the *scienter*), he in effect leaves open the question as to what is:

> . . . the true explanation of the rule applied to keeping tigers, or the principle of F *Rylands* v. *Fletcher* (1) . . .

The reason I have referred to HOLMES' analysis at length is not only that his research had great influence on English legal thought, and that it throws much light on the questions of principle raised by the present appeal, but that we get his mature reaction to *Rylands* v. *Fletcher* (1) decided in the House of Lords 13 years before he wrote his lectures. There is no hint that he regarded the G decision as introducing any such far-reaching innovation in our law as counsel for the respondent contends it did. HOLMES' principle does not go anywhere near to deciding this appeal, for it does not purport to be more than one ingredient in tortious liability. To complete any cause of action in any one of the list of torts grouped together by BLACKBURN, J., some further ingredient is needed over and above escape from control and over and above foreknowledge by the defendant of the likelihood of harm resulting from his act. To test my H general proposition it is necessary to consider each tort in that list separately; and I will leave *Rylands* v. *Fletcher* (1) to the last. Cattle-trespass is the simplest, for that grew up out of the idea that the defendant was a trespasser through the action of his cattle. It is so treated as late as 1868 in BULLEN & LEAKE, PRECEDENTS OF PLEADING, 3rd Edn., p. 416, last para. of notes. The gist of the action was, and is, the damage done to the plaintiff's land; for the herbage eaten is "vesture of the land," and real or corporeal property. It was the injury to the plaintiff's land for which the court gave relief and the ground of the relief was that the defendant's act was an interference with a positive right of the plaintiff, *i.e.*, his right of property. In the case of the escape of either noxious fumes or filth, there is a breach of the duty of "vicinage" as Kent's Commentaries on American Law, edited by Holmes (12th Edn., Vol. III, p. 436), adopting the nomenclature of the civil law, called the duty of a landowner to his neighbour; because there was an escape from the defendant's land, which did damage on the plaintiff's land. The view of the common law was simply that the defendant owed to the plaintiff a positive duty not to interfere with his right of property; and we should remember that, as against the trespasser or other infringer, the plaintiff's right of possession was as good as right of property, unless the defendant could set up a title in himself: see Bullen & Leake, Precedents of Pleading, 3rd Edn., pp. 415-418, and *The Winkfield* (3). In each case the infringement and the damage constituted an actionable nuisance, because it was the plaintiff's land which was damaged; I accept the definition of it at the beginning of the chapter on Nuisance in Winfield on Torts, 2nd Edn., p. 476, s. 129:

> . . . unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.

This principle is illustrated by *Bamford* v. *Turnley* (4) (fumes from brick works), *St. Helen's Smelting Co.* v. *Tipping* (5) (fumes from smelting works), and *Hodgkinson* v. *Ennor* (6) (water pollution). The decision in *Williams* v. *Groucott* (7) was also based on the principle of infringement of the plaintiff's right. A., the original owner of the surface and minerals, sold the latter to B., who made a shaft, worked out the minerals, and left the place without fencing the shaft. A's cattle fell in. Blackburn, J., said, at p. 157, that he who alters another's property from its former condition so as to make things dangerous to acquired rights is under obligation to fence the danger. In the case of dangerous animals (in either category), the liability rested, and still rests, only on a positive rule of public policy so long enforced by the courts that it is now a part of our substantive law: see my previous quotation from O. W. Holmes, The Common Law, p. 154. I have little doubt it is the practical certainty of harm which historically was the judicial basis for that liability.

I have now to examine *Rylands* v. *Fletcher* (1) itself. From my analysis of the other torts it is apparent that its cause of action resembles cattle trespass and nuisances of filth and fumes much more closely than it resembles the liability for dangerous animals. Indeed, it possesses one feature definitely common to cattle-trespass and nuisances, namely, that it is the damage to the plaintiff's land for which the action accrues. On the facts of the case itself, there was an interference with an existing proprietary right of the plaintiff, namely, his right to the enjoyment of his mine free of interference from water which would never have invaded it unless it had been artificially impounded by the defendant at a level from which, given the existence of an underground communication, it was bound to gravitate into his mine. And that is how the case is treated in Bullen & Leake, Precedents of Pleading, 3rd Edn., p. 365, which was published two years after *Rylands* v. *Fletcher* (1) was heard in the Exchequer Chamber, but probably was sent to the printer before July when *Rylands* v. *Fletcher* (1) was heard in the House of Lords. Bullen & Leake, Precedents of Pleading, p. 365, begins with a count in trespass, then passes to cases of interference with the natural right of support, and of the wrongful removal of barriers, and continues thus:

> By the owner of a mine against the owner of an adjacent mine for pumping up the water higher than the natural level, whereby it flowed into the plaintiff's mine: *Baird* v. *Williamson* (8); and see *Smith* v. *Kenrick* (9), *Fletcher* v. *Rylands* (1) . . .

In *Baird* v. *Williamson* (8) the plaintiff got judgment because the defendant had pumped the water up to a level higher than its natural level and so caused it to flow into the plaintiff's mine. In *Smith* v. *Kenrick* (9) the plaintiff failed simply because the defendant had not altered the natural flow of the water, and so had not interfered with any proprietary right of the plaintiff. It is significant that *Fletcher* v. *Rylands* (1) was quoted in that category of declarations and in no other. The fact is the more interesting that by alphabetical chance the very next page is concerned with counts for damage done by mischievous animals, and over the reference to *May* v. *Burdett* (10), the authors point out:

Negligence of the defendant in keeping the animal insecurely is no part of the cause of action, and need not be stated in the declaration.

The argument of counsel for the respondent was so well put, and is so far-reaching, that I have felt bound to give it a full investigation. For the reasons I have just given, however, I am satisfied that the principle of *Rylands* v. *Fletcher* (1) is limited, as counsel for the appellants contended, to the case where the escaping water gets out of the defendant's land, and on to the plaintiff's land and there does damage; and that escape from his control is a purely neutral fact, except evidentially as a link in the chain between first cause and last effect; it is not a feature of the defendant's conduct which of itself attracts any legal liability to the plaintiff. The vital feature in *Rylands* v. *Fletcher* (1) which gave the plaintiff his cause of action was the defendant's interference with the plaintiff's right to enjoy his land without interference by the defendant. It was just that and nothing else which distinguished the case from *Smith* v. *Kenrick* (9) and brought it into line with *Baird* v. *Williamson* (8). That characteristic of itself rendered it unnecessary in law to allege and prove negligence.

To extend the plaintiff's right of action defined in *Rylands* v. *Fletcher* (1) so as to embrace a case like the present on grounds of public policy would be beyond the power of judges; it is matter for Parliament if it is thought desirable. The law is too clearly limited to-day for such judicial legislation. I respectfully agree with the *dictum* of LINDLEY, L.J., in *Green* v. *Chelsea Waterworks Co.* (11), at p. 549, quoted by LORD WRIGHT in *North-western Utilities, Ltd.* v. *London Guarantee & Accident Co.* (12), at p. 119:

> "That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision."

It is not necessary to discuss the many cases cited to us on both sides, although I have considered all of them with care. The classification of cases of strict liability in WINFIELD ON TORTS seems to me logically admirable. I would only add two comments. I feel doubt as to whether the law about "Dangerous Operations," pp. 637, 638, has been sufficiently developed to constitute a clear class by itself; the two cases there included do not, in my opinion, throw light on the present appeal. A difference in the degree of care required in fact, in different circumstances, from the prudent, reasonable man is not a difference of kind in law. I mention this point, because those cases were pressed upon us by counsel for the respondent. The present case is nearer to WINFIELD'S heading of "Dangerous Structures," the principle of *Indermaur* v. *Dames* (13); though there may be a question whether the appellants were "occupiers" within the meaning of that rule. It is common ground, however, that, whatever the degree of care needed, there was no such want of care in the present case as would attract liability to the appellant company under that rule of law. Even on the assumption (which I do not accept) that the appellant company were potential tortfeasors, I should still feel doubts about their liability because of the second of the defences stated in the American RESTATEMENT OF THE LAW OF TORT (*i.e.*, that the main rule does not apply to a person performing a public duty as a public officer). I should have been disposed to think that that defence would have applied, on the exceptional facts of this case, to prevent a cause of action arising, but for the fact that Sir John Simon, K.C., put a similar point in the forefront of his argument for the defendants in *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.* (2), at p. 467, without evoking from the House any support for his submission. If it were necessary it might be possible to distinguish the facts in the present case from those in the *Rainham* case (2); the present case seems to me more favourable to the defendants. But it is not necessary to discuss the applicability of that rule here, and I express no opinion.

Finally, there is the extremely important question, looming large in the future, which is relevant to the present appeal but not for this court to discuss, as to what are the limits of the rule about "non-natural user" of land. In the *Rainham* case (2), on the facts there, the House treated the manufacturing of explosives as undoubtedly a "non-natural user" and I do not think we ought to try to distinguish the facts in the present case. In *Rickards* v. *Lothian* (14), at p. 280, LORD MOULTON, delivering the judgment of the Judicial Committee, said :

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

It is the last line which seems to me to indicate a possibility of a practical approach to a better definition of user than the word "non-natural," or any of the other epithets that have been used, with due regard to the changes in the character of industrial and other operations since 1868.

In the result, I hold that the particular doctrine of strict liability laid down in *Rylands* v. *Fletcher* (1) has no application to accidents incidental to the process of manufacture occurring to persons present on the premises whether as servants, or as invitees or licensees. The consideration that the liability would attach to all servants without the possibility of the employer pleading the defence of common employment is very important, because it would make them absolute insurers in such a case as the present.

On the second issue, that of *volenti non fit injuria*, I decide nothing as, in my opinion, the respondent had no cause of action ; but I doubt the applicability of that defence to persons under the regime of the Essential Works Order.

The appeal must be allowed with costs here and below.

MACKINNON, L.J. : The respondent, having been injured owing to the explosion of a shell within the factory managed by the appellants, claims to recover damages from the appellants, though that explosion occurred without any negligence on the part of the appellants or their servants. Whether she can so recover depends upon the answer to three questions : (i) whether the respondent can assert that the appellants are liable under the principle laid down in *Rylands* v. *Fletcher* (1), (ii) whether the use of the factory by the appellants was a non-natural user of the land on which the factory stood within the enunciation of the principle of *Rylands* v. *Fletcher* (1) in the House of Lords, (iii) whether, if the respondent would otherwise be entitled to recover, she is debarred by the operation of the principle embodied in the maxim *volenti non fit injuria.*

Of these three questions the first is by far the most important. The second and third can, in my view, be very shortly dealt with. As to the second, in *Rainham* v. *Belevedere Co.* (2), which was a similar action against the occupants of an explosives factory, the opening argument for the appellants (on p. 467) was that in time of war the use of land for manufacturing explosives was not a "non-natural user" of the land within the principle laid down by *Fletcher* v. *Rylands* (1). LORD BUCKMASTER, at p. 471, said :

> In the present case the use . . . for the purpose of making munitions . . . was certainly not the common and ordinary use of the land . . .

The other Lords do not seem expressly to deal with the point, but they all impliedly reject this part of the appellant's argument. In my view, therefore, this second question must be answered in favour of the respondent by reason of the *Rainham* case (2) as an authority by which we are bound.

As to the third question, inasmuch as the respondent was in effect ordered to work in this factory by the Ministry of Labour, I think she cannot be held to be *volens* within the maxim *volenti non fit injuria.* It was argued for the appellants that, though she may not have been *volens* at the time when she began to work in the factory, she was subsequently offered the chance of being moved to another part of the premises, some distance away, there to do clerical work at a lower wage ; as she did not accept this offer, it was said that henceforth she must be taken to be voluntarily continuing to work in the factory with its attendant dangers. I do not think this argument should prevail. The respondent became a worker in the factory under compulsion. When she had acquired that status I do not think a subsequent incident could rid her of it, unless it was clear that the compulsion was entirely withdrawn and she re-entered employment with the appellants purely as a volunteer. If half an hour before the explosion had occurred her foreman had said : "If you like you can go home to lunch now," and she had replied : "Thank you, but I had rather wait for an hour, my lunch won't be ready if I go now," I do not think that incident would have availed the appellants, if otherwise liable for the injury to her by the explosion, to escape on the plea *volenti non fit injuria*. The incident about changing the sort of work, and the place for doing it, seems to me to be in kind of the same description. I think, therefore, that the third question also falls to be answered in favour of the respondent.

The first and main question is of far-reaching importance. There is not the least doubt that in the classic judgment of Blackburn, J., in *Fletcher* v. *Rylands* (1), at pp. 279, 280, he enunciates the principle as being that of one who, having brought on his land something which will do damage if it escapes from his land, is liable to a person who is injured in his person or property by that escape. The words "escape" and "escaping" are repeated some ten times on pp. 279, 280, and the same idea is repeated in other language: "harmless to others so long as it is confined to his own property" and "the damage which ensues if he does not succeed in confining it to his own property" (both on p. 280). When, on p. 281, he cites the analogy of a person keeping a mischievous animal, he quotes Hale's Pleas of the Crown:

> . . . [he] must at his peril keep him up safe . . . if he escape and do harm, the owner is liable to answer damages.

In *Rylands* v. *Fletcher* (1) in the House of Lords, there were apparently only two Lords present. Lord Cairns, L.C., at p. 339, seems to repeat the reasoning of Blackburn, J., perhaps with the additional qualification that the bringing upon his land by the defendant of the source of danger must be a "non-natural" user of that land. But, at p. 339, he speaks of the defendants' liability if "the water came to escape and to pass off into the close of the plaintiff." At pp. 339, 340, he repeats *in extenso* the passage in the judgment of Blackburn, J., which I referred to above as the classic exposition of the doctrine of *Rylands* v. *Fletcher* (1). There can be, in my opinion, no doubt that that doctrine, as so enunciated, was limited to the operation of the source of danger brought by a plaintiff upon his land, if it caused damage outside the limits of his land to the person or property of a neighbour. Counsel for the respondent, in his very able and exhaustive argument, has sought to convince us that this was no necessary limitation to the doctrine, and that such a defendant is equally liable to one who has suffered from the source of danger operating within the bounds of the defendant's land. There is no reported case which so decides, but counsel for the respondent says that there are cases from which such a principle can be, and ought to be, deduced. So far as I know, *Howard* v. *Furness* (15) is the only reported case in which a plaintiff has sought to rely on the proposition now advanced by counsel for the respondent. The argument was there adduced, and is in terms stated and rejected by Lewis, J., at p. 786. If we are to dismiss this appeal, I think we must say that that passage in the judgment of Lewis, J., was erroneously decided.

In the absence of any case upon the point, counsel for the respondent sought to rely, by way of argument, upon two passages from text books—a passage in a text book by a living writer, Charlesworth on Negligence, at p. 219, and a passage in the American Restatement of the Law of Torts. The former is very nearly in the words of the argument of counsel for the respondent; the question remains whether that argument is sound. As to the latter, with all respect to the authors of it, the proposition seems to me so vague and general in its terms as to be more akin to the enunciation of a moral generalisation than the precise definition of a principle of law. It is akin to the general words used by Lord Cranworth in *Rylands* v. *Fletcher* (1), at p. 341:

> . . . when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.

If that were taken literally as providing a rule of law, it is obvious that the elaborate discussion of liability in tort in innumerable cases was quite unnecessary for example, in the analysis of the duty to an invitee, a licensee, or a trespasser, as the case may be.

There remains the question whether, as counsel for the respondent argues, the implications of cases subsequently decided have made obsolete and ineffective the limitations imposed by Blackburn, J., and the House of Lords in enunciating the principle of *Rylands* v. *Fletcher* (1). I do not think it is necessary to examine all the cases cited to us. It is enough to point out that they are not in terms directed to a re-examination of the principle of *Rylands* v. *Fletcher* (1) and in some of them that case is not mentioned either in argument or judgment. Examples of this are *Grayson* v. *Ellerman* (16) and *Honeywill* v. *Larkin* (17).

It is said, however, that propositions laid down in these cases, or some of them, if applied to *Rylands* v. *Fletcher* (1) involve an extension of the principle of that case so as to do away with the limitation of "escape." This, I think, is not a legitimate use of precedent. A judge's observations in any case, perhaps in general terms, must be considered in the light of the particular facts and the particular problem with which he is confronted in the case he is deciding. They ought not to be relied on as the enunciation of general principles applicable to the facts and problems involved in other cases which he has not envisaged at all. This is a truism which is nowhere expressed more aptly than in the wise words of the Earl of Halsbury, L.C., in *Quinn* v. *Leathem* (18), at p. 506:

> . . . every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found . . . a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

It is not from any lack of appreciation or admiration of the industry and ingenuity of the argument of counsel for the respondent that I abstain from discussing in detail the cases he cited. My conclusion is that the judge was misled by that industry and ingenuity, and came to a wrong conclusion in this case, and that as a result this appeal should be allowed.

du Parcq, L.J.: The appellants in this action were in occupation of a factory at which high explosive shells were made. They managed the factory and controlled the manufacture of the shells. They admit that high explosive shells are "dangerous things." The respondent worked in the factory, though not as a servant of the appellants, and while she was there her position was that of an invitee. On an occasion when she was present in the factory a shell exploded, whereby she suffered injuries. No negligence on the part of the appellants was proved, or alleged. It is consistent with the case pleaded, and with the evidence, that they took the utmost care for the respondent's safety. There is no doubt that they were carrying on a lawful business. In these circumstances, the question has arisen whether the appellants are liable to the respondent in damages.

Pollock on Torts (14th Edn., p. 107), posed the question:

> . . . whether an action lies against me for harm resulting by inevitable accident from an act lawful in itself, and done by me in a reasonable and careful manner.

He defined "inevitable" as meaning "not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take," and said:

> It may seem to modern readers that only one solution of the problem thus stated is possible, or rather that there is no problem at all. No reason is apparent for not accepting inevitable accident as an excuse.

When the question which has been discussed so fully at the Bar was first propounded to us, there was some temptation to believe, with Sir Frederick Pollock's "modern readers," that there was no problem at all. The instances in which, although negligence cannot be alleged, an action lies for injury resulting by accident from another's lawful act are few, and by now, it may be thought, fairly well defined. There can be no doubt that a manufacturer of explosives, which he knows to be dangerous, is under a duty to take a high degree of care, but I had supposed it to be well settled that, if he fulfilled that duty, he would not be liable to any person using his premises for the consequences of an accidental explosion. We have heard, however, an ingenious and serious argument from counsel for the respondent in favour of the view that liability exists in such a case, and there is before us a carefully reasoned judgment of Cassels, J., who, at the trial, accepted the submissions of counsel for the respondent. Clearly, therefore, the question deserves full consideration and is not to be disposed of summarily.

The argument for the respondent is based on *Rylands* v. *Fletcher* (1) or, to speak more accurately, on a general proposition of which *Rylands* v. *Fletcher* (1) (in the words of counsel for the respondent) is to be regarded as "one facet." If the general proposition were accepted, the appellants would be held liable because they were engaged in "an extrahazardous activity," and because, although they took the utmost care to prevent injury to the respondent, she was in fact harmed by the miscarriage of that activity. Counsel for the respondent A did not suggest that any authority could be found which distinctly supported his wide proposition. He submitted that it followed logically from *Rylands* v. *Fletcher* (1) and that it was deducible, or very nearly deducible, from certain *dicta* to be found in other cases, particularly in some of those dealing with fierce animals. In order to appreciate the full import of the rule laid down in *Rylands* v. *Fletcher* (1), it is necessary (so runs the argument) to treat as non-essential the references which it contains to "escape" from land and to the duty of B keeping on the land things which are dangerous if they escape. The judgment of BLACKBURN, J., it is suggested, formulated, or at least adumbrated, a far more comprehensive principle than has been generally supposed.

Historians have explained that BLACKBURN, J., in his classical judgment, established a place in modern law for the application of what has been called "the mediaeval principle of liability." That principle, according to HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. VIII, p. 446:

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> . . . can be stated somewhat as follows: A man is liable for all the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. A man acts at his peril.

At p. 465, SIR WILLIAM HOLDSWORTH writes:

> In our modern law there are two main classes of cases in which the mediaeval principle D of liability is still applied. The first is the case where one man has done an act which infringes his neighbour's possession of, or right to possess, land or chattels. The second is the class of cases which, in our modern law, fall under the rule of *Fletcher* v. *Rylands* (1).

Most lawyers would agree that the courts in modern times have been vigilant to prevent the "mediaeval principle" from breaking bounds and invading areas of the law in which it has no place. The doctrine of *Rylands* v. *Fletcher* (1) is E properly to be regarded rather as an exception to the general principle that there is no liability without fault, than as itself a general rule, and it ought not to be extended readily, even if the extension appears to have a logical foundation. In *Green* v. *Chelsea Waterworks Co.* (11), at p. 549, LINDLEY, L.J., said, in 1894, with reference to a threatened encroachment which was not more formidable than that which is now being attempted:

> F If it were extended as far as strict logic might require, it would be a very oppressive decision.

A few months later *Ponting* v. *Noakes* (19) came before a divisional court consisting of CHARLES and COLLINS, JJ., and the court showed no disposition to extend the rule to cover dangerous things which had not escaped from the defendant's land. On the contrary CHARLES, J., at p. 284, insisted that *Rylands* v. *Fletcher* (1) only referred:

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> . . . to the escape from a defendant's land of something which he has brought there, and which is likely to do mischief if it escapes.

(See also per COLLINS, J., at p. 287). There is no instance recorded in the reports of any challenge, either successful or unsuccessful, to the interpretation put upon the rule in *Ponting* v. *Noakes* (19), until, as recently as 1936, that interpretation was reaffirmed and adopted by LEWIS, J., in *Howard* v. *Furness* H *Houlder, Ltd.* (15). Moreover, if the principle for which counsel for the respondent contends is indeed part of the law of England, it would seem to have been unaccountably overlooked in many cases: see, for instance, *H. & C. Grayson* v. *Ellerman Line* (16). It is true that in one respect the doctrine may be said to have been extended, since it has been held to apply not only as between adjacent landowners, but also between parties who have no estate or interest in the soil but only a licence to enjoy the use of it, for example, by laying cables or underground mains. But this extension is not material to the present case, and in general the scope of the rule has been restricted rather than enlarged, so that in

1928 SCRUTTON, L.J., went so far as to say in *St. Anne's Well Brewery Co.* v. *Roberts* (20), at p. 6 :

> . . . there are so many exceptions to it that it is doubtful whether there is much of the rule left.

The statement of the rule in SALMOND ON TORTS (9th Edn., p. 572), which SCRUTTON, L.J., then said to be accurate, accords with that in *Ponting* v. *Noakes* (19), and leaves no doubt as to its limited application.

Counsel for the respondent, recognising the difficulty of bringing this case within the principle laid down in *Rylands* v. *Fletcher* (1), put forward the suggestion, to which I have already alluded, that *Rylands* v. *Fletcher* (1) was but " one facet " of the wider proposition which he invoked. This is metaphorical language, and it is perhaps permissible to say, adopting the metaphor, that it would be rash to infer the existence of an invisible gem when all that is revealed to us is a fragment alleged to be one of its facets. If we leave aside metaphor, the question is whether the proposition of counsel for the respondent can be established by logical deduction from *Ryland* v. *Fletcher* (1), and is borne out by the *dicta* which he cited.

The appeal to logic, against which we have the warning of LINDLEY, L.J., in *Green* v. *Chelsea Waterworks Co.* (11), to be on our guard, in my opinion wholly fails. It is, to my mind, plain that BLACKBURN, J., in the passage (at pp. 279, 280) which was approved in the House of Lords and is so frequently cited, was not purporting to compile a representative list of " extrahazardous " activities. It is not " extrahazardous " to keep cows, or to maintain a privy or even a reservoir. BLACKBURN, J., was dealing, as he said, with things which are harmless to others, so long as they are confined to a man's own property, and was not considering at all the rights of those who have entered upon premises on which there are dangerous chattels. But, it is said, the judgment went on to deal with animals *ferae naturae*, and a man who keeps a wild beast is liable for injuries which it causes to a person on his land. That is true, but not, I think, much to the point. Indeed, the argument which counsel for the respondent founds on the authorities dealing with ferocious animals needs only to be stated baldly in order that the fallacy which underlies it may become apparent. Reduced to simple terms, it is as follows : he who permits cattle, or sewage, or artificially retained water to escape from his land is liable for damage which is the natural consequence of the escape, though no negligence be proved against him. He is similarly liable if ferocious animals escape from his land, and, in the case of such animals, is held liable, without proof of negligence, for damage which they may cause to another while they are still on his land. Therefore, it is concluded, he must be similarly liable for damage done by those other things, which are dangerous if they escape, even though they have not escaped but remain on his land. This argument is plainly fallacious. It depends for any validity it may seem to possess on the hypothesis, which certainly cannot be maintained, that precisely the same rules are to be applied to straying cattle dangerous only because of their natural inclination to eat grass, to escaping water, and to wild animals. The truth is that, when injury is caused by a ferocious animal to a person who has entered upon the land occupied by its owner, it is not, strictly speaking, appropriate, and certainly not necessary, to invoke the rule in *Rylands* v. *Fletcher* (1) at all. POLLOCK ON TORTS (14th Edn., p. 398), says that the responsibility of owners of dangerous animals is " closely connected with " the doctrine of *Rylands* v. *Fletcher* (1). This is true in the sense that they are both cases in which negligence need not be alleged, but historically their origins are known to be different, and it is not to be assumed that they are in all respects identical. It is, indeed, demonstrable that they are not. (See WINFIELD ON TORTS, 2nd Edn., pp. 568, 569, to which we were referred by counsel for the appellants). There may be *Rylands* v. *Fletcher* liability without any lack of ordinary prudence on the part of the defendant, but it is difficult to say the same when liability depends on the fact that a dangerous animal has been left at large. In the latter case it is, I think, more accurate to speak of presumed negligence than to say that the defendant is liable notwithstanding the fact that he has shown due care. For, except in a case of *vis major*, or of the wrongful act of a third party, or where the injured person has been careless for his own safety, the very fact that the fierce animal has been at liberty to injure the plaintiff may well be considered to raise an irrebuttable presumption of negligence. As SIR WILFRID GREENE, M.R., pointed out in *Aldham* v. *United Dairies* (*London*), *Ltd.* (21), at p. 511 ([1939] 4 All E.R., at p. 525):

> In dealing with questions relating to animals it must be borne in mind that an animal is capable of spontaneous action.

Dicta collected from cases in which such questions were being considered ought in my judgment to be regarded with extreme caution when one is dealing with inanimate objects and when the liability which it is sought to establish is wholly independent of negligence or fault of any kind. I do not think that any help is to be obtained from them in this case.

Outside the cases about animals, the strongest *dictum* which counsel for the respondent could cite was that in *Honeywill & Stein, Ltd.* v. *Larkin* (17), where this court expressed the opinion (not necessary to the decision) that there was an absolute liability on defendants, who had given permission to take photographs on the plaintiffs' premises, and had set fire to those premises through the use of a dangerous flashlight. The special circumstances of that case may well have justified that *obiter dictum*, but I am convinced that the phrase (at p. 200) "an obligation . . . which was, as we think, absolute," expressing as it does an idea which was not elaborated or developed in the judgment, was not intended to unsettle a doctrine of the common law, as it had long been understood.

One passage in the judgment of CASSELS, J., shows that he was much impressed by certain anomalies which appeared to him to result from a strict reading of the rule laid down in *Rylands* v. *Fletcher* (1). Such apparent anomalies are a necessary consequence of the distinctions which the law is compelled to draw in determining rights which must vary according to the circumstances in which the person claiming the right is placed. Nobody would doubt that, if a ruinous wall adjoining the highway collapses, a person injured by its fall may well find that the existence or extent of his right to compensation will depend on the question whether, at the time of the accident, he was in the road or within the bounds of the land on which the wall was built, and, if the answer is that he was within those bounds, on the further question in what capacity he was there. It is impossible to enter premises occupied by another person without assuming certain obligations, and obtaining certain rights, *vis-a-vis* that person. The rights obtained are very valuable to an invitee, less so to a licensee, and comparatively insignificant in the case of a trespasser; but, whatever they may be, it is on them, and not on the doctrine of *Rylands* v. *Fletcher* (1) that he must rely in such circumstances as exist in the present case. In my opinion, the respondent's statement of claim disclosed no cause of action and no case was made out against the appellants.

It thus becomes unnecessary to decide whether, if a *prima facie* case had been made against them, the appellants could have succeeded on their plea that the plaintiff voluntarily incurred the risk. I will add, however, that the argument by no means satisfied me that the judge came to a wrong decision on that point.

In my opinion, the appeal should be allowed with costs, the judgment of CASSELS, J., set aside, and judgment entered for the appellants with costs.

Appeal allowed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor* (for the appellants); *L. Bingham & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BRILLIANT *v.* MICHAELS.

[CHANCERY DIVISION (Evershed, J.), **October 27, 1944.**]

Landlord and Tenant—Agreement for lease—One month's rent and cost of decoration paid in advance—Receipt by landlord—Tenancy agreement to be signed in due course—Possession to be taken when vacant—Commencement of lease uncertain—Validity of agreement—Law of Property Act, 1925 (c. 20), *s.* 40.

The defendant was the owner of a block of flats. The plaintiff was desirous of obtaining one of the flats then occupied by H. The plaintiff alleged that in the course of various interviews which took place between the parties, the defendant had agreed to let to him the flat in question, when vacant, at a monthly rent of £14 1*s.* 8*d.* This rent was in fact in excess of the standard rent. The plaintiff paid to the defendant various sums as deposit, rent in advance, costs of decoration and other charges, amounting in all to £146 8*s.* 8*d.* For his payments the plaintiff was given receipts which stated *inter alia* that the rent was to commence from the date of possession and that a tenancy agreement was to be signed in due course. H. went out of possession in June, 1943. The defendant then refused to grant a lease of the flat to the plaintiff. It was contended on her behalf (i) that no firm contract was ever made and that there was, in any case, no sufficient memorandum in writing of the alleged oral contract to satisfy the Law of Property Act, 1925, s. 40, and (ii) that, if there was an agreement, it was not enforceable at law or equity by reason of the absence of any sufficiently ascertained date for the commencement of the proposed term :—

Held : (i) no final and binding contract for a tenancy was entered into by the parties.

(ii) a contract for a lease was enforceable notwithstanding that the commencement of the term was expressed by reference to the happening of a contingency which was at the time uncertain, provided that at the time the contract was sought to be enforced the contingency had occurred.

Marshall v. *Berridge* (4) and *Phelan* v. *Tedcastle* (6) *applied.*

(iii) specific performance ought not to be granted in the case of an agreement one term of which to the knowledge of the court was unenforceable in whole or in part.

[**EDITORIAL NOTE.** An agreement for a lease is not void for uncertainty as to date of commencement when it is expressed to commence on the happening of a future contingency. This case decides that it is immaterial if the future event is not likely to happen for many years or, indeed, at all. It must, however, have happened before the parties can seek the enforcement of the contract. The case may be compared with *Swift* v. *Macbean* [1942] 1 All E.R. 126, a proceeding arising out of one of the agreements, of which there were many in 1939, for a lease of property to commence on the outbreak of war.

The court also expresses the view that had the plaintiff succeeded, specific performance would not have been ordered, since one term of the contract was in breach of the Rent Restriction Act. This appears to be in line with *Rees* v. *Marquis of Bute* [1916] 2 Ch. 64.

As to Requisites for Agreements for Lease, see HALSBURY, Hailsham Edn., Vol. 20, pp. 40-53, paras. 46-54 ; and for Cases, see DIGEST, Vol. 30, pp. 372-381, 398-405, Nos. 362-448, 610-685.]

Cases referred to :

*(1) *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284 ; 12 Digest 83, *492* ; 81 L.J.Ch. 184 ; *sub nom. Hatzfeldt* v. *Alexander*, 105 L.T. 434.

(2) *Rossdale* v. *Denny*, [1921] 1 Ch. 57 ; 12 Digest 89, *545* ; 90 L.J.Ch. 204 ; 124 L.T. 294.

(3) *Winn* v. *Bull* (1877), 7 Ch.D. 29 ; 12 Digest 86, *511* ; 47 L.J.Ch. 139.

*(4) *Marshall* v. *Berridge* (1881), 19 Ch.D. 233 ; 42 Digest 453, *233* ; 51 L.J.Ch. 329 ; 45 L.T. 599.

(5) *Modlen* v. *Snowball* (1861), 4 De G.F. & J. 143 ; 30 Digest 399, *627* ; 31 L.J.Ch. 44 ; 5 L.T. 299.

*(6) *Phelan* v. *Tedcastle* (1884), 15 L.R. Ir. 169 ; 30 Digest 380, *442 i.*

*(7) *Bath's* (*Bp.*) *Case* (1605), 6 Co. Rep. 346 ; 31 Digest 59, *2065* ; 77 E.R. 303 ; *sub nom. Fish* v. *Bellamy*, Cro. Jac. 71.

Action for specific performance of an alleged oral agreement made on Apr. 3, 1943, and varied on May 10, 1943, for the letting by the defendant to the plaintiff of a flat. The facts and arguments are fully set out in the judgment.

H. J. Astell Burt for the plaintiff.

C. D. Myles for the defendant.

Evershed, J. : This action is one for specific performance of an alleged oral agreement made on Apr. 3, 1943, and varied on May 10, 1943, for the letting by the defendant to the plaintiff of a flat No. 4, Cedra Court, Cazenove Road, London. The defence is, first, that there was no firm contract ever made ; secondly, that, if there was any agreement, such agreement is not enforceable at law or equity by reason of the absence of any date or any sufficiently ascertained date for the commencement of the proposed term ; and, thirdly, that there is no sufficient memorandum in writing of the alleged oral contract to satisfy the Law of Property Act, 1925, s. 40, by reason partly of the absence from the memoranda relied upon of any fixed or certainly ascertainable starting date as above mentioned or of many provisions referable to a letting of this kind which, as it is said, were intended to form part of the tenancy contemplated.

It will be convenient for me to state at once the conclusion I have reached, which is that, as a matter of fact, there never was here any final and binding contract for a tenancy. I think that, at the various relevant interviews which took place between the parties, there was "agreement" between them; but A only in the sense that there was mutual assent to one and the same proposition. Having considered the evidence of the plaintiff and the defendant and the documents in the case, I find as a fact that, at the highest, the parties did no more than contract to make a contract, and never made or intended to make, a final and conclusive bargain for the letting of the flat in question. In formulating my conclusions as I have done, I have had in mind the many cases in questions of this kind, and in particular the decision of PARKER, J., in *von* B *Hatzfeldt-Wildenburg* v. *Alexander* (1), and the decision of RUSSELL, J., in *Rossdale* v. *Denny* (2). I will refer to the well-known passage in the former of the two cases, where PARKER, J., stated at p. 288:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract C is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

The phrase that the law does not recognise a contract to enter into a contract D must now be taken as subject to certain qualifications; but these qualifications are not material in the present case. Nor is it, in my judgment, material that the contract here alleged is an oral contract and not a written contract contained, as it was in the case of PARKER, J., in the correspondence. The principle is the same and may be expressed in the form of a question: Did the parties intend to make a final and exhaustive bargain, the terms of which should in due course, for convenience or otherwise, be recorded in a formal document; or did E they merely reach the point of together saying that either immediately or on the happening of some event an agreement would be entered into between them incorporating not only matters on which they had already reached accord but other matters proper or essential to the relationship proposed between them but not so far discussed?

I now proceed to recite the facts of this case as proved before me. The story begins in March, 1943. The plaintiff, who was, as I understand, really acting F largely on his mother's behalf, came to the conclusion that a flat in Cedra Court, belonging to the defendant would suit the purposes of his mother and himself, called on the defendant and, as a result, parted with the sum of £5 and got from the defendant a receipt in the following terms:

> Received of L. Brilliant of 79, Sandringham Road, Dalston, E.8, the sum of £5 deposit on flat no definite date for possession. £70 to be paid for decoration on com- G pletion of work at the rate of £3 5*s*. per week payable monthly in advance. Rent to be worked out accordingly to monthly payments. Agreement to be signed by the above tenant for three years. Agreement £2 2*s*. and stamp duty five shillings. Deposit to be returned if required.

I observe that there was at that date no flat specified and no rent fixed or the date of the commencement of the term indicated. At that time, indeed, there was no flat available or none which met the plaintiff's requirements; and it is H plainly impossible that either the plaintiff or the defendant could have supposed that any final bargain was being made between them, there being, as I have said, no subject matter upon which such an agreement could operate. The plaintiff obviously got nothing of any real value for his £5, save an expectation or hope that if and when a flat suitable to his taste became available the defendant would favourably consider his application to become her tenant. I emphasise the language at the end of the document:

> Agreement to be signed by the above tenant for three years. Agreement £2 2*s*. and stamp duty five shillings . . .

as showing clearly that, in the circumstances as they then existed, nothing binding between them would or could come into existence until the tenancy agreement referred to had been prepared and executed. At most they agreed that in certain events they would enter into a tenancy agreement of a flat at Cedra Court.

At this time a flat, No. 4, was in the occupation of one Hyams, and at the beginning of April it came to the plaintiff's knowledge that Hyams was contemplating removal from the flat. That flat, No. 4, was entirely suitable to the plaintiff and his mother, and, accordingly, on Apr. 3, he called again on the defendant. At this interview, according to the plaintiff's evidence, which I accept, the defendant confirmed the information that the plaintiff had had that Hyams was going, and she authorised and advised him to see Hyams for himself and to find out. The defendant further at that interview told the plaintiff that he could (I use the plaintiff's own words) " go in as soon as Hyams went out." The defendant proceeded to improve further on the occasion by extracting from the plaintiff the further sum of £70 for decorations which had been stipulated by her at the March interview and referred to in the receipt of that date. A further receipt was given. That receipt reads :

> Seventy pounds paid by L. Brilliant of 79, Sandringham Road, Dalston, E.8, on No. 4 flat Cedra Court, Cazenove Road, Clapton, N.16, to be decorated—possession to be taken when vacant rent monthly in advance at £13 13*s*. per month £2 5*s*. to be paid and 5*s*. stamp duty on agreement.

I observe that in this receipt specific reference is made both to the number of the flat and to the rent which the defendant said she would charge and to which the plaintiff apparently assented without demur. I should state here that these flats are subject to the limitations as to rent imposed by the Rent Restrictions Act. The plaintiff told me that at a later stage in the negotiations he discovered that the rent which had in fact been paid by Hyams was £2 12*s*. 6*d*. per week, which was the standard rent, so that the sum of £13 13*s*. per month demanded by the defendant (and *a fortiori* the higher figure to which the defendant afterwards succeeded in getting the plaintiff's assent) was, and must have been known to her to have been, considerably in excess of the sum which she was entitled to recover under the Rent Restrictions Act. It will be noticed that in the receipt of Apr. 3, 1943, no mention is made of the term of the proposed tenancy, though again a clear reference to the tenancy agreement which it was intended in due course should be signed is to be found. The omission is not remarkable, in my judgment, since it seems clear to me that the transaction of Apr. 3 was merely a further step in the negotiations which had begun on Mar. 17. If it is true (as I believe it is) that on Mar. 17 the plaintiff and the defendant never intended to do more than agree that, in certain events, an agreement should be made between them, I cannot think that the whole nature and basis of the matter was altered on Apr. 3, when specific reference was again made to the intended agreement at a slightly enhanced price. I draw attention to the phrase in the receipt : " Possession to be taken when vacant." At this date—and, indeed, at the later interview in May—though the removal of Hyams was regarded as probable, the date was wholly uncertain, and, having regard to his protected position under the Rent Restrictions Act, the event might not occur for a very long period indeed. It is, no doubt, correct, as counsel for the plaintiff argued, that the court is not concerned with the good sense of a bargain, if a bargain was in fact made ; but, in considering whether a final bargain was or was not made, it seems to me material to take account of those serious elements of uncertainty and to ask whether the plaintiff and defendant can have intended to bind themselves firmly to one another to a condition the time for performance of which might not arise for months or even years. I think I am entitled to take into account the improbability of such an intention as corroborating the view which I have already formed that, at this stage, neither party was intending any conclusive bargain at all.

The plaintiff saw Hyams and learned from him that he, Hyams, was in truth proposing to leave No. 4, Cedra Court in the very near future. The plaintiff did not, however, having discovered this fact, call again upon Hyams of his own motion. The plaintiff did call on the defendant on May 10. The main purpose of the interview is shown from the further receipts signed on that day for various sums which, together with the sums already paid, bring up the total amount which the defendant had extracted from the plaintiff to no less than £146 8*s*. 8*d*. The fact that so large a sum was paid is, in my judgment, clearly a circumstance to be taken into account in deciding whether the parties' intention was to make a firm bargain. Counsel for the defendant replied that the sums so paid were no more than deposits in anticipation of the agreement then intended at any rate by the plaintiff; and he refers to his client's letter of May 24, in which the sums are referred to by her as a deposit; but this description of the sums paid A over to her by the plaintiff, is, in my judgment, no more accurate than many another of her statements. The sums were in fact made up as follows: £5 as deposit paid on Mar. 17; £70 for decorations paid on Apr. 13; £14 odd paid as rent in advance on May 10; £2 7*s*. paid in respect of the agreement and stamp duty and £20 in respect of dilapidations; and £35 for the frigidaire paid on the same date; the total being £146 8*s*. 8*d*. The size of the sums and the purposes for which they were paid have caused me the greatest difficulty on this B part of the case and have increased the temptation to reach a conclusion which might be said to be a just retribution for the defendant's avidity. But when the evidence is examined it seems impossible to conclude that at the interview of May 10 there was any change in the relationship hitherto established between the plaintiff and the defendant. Indeed, it seems clear from the plaintiff's own evidence that the only purpose of the interview was to enable the defendant C to get the plaintiff's agreement to a further increase of the rent to £14 1*s*. 8*d*. per month and to extract from the plaintiff one month's instalment of such increased rent, together with a further sum of £55 in respect of other matters. According to his own evidence the plaintiff never appears to have resisted the defendant's further demand for rent by asserting that the matter had already been finally agreed. The truth is (and I so find) that the plaintiff was trying to get himself into as strong a position as possible for obtaining a tenancy agree- D ment from the defendant as soon as the flat became vacant, so that, unless he was to throw away his chances of getting such an agreement, he felt compelled to submit to every demand which the defendant made upon him from time to time.

I will now read the three receipts given to the plaintiff on that day, May 10, 1943. The first is as follows:

> Received of L. Brilliant of 79, Sandringham Road, Dalston, E.8, the sum of £14 1*s*. 8*d*. E being one month's rent in advance on flat No. 4, Cedra Court, Cazenove Road, Clapton, N.16, rent to commence from date of possession, agreement for tenancy to be for three years £2 2*s*. for agreement and five shillings stamp duty.

The second receipt is:

> Received the sum of £20 for any wilful damage that may be done to decorations, etc., is to be deducted from the £20 after his expiration of his three years' tenancy.

F The third is:

> Paid for fridge £35 by Louis Brilliant of 79, Sandringham, Dalston, E.8. To be in good working order.

The first receipt is more comprehensive than any of its predecessors since it specifies the flat to be taken, the term and the rent, and it states that the rent is to commence from the date of possession, that is, the date when Hyams should G in fact move out of No. 4, Cedra Court. As I have said, there is no evidence whatever that, at the interview of May 10, there was any change in the relationship previously established between the parties at the earlier interviews; and I note particularly that the reference to the future execution of an agreement is once more repeated in substantially identical terms.

In my opinion, it is impossible to conclude that such reference in the documents of May 10 indicates any different intention from the references to the H same agreement in either of the earlier receipts. In this connection, there is one other matter to which I should refer, namely, the admissions by the plaintiff in cross-examination in regard to the provisions which he was to expect in the tenancy agreement when it was put before him. I do not place too great a reliance on this matter. When these provisions were put to him in cross-examination, the plaintiff answered them candidly. It does not seem to me that the answers, given as they were, are necessarily conclusive against the view that a binding agreement did exist. Yet, on the other hand, I think they do fairly lend support to the conclusion that no such formal bargain covering all material terms had in fact been made. The terms of the plaintiff's solicitor's letter of June 2, after the defendant had made it plain that she did not regard herself as bound to the plaintiff, are further corroboration of that. I also have in mind the circumstances to which my attention has been drawn in the case of *Winn* v. *Bull* (3) that, where the subject matter which is in course of negotiation is a lease, the court is somewhat slower to assume that a final bargain has been reached since, as is well known, any lease must or will naturally contain a number of provisions peculiar it may be to the particular tenancy.

The remaining facts can be dealt with shortly. On June 9 Hyams in fact went out of possession of No. 4, Cedra Court, and that flat thereupon became vacant and available to the plaintiff. Meanwhile, on May 24, the defendant wrote enclosing a cheque for what she called a "deposit" and repudiating any obligation to proceed further with the proposed letting. That she put forward reasons for her decision which were not in accordance with the facts is not material for present purposes. I, therefore, find that no final or binding or enforceable contract for letting by the defendant to the plaintiff of No. 4, Cedra Court, was ever made.

This concludes the matter; but as considerable argument has been put forward with regard to the second point raised, namely, with regard to the uncertainty of the commencement of the lease, it may be desirable for me to express a view upon that point.

The point is, or may be briefly put thus, that it is essential for the enforceability of a contract relating to the letting of land that the date of the commencement of the term should be certain or, at any rate, certainly ascertainable and should not be dependent upon the happening of some event which may be called a wholly casual event. I should like to refer to the passage in FRY ON SPECIFIC PERFORMANCE, 6th Edn., para. 378, where he says, at p. 177:

> Again a material term may well be supplied by construction or inference where the circumstances justify it: but if neither supplied by expression, construction, nor inference, the contract is incapable of performance. In a contract for the grant of a lease the date of the commencement of the lease is a material term, and if it does not appear in the contract, by expression or reference, it is incomplete: nor can it be inferred to begin at the date borne by the memorandum of agreement, though it may, of course, be collected from the agreement read as a whole.

I should also like to refer to the well-known passage in the judgment of LUSH, L.J., in *Marshall* v. *Berridge* (4), where the Lord Justice says, at p. 245:

> There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements.

The reference to the necessity for a certain beginning does not, of course, by any means necessarily mean that there must be in the contract either by express terms or by necessary inference a date then and there fixed. It is, I think, clear that valid contracts may be made which are enforceable though at the time of the making of the contracts they may be conditional. For that proposition I can again refer to the book of FRY, L.J., at p. 458, para. 982, where he says:

> A contract may be originally conditional, and contingent upon the performance of some act or the happening of some event. Where that has occurred the contract becomes absolute, and rests on the same footing for all purposes as if it had been originally made positively and without reference to any contingency.

Then the author goes on to refer to a case which came before LORD ROMILLY, M.R., where the contract for the lease of a public-house was expressed to be conditional on the magistrates having granted a licence. The case is that of *Modlen* v. *Snowball* (5). In that case, the court decided as a fact that the condition never had been fulfilled, so that no enforceable contract was ever in existence. It does not decide by inference that the contract would have been good had in fact that uncertain condition been fulfilled, because that determination was unnecessary to the case before the court.

The present case is in a sense novel and, perhaps, may be said to go a little further than any actually decided case, because the event here subsisting was, as I have stated, one which might not occur for a very long time indeed—if, indeed, ever within the life-time of the plaintiff or of the defendant.

In some of the cases it appears that the condition, if it was the happening of some contingency, was a condition which must happen, if at all, within some reasonably limited time; but I have come to the conclusion that that is not essential to the validity of the contract, and I cannot see any matter of principle which ought to distinguish the case of a contingency which must happen within, say, 10 or 20 years, and a contingency which may not happen for a very long time indeed, if at all.

There are two cases which seem to me to be of most assistance on this point. The first is *Marshall* v. *Berridge* (4). In that case the alleged agreement was expressed to be contingent for its enforceability upon one of the parties having made a satisfactory agreement in regard to certain iron ores and, as things turned out, no such agreement had ever been made. I will refer to a passage in the judgment of Baggalay, L.J., on p. 244:

> Then it has been contended that the letter of June 15 and the memorandum of June 29 contain sufficient indication that the parties intended the lease to commence from the date of the agreement, whenever that agreement might be executed or come to. I am unable to find any such indication. I should infer from the documents that there was an intention that so soon as the plaintiff should be able to ascertain that he could obtain mining rights on adjoining property, then an agreement should be entered into, but I can find nothing to show that the parties intended the term to commence from the day when the final agreement should be signed.

Though it is only inferential in point, I read that as saying that according to the Lord Justice's view it would be competent for the parties to make an agreement conditional upon the execution of some other agreement, and that, if in fact that other agreement had been made the condition would have been fulfilled. I think I am not misinterpreting the Lord Justice's statement. Of the other cases I obtain some assistance from the Irish case *Phelan* v. *Tedcastle* (6). It was a case in which there were two agreements. The first was for a tenancy to commence from the execution of what is called a writ of *haberi*, which is an Irish process connected with forfeiture, which tenancy should last for such time as the party against whom the execution was levied should be entitled to redeem, which I gather to have been a period of six months. There was a further agreement for a lease on the expiry of the former period during which he could redeem. As the facts of the case had happened, the period of six months for redemption had expired, and, therefore, it was alleged, and successfully alleged, on his behalf that the condition had been fulfilled. I only refer to it because that was a case, as it seems to me, in which the event or contingency was uncertain. It might have been that the former publican would have redeemed, in which case the condition never would have taken effect, or there may possibly have been, by agreement or otherwise, some extension of the period.

I should refer to the *Bishop of Bath's* case (7). There the question was in reference to the validity as a good lease at law of a lease expressed to be reversionary and the term of which was to commence at the falling in of the subsisting lease, which subsisting lease was granted for a period of 60 years, but with clauses of re-entry upon the death of the survivor, so that the subsisting lease might have terminated by re-entry before the expiration of 60 years. It was held that the lease was a good lease. In the course of the judgment there is a distinction drawn between conditions which may be regarded as certain to happen or as being certain in their character and conditions which are described as being wholly casual—what is there called a possible or casual certainty. The case refers to a lease, and the question with which I am concerned is the enforceability of a contract.

As I have stated, it seems to me that it is highly improbable that persons would bind themselves firmly and conclusively to each other for a period which might almost be of indefinite duration, because the event, the happening of which is to be regarded as a condition, might never occur at all, but, on the other hand, it might occur at almost any length of time. I do not feel that the fact that such an agreement is highly improbable is in principle a sufficient answer. If two persons do in fact make such a bargain and really intend to bind themselves on those terms, I cannot see why a court should not enforce the bargain made, provided that at the time when the one party or the other comes to the court to enforce it, the condition has in fact been satisfied and the contemplated event has occurred. My opinion, therefore, is that a contract for a lease is enforceable notwithstanding that the commencement of the term may be expressed by reference to the happening of a contingency which is at the time uncertain provided that, at the time that the contract is sought to be enforced, the event has occurred and the contingency has happened. The result is that, if the matter had rested upon that line of defence, I should have been prepared to find in favour of the plaintiff.

There is one other matter to which I think perhaps I ought to make some reference since the point is a novel one on which there has been some argument. The rent which was eventually settled in the final of these receipts was a rent which appears to have been substantially in excess of what is called the standard rent applicable to these premises by virtue of the current rent restrictions legislation. It is quite clear that, if two parties agree that one is to pay and the other is to receive a rent in excess of the so-called standard rent, neither that part of the bargain nor the whole contract is thereby rendered illegal. The fact is that in so far as the rent inserted or agreed upon is in excess of the standard rent the excess is not recoverable at law.

Had the plaintiff succeeded, the question would have arisen whether, in circumstances such as appear here, the court would have made an order for specific performance of an agreement a material term of which was not wholly enforceable at law. In the circumstances which have happened, it is unnecessary for me to reach a final conclusion, but, for what it is worth, I will say that I am not yet satisfied that the court ought to grant specific performance, having regard to the form of decree common in these cases of an agremeent one term of which to the knowledge of the court is unenforceable in whole or in part, particularly where, as in this case, the subject matter, the rent and the limitation of the amount of rent which can be charged, is a matter of public policy. I, therefore, say without expressing it any more affirmatively than that, that I am not satisfied that it would be right in such a case to grant a decree of specific performance with such a term as to rent in the agreement.

Judgment for the defendant. Plaintiff to have one half of the defendant's costs of the action.

Solicitors: *Lucien Fior* (for the plaintiff); *W. B. Wattson* (for the defendant).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

MOORE *v.* CANADIAN PACIFIC STEAMSHIP CO.

[Liverpool Autumn Assizes (Lynskey, J.), **November 8, 1944.**]

Shipping—Seaman—Contract for service for two years—Seaman dissatisfied with treatment by ship's doctor—Advice by shore doctor that operation immediately necessary—Master not informed by seaman—Seaman going to hospital disobeying master's order to stay aboard pending enquiries—Whether desertion—Merchant Shipping Act, 1894 (*c.* 60), *ss.* 221, 228—*Merchant Shipping Act,* 1906 (*c.* 48), *s.* 36 (1).

Libel—Qualified privilege—Entry in ship's log "J.M. deserted the ship"—Statutory duty to make entry when seaman left behind—Master not informed that seaman in hospital—Absence of malice.

In Jan., 1942, the plaintiff signed on for two years as an assistant cook on the S.S. Empire Woodlark, a vessel belonging to the defendants. The plaintiff who suffered from chronic mastoiditis, necessitating operations from time to time, received some medical treatment by the ship's doctor with which he was dissatisfied. When, in early July, 1942, the ship reached Durban, the plaintiff on his own initiative approached the port health officer, who told him to see a private doctor. This doctor advised him that an operation was necessary, but altered his view after consultation with the ship's doctor. The plaintiff, acting on the advice of the port health officer, saw then a second doctor who came to the definite conclusion that an operation was imperative. The plaintiff went thereupon into hospital without informing the master of the ship; he had already defied the master's orders to stay aboard pending investigations when he went to see the second doctor. The ship left Durban on July 20, and the master entered on the same day in the ship's log: "J.M. [plaintiff] deserted the ship at the port of Durban." The plaintiff's belongings were detained on board the ship for some twelve months. In these circumstances the plaintiff claimed a declaration that he was not a deserter. He further claimed for the return of his effects or their value, for wages, and for damages for breach of statutory duty, and, finally, he claimed damages for libel. The defendants, though not in terms pleading desertion, denied the facts alleged by the plaintiff. They contended on the libel issue that the publication as made by the master was made on a privileged occasion without malice and in the honest belief that the words were true :—

HELD : (i) the plaintiff was justified, having regard to the medical advice received, in accepting treatment at the hospital. He was, therefore, not a deserter and was entitled to the declaration asked for.

(ii) since the plaintiff was not a deserter, the provisions of the Merchant Shipping Act, 1894, s. 221 (*a*) did not apply, and the defendants were not entitled to detain the plaintiff's belongings or to withhold the wages earned by the plaintiff.

(iii) the duty imposed by the Merchant Shipping Act, 1906, s. 36, on the master to obtain a certificate of proper authority when a seaman was left behind abroad, was absolute in terms, and the master was bound to comply with the duty in any event.

(iv) the entry in the log, though defamatory, was made on a privileged occasion since by the Merchant Shipping Act, 1894, s. 228, the master was bound to record in the log any case where a seaman was left behind and the reason therefor, whatever the reason. Since the master had no knowledge, direct or indirect, of the plaintiff's condition, he was entitled to assume that the plaintiff had deserted the ship.

[**EDITORIAL NOTE.** There is no authority on the effect of entering a defamatory statement in a ship's log-book, but in view of the duty of the master to record offences in the official log imposed by the Merchant Shipping Act, 1894, s. 228, this is clearly a case of qualified privilege. The second point of interest here to which attention should be drawn is the decision that the duty of a master on leaving a seaman behind to obtain a certificate of the cause from the proper authority is an absolute one and must be complied with even if this involves delay in sailing.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 30, p. 235, para. 410 and p. 237, para. 413 ; and FOR CASES, see DIGEST, Vol. 41, pp. 231-233, Nos. 698-723.]

Case referred to :

(1) *The Westmorland* (1841), 1 Wm. Rob. 216 ; 41 Digest 217, *569* ; 1 Notes of Cases, 11.

ACTION by plaintiff, a seaman, for (*a*) a declaration that he did not desert his ship ; (*b*) the return of his effects or their value ; (*c*) alternatively, damages for conversion ; (*d*) damages for breach of statutory duty under the Merchant Shipping Act, 1906, s. 36 (1) ; (*e*) an account as to wages ; (*f*) damages for libel. The master, on July 19, 1942, entered in the ship's log : " J.M. [plaintiff] deserted the ship at the port of Durban." The relevant facts and arguments are set out in the judgment.

Edward Wooll, K.C., and *Rose Heilbron* for the plaintiff.

Wilfrid Clothier, K.C., and *Scholefield Allen* for the defendants.

LYNSKEY, J. : In this case the plaintiff, James Moore, who was employed by the defendants, the Canadian Pacific Steamships, Ltd., on their steamship Empire Woodlark, claims, first of all, a declaration that he did not desert his ship, and secondly, the return of his effects or their value which he alleges were detained upon the said ship and damages for their detention. Alternatively he claims damages for conversion ; and fourthly, damages for breach by the defendants of their statutory duty under the Merchant Shipping Act, 1906, s. 36. Fifthly, an account of the wages due to him and payment of the wages found due ; and finally, damages for libel in that the defendants' servant or agent, the master of the Empire Woodlark, falsely and maliciously wrote and published on July 19, 1942, in the ship's log the words " James Moore deserted the ship at the port of Durban." The defendants so far as the plaintiff's first five claims are concerned content themselves with either denying or not admitting the facts alleged by the plaintiff. As to the sixth claim made by the plaintiff, the defendants plead that the publication was made by the master on a privileged occasion without malice to the plaintiff and in the honest belief that the words were true. Although the plaintiff's allegation of the facts are denied, the defendants do not by their defence in terms plead that the plaintiff did desert his ship or seek to justify the said libel.

I propose first of all to deal with the plaintiff's claim for a declaration that " the plaintiff did not desert the S.S. Empire Woodlark at Durban in July, 1942." Desertion by a seaman of his ship is dealt with in the Merchant Shipping Act, 1894, s. 221. The desertion of his ship by a seaman is not defined in the Merchant Shipping Act or any amendment of that Act, and there are no recent authorities dealing with the matter. In my view, to constitute desertion by a seaman of his ship there must be complete abandonment of duty by him without justification. I take this definition from *The Westmorland* (1). H. H. Davies, the master, in his evidence gave what he regarded as the Merchant Navy's idea of desertion. He said :

> I think a deserter is a man who leaves his ship and does not return to it with no other purpose than to break his agreement.

This is not a legal definition, but it supports my view of the law that circumstances may exist which justify a man in leaving his ship and not returning to it, even though this may involve his abandoning his service agreement. If a man is brutally treated by the master it has been held that such treatment justifies him in refusing to carry out his agreement ; equally, if the master fails to provide proper food for his crew a seaman is justified in leaving the ship and not returning to it. The question I have to consider on the plaintiff's first claim is : Was he justified in leaving his ship and not returning to it before the ship sailed ? This is a question of fact. The plaintiff is a man of 49 years of age ; he had been going to sea for some 31 years, and in later years either as a cook or an assistant cook. In 1916 the ship upon which he was engaged was torpedoed and he sustained a fracture of the right thigh and injuries to the head ; the fracture of the right thigh united in good position and apart from a slight limp caused no disability. The injury to the head was more serious ; it resulted in the plaintiff suffering from chronic mastoiditis, which I gather is a disease of the mastoid bone. The disease flared up from time to time and necessitated a surgical operation to scrape the mastoid bone and remove dead bone. Prior to Jan., 1942, the plaintiff had had seventeen of these operations. When these operations became necessary they caused the plaintiff severe pains in his ear.

On Jan. 8, 1942, the plaintiff signed on as one of the assistant cooks on the S.S. Empire Woodlark at Liverpool. The articles were for voyages over a period of two years. The vessel called at Durban on its outward voyage ; it was engaged in carrying troops and went out to the east. The vessel called at Durban a second time in April or May. The plaintiff carried out his duties without complaint until about Apr. 15, 1942, when he saw the ship's doctor and complained of his right thigh ; he said the muscles were contracting and causing him pain. The ship's doctor, Dr. Harper, gave him some treatment, but told him the limb would have to be X-rayed and that he would send him to the ship's agents on arrival at Durban to obtain the necessary permission for this to be done. There was no complaint at this time by the plaintiff of any mastoid trouble. On Apr. 27, 1942, the plaintiff made some complaint as to his ear and his ear was syringed and wax removed. Some time about the middle of June, 1942, the plaintiff's ear appears to have become painful, and although there is no entry in the ship's doctor's record I am satisfied he received treatment from the dispenser in the doctor's surgery. On July 3, 1942, the ship reached Durban. It was not until July, 13, 1942, that Dr. Harper wrote a note for the plaintiff to see the ship's agent. In the meantime the plaintiff had become dissatisfied with the treatment he was receiving from the ship's doctor. On about July 10, 1942, the plaintiff went ashore and saw the port health officer who examined the plaintiff and thought he ought to see a private doctor. The port health officer signed a letter to the master of the Empire Woodlark, which never reached him and was subsequently found at the hospital in Durban to which the plaintiff ultimately went. The port health officer sent the plaintiff to Dr. Sampson to be examined in relation to his leg complaint and to Dr. Pugh to be examined in relation to the mastoid complaint. Both of them required X-ray photographs and a radiologist's report and each sent the plaintiff to be X-rayed. The plaintiff obtained from the ship's agents at Durban an authority to be X-rayed, and on July 13, 1942, the radiologists' reports were received and apparently seen by Dr. Sampson and Dr. Pugh and copies sent to the ship's agents. On July 14, 1942, copies of the X-ray photographs and reports were handed by the ship's agents to Captain Davies, who knew nothing about any arrangement for their being taken, and he promptly commenced inquiries. He sent for the plaintiff, who was, however, not aboard the ship. On July 15, 1942, the plaintiff saw Dr. Pugh again, who according to the plaintiff told him that he must go to hospital and be operated upon immediately, but that he must obtain a note from the ship's doctor allowing this to be done. The plaintiff reported this to the ship's doctor. The ship's doctor had not authorised the X-ray examination or consultation with the shore doctor and was not satisfied with the plaintiff's statement. Then Dr. Harper met the plaintiff at Dr. Pugh's surgery, and after a consultation between the two doctors Dr. Pugh told the plaintiff that it was not a matter of life and death and the operation could wait until the ship again reached port and indeed until the ship returned to Liverpool. In fact it did not return to Liverpool until two years afterwards.

The plaintiff was not satisfied with Dr. Pugh's second opinion, and he went back to the port medical officer and told him what had happened. The port medical officer was likewise not satisfied and he sent the plaintiff to a Dr. Sarkin. Dr. Sarkin took a very serious view of the plaintiff's condition and according to his letter, dated Sept. 20, 1944, he was satisfied that the plaintiff was definitely ill and required urgent attention. He says he informed the plaintiff that an operation was imperative in order to avoid the complication of infection spreading from the mastoid to the brain and forming a fatal cerebral abscess and that it was out of the question for him to proceed to sea until affection of the mastoid had been eradicated. From the plaintiff's point of view this was a serious and alarming opinion; it tended to confirm the first opinion given by Dr. Pugh. This opinion seems to have been given by Dr. Sarkin on July 15, and on that day he arranged with the plaintiff that the plaintiff should see him the next day so that he could, if possible, make arrangements for the plaintiff's admission to Adlington Hospital for the operation. On July 16, 1942, the master, Davies, sent for the plaintiff to come to see him. I accept Captain Davies's evidence as to what happened, as I found the plaintiff a witness upon whose testimony I could not place very much reliance. The plaintiff was asked by the master, "On whose authority did you have the X-rays taken?" The plaintiff said, "I have been to the Port Health Officer who sent me to a radiologist." The master asked him, "Who is going to pay for them?", and the plaintiff said, "The ship, and I have an appointment with the doctor at 9 o'clock this morning." The master said, "I order you to return forthwith to duty pending investigation," and he answered, "I will go ashore; you cannot keep me on board." The master said, "If you leave this ship I will have you arrested." During this interview the plaintiff was excited and shortly afterwards he defied the master's orders and went ashore. The plaintiff in this case is a man with 31 years' sea service; his discharges previously had always been good and he must have realised the serious step he was taking in defying the master. In my view the reason was that in view of Dr. Sarkin's advice he thought an operation was imperative and delay might have fatal consequences for him. He entered hospital on July 17, 1942, where he remained until July 24, when he was operated upon, and he continued as an in-patient until July 28, when he was discharged. He was then certified as fit to travel but not to work. The plaintiff did not inform the master or anyone on board the ship that he was in hospital, as he says it was usual for the hospital to do so. In fact the hospital did not do so, but on July 22, 1942, they informed the ship's agents. The ship sailed on July 20. In those circumstances was the plaintiff justified in leaving his ship and not returning to it, or was he a deserter? In my view, the plaintiff was entitled to accept the opinion of Dr. Sarkin, and as in Dr. Sarkin's view, as expressed to the plaintiff, delay might have had fatal consequences, I think the plaintiff was justified in taking the necessary treatment and not returning to his ship. I am fortified in this view by the evidence of Davies and the purser. The master said in his evidence "If I had known he was in hospital I should have paid him off and signed him clear of the articles." That means he would not have treated him as a deserter but as a seaman unable to proceed on the voyage. The purser said, "If I had known he was in hospital I would have paid him off and landed his effects;" in other words, the purser would have taken the same view as the master, and he would not have treated him as a deserter.

In those circumstances the plaintiff was not in law a deserter, but was justified in what he was doing. The effect of that of course is that the plaintiff is entitled to the declaration for which he asks.

With regard to the claim for the return of his effects or their value and damages, as I have found that the plaintiff was not in fact a deserter, the provisions of the Merchant Shipping Act, 1894, s. 221, would not apply to him. That section provides :

> If a seaman lawfully engaged, or an apprentice to the sea service, commits any of the following offences he shall be liable to be punished summarily as follows : (*a*) If he deserts from his ship he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned . . .

There is no other provision in the Merchant Shipping Act or any amendment of it which entitles the master or owners to detain a man's effects or to fail to pay him his wages. As in fact, in my view, he was not a deserter, the defendants cannot under that section of the Act, or any other Act, or at common law detain this man's effects or refuse to pay him the wages he has earned. Under those circumstances, as it seems to me, it is admitted by the defendants that they did detain his effects, did refuse to pay his wages, and did detain his effects after they were demanded of the ship's master at Durban when the ship returned on Aug. 6, 1942. In my view the plaintiff is entitled to recover damages in respect of that detention.

I have been given a list of articles which the plaintiff says were detained in his three suitcases. The plaintiff values those articles at not less than £140, so they are probably worth more, and although apparently the goods or suit cases were brought into court by the Board of Trade representatives at Liverpool, the defendants have not sought to secure their valuation. In those circumstances, in respect of that claim, in my judgment, the plaintiff is entitled to the return of his effects or, alternatively, the sum of £140. The question then arises as to whether he is entitled to any further damages in respect of that detention. The position was this : the master detained those goods, as he thought, rightly. The plaintiff was left ashore, he says, with just a shirt and a pair of shorts and no other clothing. He was deprived of clothing while at Durban and he was deprived of it for many months afterwards. His clothing was in fact detained on the ship for some twelve months afterwards before being landed ashore, but he was able to obtain other clothing. It seems to me in those circumstances that if I award him £20 for general damages in addition to the return of effects or their value, the amount would be approximately as near to the damages he desires as I can make it.

That brings me to the question of wages. It is agreed that as far as the wages are concerned the amount actually due to the plaintiff up to the date that he went ashore on July 16, was £10 9*s*. 0*d*. As far as that amount is concerned, that seems to be the total wages due, and under those circumstances he is entitled to judgment for that sum.

As conversion is only alternatively claimed, and as I have decided this case on the basis of detinue I need not trouble with the claim for conversion.

In regard to the breach of statutory duty, counsel for the plaintiff relied on the Merchant Shipping Act, 1906, s. 36 (1), which provides :

> The master of a British ship shall not leave a seaman behind at any place out of the United Kingdom, ashore or at sea (except where the seaman is discharged in accordance with the Merchant Shipping Acts), unless he previously obtains, endorsed on the agreement with the crew, the certificate of the proper authority, as defined for the purpose in this part of this Act, stating the cause of the seaman being left behind, whether the cause be unfitness or inability to proceed to sea, desertion, or disappearance or otherwise.

The master agreed that he did not in fact obtain a certificate under that particular section of the Act. He said that in practice that section of the Act is ignored because in fact it is not known whether a man is a deserter or not until after the ship sailed, and if he is required to obtain a certificate (in this case it would be from the shipping master at Durban) entitling him to leave behind a man who had failed to return to his ship it would involve holding up the ship for hours, if not for a longer period. The section is absolute in terms, and in my view it is the duty of the master to comply with it, and if it is impracticable to comply with the statutory enactment then the authority to alter it is not the judges but Parliament. In my view, in this case there was a breach by the master of this statutory duty. Having regard to the fact that the plaintiff has recovered in respect of his claim for detention both the wages and the goods to which he was entitled, and also damages for the loss and inconvenience he suffered in respect of that detention, in my view the plaintiff has suffered no further damage as a result of that breach of statutory duty, and I do not propose to award him any damages under that head apart from the nominal damages of 1*s*.

That brings me to the final question in this case, the question of damages for libel. It is admitted by the defendants that the words, if they were not true, are clearly defamatory. There is no doubt they are. Equally I find that the words were written and published on a privileged occasion. The position is that under the Merchant Shipping Act, 1894, s. 228, there is a statutory duty upon the master to make entries in the log, and in any case where he leaves a man behind he must state in the log whether the cause of leaving him behind is desertion or inability to proceed to sea or disappearance, and he must make an entry. In those circumstances, before the plaintiff can succeed on his claim for damages for libel, he must satisfy me that the master in making that entry was not acting *bona fide* but in fact was acting maliciously. Counsel for the plaintiff said that he did not suggest there was malice in the nature of ill-will against the plaintiff on the part of the captain. So the question is really reduced to this: as to whether the captain made that entry *bona fide* or from some indirect or improper motive. In considering that question one has to have regard to the state of the captain's knowledge at that time. A man may be neglectful; he may, in the rush of a master mariner's business at a port when he is attending to the very many duties he has to attend to, overlook something which in calmer moments or moments in which he was not so rushed he would certainly endeavour to do. But, in my view of the law, negligence is not enough to constitute malice unless it is wilful negligence. In this case the master's position was this. He had seen the plaintiff from time to time on his journeys round the ship but he had never come into personal contact or conversation with him. The plaintiff said that prior to July 16 he had seen the captain on two occasions, when he produced letters which the captain tore up. I do not accept that; I prefer the evidence of the master, and I am satisfied that the first the master knew about this matter was on July 14, 1942, when the ship's agent handed him two X-rays with the radiologist's report. He was surprised to see them and knew nothing whatever about them and he promptly started to make enquiries; he apparently saw the ship's doctor and he tried to see the plaintiff, but according to the doctor's evidence—which again I accept—the plaintiff seems to have occupied his time in the three days before July 16 in going ashore without leave, and he could not be found on the ship on July 14 when the master wanted to see him and apparently was not found until July 16. The position at that time was that the master knew these X-rays had been taken without his knowledge, that the plaintiff had been missing, and on July 16 he saw the plaintiff on the bridge. At that time the master had no knowledge of the report of either Dr. Pugh or Dr. Sarkin. I am satisfied that the master received no information from the hospital or from the ship's agents. I am satisfied that he received no information from the purser or the doctor. I do not think the purser himself knew the facts. On July 19 when the master made the entry in the ship's log that the plaintiff was a deserter the position was that so far as the master was concerned the plaintiff was a man who had had two X-ray photographs taken of him. The master had instructed the doctor to make inquiries to find out the circumstances under which they were taken; he had not heard from the doctor the result of those inquiries, and did not in fact hear until after the ship had left port and was at sea some time after July 20. So the situation was so far as the master was concerned that two X-ray photographs had been taken of a man whom he had ordered to remain on board and who had defied his orders on July 16, who went ashore and did not come back, and the ship's sailing date was July 19. The master made enquiries from the head of his department, who said that the plaintiff had not come back. Under those circumstances, I am satisfied that the master honestly believed at that time that the plaintiff had deserted his ship. I am satisfied he made those entries in his log *bona fide* and in the firm belief that it was true.

It was suggested by counsel for the plaintiff that the master's subsequent conduct indicated malice. The master's conduct was this. He had not seen and did not see Dr. Sarkin's opinion until after he arrived back in this country some time early this year. In fact I think he said he did not see the actual document until he arrived in this port. His view all the time was this, "This man had no right to leave the ship; he had no right to go to hospital; it was not necessary for him to go to hospital from what I learnt from the doctor subsequently." The master's action thereafter has been consistent—in fact it was consistent—with that. "I thought that man was a deserter and I continue to do so." In those circumstances I can find no evidence of malice on the part of the master. Then it was suggested by counsel for the plaintiff that there might be evidence upon which the defendants were liable, because the defendants here are the steamship company and not the master. He suggested there might be evidence on which the steamship company are liable because of malice either on the part of the purser or the ship's doctor or the defendants themselves because of the way in which the case was conducted. Counsel for the plaintiff argued that you may have a publication by one servant instigated by another, and the man who instigated the publication being malicious, his malice although the publication by the servant instigated was innocent makes the publication malicious by the steamship company. I accept that as the law, but in this case so far as I can see there is not any evidence of malice on the part of the ship's doctor. The only evidence I have got is that he had information on July 18 that he did not pass on to the master; on that I cannot find malice on the part of the doctor, and even if there was I see no evidence to connect that malice with the publication of this libel. As far as the purser is concerned, I accept his evidence that he knew nothing about it and did not know the man was in hospital until he arrived in this country.

Finally counsel for the plaintiff says there is evidence of malice on the part of the defendants because, knowing that the ship's master still believed this man to be a deserter and although they had justified they still called the master as a witness. Well, I do not see what else they could do. They were here pleading privilege; they were alleged to have libelled the plaintiff, through their master. To justify that privilege they had to call the master to show his state of mind at that time and his knowledge. Is it to be suggested that the defendants should have said to the master, "Give your evidence as to the facts as to privilege, but on no account answer truthfully if you are asked what your opinion is"? That in no way, in my opinion, is any evidence of malice at all. Therefore, in my judgment, the claim by the plaintiff for damages for libel fails. The result is that there will be judgment for the plaintiff for a declaration that he did not desert his ship, the S.S. Empire Woodlark, in July, 1942. There will be judgment for the return of his goods and effects or their value which I assess at £140, together with £20 damages for their detention. There will be judgment for the plaintiff for the wages of £10 9*s.* 0*d.*, and there will be judgment for him for 1*s.* nominal damages for breach of statutory duty. There will be judgment for the defendants on the claim for damages for libel.

Judgment for the plaintiff except for his claim for damages for libel. Costs to be set off.

Solicitors: *Livermore and Silverman*, Liverpool (for the plaintiff); *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

ANNIE AMELIA BAKER *v.* MAYOR, ALDERMEN AND BURGESSES OF BETHNAL GREEN.

[Court of Appeal (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **December 8, 1944.**]

Negligence—Air-raid shelter—Steps to shelter uneven, inadequately illuminated and without centre hand-rail—Duty of local authority as occupier of premises—Nonfeasance of statutory obligations—Civil Defence Act, 1939 (c. 31), *Pt. II, s.* 4.

Emergency Legislation—"War injury"—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *s.* 8.

The appellants as the local authority in a particular borough took over an underground station in course of construction and converted it for use as a public air-raid shelter. From the street there was only one entrance, the doors of which opened inwards and led to a flight of nineteen steps. These steps were defective, very faintly illuminated, and, though 10 feet wide, without a hand-rail in the centre. There was no physical means of controlling the crowd and no warden posted there. On the occasion of an air-raid warning the respondent, her husband and daughter, along with a large number of other persons, were proceeding down the steps to the shelter at night, when some person fell causing a number of the other persons, including the respondent and her family, to fall and collect on one another, so that the respondent was injured and her husband and daughter killed. There had been previous complaints as to the condition of the steps. In an action by the respondent on her own behalf and as the administratrix of the estates of her husband and daughter, it was contended that the steps were in the nature of a trap which the appellants were aware of. For the appellants it was contended that: (i) in converting the underground station for use as a public air-raid shelter, the appellants as the local authority were acting under the Civil Defence Act, 1939, Pt. II, s. 4, and, therefore, nonfeasance on their part gave rise to no liability; (ii) the injuries in question were "war injuries" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, and, therefore, the respondent's action was barred under s. 3; (iii) the accident was not caused by the defect in the steps but was the inevitable result of the pressure of the crowd pushing in behind upon those who were in front:—

Held: (i) the Civil Defence Act, 1939, Pt. II, s. 4, did not apply where a local authority became the occupier of premises taken over for use as an air-raid shelter.

(ii) the accident was due to the negligence or breach of duty of the appellants and, therefore, the injuries sustained as a result of the accident were not "war injuries" within the meaning of sect. 8 of the Act.

Greenfield v. *London and North Eastern Ry. Co.* (1) *applied.*

(iii) the applicants were aware that there was a strong probability of a large rush of people which in the absence of control would be dangerous. The appellants were, therefore, liable for breach of their duty to the respondent and her family.

Decision of Singleton, J., ([1944] 2 All E.R. 301), *affirmed.*

[**EDITORIAL NOTE**. The Court of Appeal here uphold the court below on all points on which the appeal is based. Two matters call for reference in this note. It is held that the local authority failed in their duty to the respondent and the Master of the Rolls assumes for the purpose of his judgment that the level of duty was that owed to a licensee. Whether the respondent was a licensee or an invitee, however, was not fully argued, and du Parcq, L.J., is inclined to regard the position as being rather that of an invitee. The local authority was acting in pursuance of a public duty in providing an air-raid shelter, and the case may be compared with *Ellis* v. *Fulham Borough Council* (2), where the local authority provided a park or recreation ground. The case should, at all events, not be taken as authority for the proposition that persons using a public air-raid shelter provided by a local authority are necessarily licensees only.

The second point to which attention may be drawn is the expression of the court of the great importance of public hearings. A hearing *in camera* is held to be justified only where there are solid grounds, such as to outweigh the urgent public importance of maintaining the publicity of trials, for believing that public security demands a

secret trial. Secrecy leads to rumour which is almost invariably worse than the truth.
As to Occupier's Duties to Invitees and Licensees, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-612, paras. 851-863; and for Cases, see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306.]

Cases referred to:

*(1) *Greenfield* v. *London and North Eastern Ry. Co.*, [1944] 2 All E.R. 438; 171 L.T. 337.

*(2) *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212; [1937] 3 All E.R. 454; Digest Supp.; 107 L.J.K.B. 84; 157 L.T. 380.

(3) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74; 36 Digest 37, *213*; 92 L.J.K.B. 50; 128 L.T. 386.

(4) *Addie, R. & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.

Appeal by the defendants from a decision of Singleton, J., dated July 18, 1944, and reported [1944] 2 All E.R. 301. The facts are fully set out in the judgment of Lord Greene, M.R.

Sir Patrick Hastings, K.C., and *Montague Berryman* for the appellants.

Gilbert J. Paull, K.C., and *Phineas Quass* for the respondent.

Lord Greene, M.R.: This appeal was based on three simple and clear-cut points. Two of them were points of law, and one was a point of fact. The points of law can be dealt with quite shortly.

The first was based upon the provisions of the Civil Defence Act, 1939, Pt. II. Under that Part a local authority is empowered to use premises described as "designated premises," and under sect. 4 it is provided that:

> Where it appears to the local authority expedient for the purpose of making designated premises suitable or more suitable for any of the purposes mentioned in subsect. (1) of sect. 2 of this Act [the relevant purpose is use as a public air-raid shelter] or of keeping them suitable for any of those purposes, that works should be executed in those premises, or in the building of which they form part, or in or on any adjacent building or land, they may, if they are unable to secure the execution of those works by agreement, themselves execute those works.

It was said that the local authority in this case was acting under these provisions. It was said that sect. 4 merely empowers the local authority to execute works where it appears to them expedient to do so for the purposes mentioned; that in the present case the local authority did nothing, and that under a section worded as this section is worded, the failure to exercise the statutory powers gives rise to no cause of action if by reason of that non-exercise an accident takes place.

There are, in my opinion, two short answers to that argument: The first is that the local authority was not acting under that section, which appears to deal, and to deal only, with cases where the premises remain in the occupation of some private occupier, and the local authority uses them as an air-raid shelter. Those provisions do not appear to me to cover a case like the present, where the local authority itself takes over, as tenant, premises for use as an air-raid shelter, and itself becomes the occupier. The second answer is this, that, if the view which I have just expressed is not right—and I have no doubt that it is right—the cause of action in the present case is not in any way based on the statutory obligations of the local authority. It is based upon their common law position as being persons in occupation of premises which were in fact dangerous, and then proceeding either to invite (in the technical sense) or to license the public to use them; and on that view of the case the fact which counsel on behalf of the appellants placed in the forefront of his argument, that the local authority did nothing, is, in my opinion, quite irrelevant. So much for the first of the two points of law.

The exact statutory provisions under which this air-raid shelter was taken over by the local authority and maintained and opened to the public have not been fully explored. It would appear probable that they were acting under the provisions of the Air-Raid Precautions Act, 1937, but neither side has thought it necessary (and I do not think that it was necessary) to explore that question, because it is common ground that the local authority, in providing this shelter, was acting in pursuance of a public duty, and that is quite sufficient for the consideration of this case.

The other point of law arises under the Personal Injuries (Emergency Provisions) Act, 1939. Under that Act very special provisions were made for compensation by way of pension or grant to persons suffering from what are described as "war injuries." Sect. 3 of that Act provides, taking it quite shortly, that a person who has suffered a war injury is precluded from bringing an action for damages on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible. It is said that the injury which resulted in the death of the respondent's husband was a war injury, that the cause of action is in negligence or breach of duty, and that, accordingly, the action is barred by sect. 3 of the statute. In my opinion, that argument fails. In sect. 8 of the Act war injuries are defined as follows:

> "War injuries" means physical injuries—(*a*) caused by [and I pick out the relevant words] (i) the discharge of any missile . . . or [and this is the important phrase] (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy.

The argument is that the air raid which took place at the time of this catastrophe was "the doing of an injurious act by the enemy." That, it is said, caused these physical injuries. In my opinion, that argument cannot for a moment be supported. The physical injuries in this case, if the respondents are right, were caused by negligence or breach of duty on the part of the local authority, and to say that they were caused by the air raid is, to my mind, a fantastic view of the meaning of causation in this definition. No doubt the fact that an air raid was taking place, or about to take place, was one of the elements which led to this occurrence. In every case of cause and effect there is a complex of circumstances, all of which together may in one sense be regarded as the cause, but in dealing with causation in such a context as this one has to apply ordinary commonsense principles, and select that which to the ordinary man can be properly called "the cause."

In the present case, to say that the injury, which was due in every sense of the term to negligence or breach of duty, was caused by one of the surrounding circumstances, namely, the air raid, is, in my opinion, quite wrong. I do not take up time in elaborating that argument; it is sufficient, I think, to say that the view that I take appears to me to be in complete conformity with the view taken in this court in a quite recent case of *Greenfield* v. *London and North Eastern Ry. Co.* (1), where a crater had been formed by a bomb on a railway line, and the driver of the engine of a train, in obedience to instructions, proceeded to drive the train down the line, and the engine fell into the crater. The provisions in the section to which attention was particularly directed were those dealing with the impact of anything dropped from an enemy aircraft, and it was said that the cause of the injury was that impact. It was pointed out that the impact could not properly be described as the cause of the accident, but that the cause of the accident was the negligence of the person who gave the instructions to the driver to proceed.

I can now turn to the point most seriously put forward on behalf of the appellants. It was directed, and directed solely, to displacing an inference which the judge had drawn as to the cause of the accident. I take three passages from the judgment, which show what the inference was that was so strenuously attacked. The first one is at p. 304 ([1944] 2 All E.R. 301):

> Probably the old lady who seemed, as a witness said, to slip on the edge of the step was the first to fall and she took at least one person with her . . . It seems to me that the only inference to be drawn is that the block was caused by someone or by more than one person tripping or slipping on the unsafe steps.

Then at p. 305:

> The real cause of this tragedy was the dangerous condition of the steps. There were other matters which contributed—for example the very poor light and the lack of a handrail in the centre.

The judge then proceeded to mention other matters. That conclusion was attacked on two grounds: First of all it was said that the evidence of a witness that an old lady slipped or seemed to slip on the steps ought on no account to be accepted, and the reason given for that is a striking and important one. It was said that the light was practically non-existent, that it would have been quite impossible for a witness, standing on the landing at the bottom of the top flight of steps, to see anything of that kind; some sort of a blur may have been seen, but it was quite impossible for a witness to say that the old lady seemed to slip. The other ground for attacking the finding is equally striking, and its importance will appear later. It was said:

> Here was a state of affairs in which this accident was inevitable. A large crowd of people were pressing as fast as they could down the steps. The crowd was uncontrolled, and it was inevitable [this is the argument] that in that state of affairs what may be described as the front row or front rows of the crowd would be pushed over by the force of the pressure behind.

In those circumstances, it was said, the judge was not justified in picking out from the possible causes of this accident the undisputed bad condition of the steps, and inferring that that was what led to people falling, with the consequential piling-up of the crowd behind and on top of them.

Taking that argument by itself there is, I think, a good deal to be said for it. Here was a case where a large crowd of people were proceeding down these steps, in circumstances which I shall have to describe in more detail presently. The possibility of falling in those circumstances, quite apart from any defect in the steps, was obviously very great; and, if the case depended upon the validity of that particular inference, that it was the state of the steps which caused the accident, I should have required to consider with some care whether that was an inference which, in my opinion, ought to be drawn. But counsel for the respondent, while supporting the inference which the judge had drawn, was prepared to base his case on much broader grounds, and that leads me to a short consideration of one or two of the facts in the case. He said that the very grounds of attack on the judge's inference in themselves afforded a conclusive condemnation of the appellants. What is meant by that will appear in a moment.

This was a shelter of a quite unusual description. It was capable of accommodating at least 10,000 people. Sleeping accommodation was provided for 3,000 or 3,500. It was anticipated that very large numbers of people would use it, as in fact they had been in the habit of doing earlier in the history of this war. At the time when this catastrophe took place there had been a lull in the aerial attack on London, and people were apprehensive lest it might be renewed. That there was a strong probability of a large rush of people, which in the absence of control would be dangerous, was a matter to which the local authority was quite clearly alive. As far back as Sept. 30, 1941, they were anxious as to what might happen should such an eventuality occur. In a letter of that date written by the town clerk to the chief administrative officer of the London Civil Defence Region, the following passage occurs:

> The committee are aware in the light of past experience that there is a grave possibility that on a sudden renewal of heavy enemy air attack there would be an extremely heavy flow of persons seeking safety in the tube shelter, and that the pressure of such a crowd of people would cause the wooden structure to collapse and a large number would be precipitated down the staircase.

The particular possibility which the council were considering in that passage was the possibility that the pressure of the crowd would break down the wooden partitions which formed the sides of the approach to the shelter and the upper stairway. They were anxious to put that position right by building walls in place of the wooden partitions. The fact that that was the particular matter to which their minds were directed is quite irrelevant. What is important is that they were quite clearly contemplating (and, indeed, it appears in the evidence) the possibility and, indeed, the probability that on a recurrence of air raids there would be a large and uncontrollable rush of people seeking to obtain access to this shelter.

There are certain other matters in connection with this shelter which I will shortly state. First of all, it had only one entrance, and that entrance was such that the intake of persons seeking shelter would be so slow that, if a very large number of people, running into thousands, were endeavouring to obtain access, it would take a very long time for them to be passed through the entrance and down the staircase, a time far in excess of the seven minutes which was regarded as the period which would probably elapse between the alert signal and the first dropping of bombs. There was no sort of physical means of controlling the crowd. There were no sliding crush bars. The doors opened inwards, and there was no system for providing any kind of human control at the entrance to the shelter. No warden was posted there, and no instructions were given to the chief warden to post a warden there for the purpose of controlling the crowd and supervising the operation of getting the people in. The lighting was practically non-existent. There was a flight of 19 steps, 10ft. wide, with no handrail in the middle, so that, if anyone towards the middle of the steps were to fall there was no support available for him or for his neighbour if suddenly clutched by the person falling in an effort to save himself. The lighting, as I have said, was practically non-existent. I shall have occasion presently to refer to an answer that was given by one of the witnesses called on behalf of the appellants with regard to that matter. It was proved beyond possibility of doubt that this lighting was, for all practical purposes of getting people down the steps in safety and enabling them to see what was happening, wholly inadequate. It was the merest glimmer, and, indeed, that was accentuated by counsel for the appellants in opening the case, when he said that the lighting was so slight that the evidence that a witness at a distance of a yard or two had seen the old lady slip could not on any account be accepted. It is proved beyond possibility of doubt that the lighting was practically non-existent for any practical purpose. Each one of those circumstances was a source of danger. The evidence leaves no doubt in my mind whatsoever. Each one alone called for a remedy. In combination they gave rise to a situation which, as counsel for the appellants said more than once, was bound to lead to an accident of this description. The evidence leaves me quite clear that each one of those elements of danger was capable of being rectified without any difficulty whatsoever, and that was practically admitted. In those circumstances, what is the position ? Counsel for the appellants said, and it was an essential part of his argument, that the appellants did nothing. It was essential for him to take up that attitude, in order to make good the argument that he presented under the Civil Defence Act, because he was saying : "Non-feasance gives rise to no liability." That those matters were readily capable of remedy, that to remedy them was what a reasonable person would have done, is, to my mind, as clear as anything can be. If the measure of duty in the circumstances of this case which lay upon the appellants is that appropriate to the relationship of invitor and invitee there can be no question that the local authority committed a breach of its duty in not taking reasonable steps to remedy the defects.

I should perhaps divert the course of my judgment for a moment in order to say a few more words about the situation as it inevitably developed. This shelter was, naturally, intended for the accommodation of every sort of person, the young, the old, the infirm, men, women, children, babies, persons carrying bundles containing blankets and so forth for use at night. For a crowd of that description to make its way down a well-lighted staircase must necessarily be a rather slow affair, and, if you have infirm and aged people encumbered with children in the front rows of such a crowd, the speed of the front rows is necessarily slowed up ; but when you have a crowd of that description going down a flight of 19 steps which, even to the feel of the foot, must have appeared to be defective, in almost pitch darkness, the pace must inevitably be slowed down still more. People had to shuffle to find the steps, and a shuffling crowd of that description cannot proceed with very much speed. Counsel for the appellants said that the fall of one or more persons towards the front of the crowd was not caused by defects in the steps ; it was the inevitable result of the pressure of the crowd pushing in behind upon those who were in front. That, he said, was bound to lead to falls and to the subsequent catastrophe. That was the state of affairs, and those were the possibilities, and, indeed, the probabilities of the case, which leap to the eye.

The first question that arises is whether or not the relationship of the appellants to the respondent's husband was that of invitor and invitee. It seems to me that there are serious arguments in favour of the view that that was the true relationship. The appellants were fulfilling a public duty. Upon the due performance of that duty their reputation as servants of the public depended. In order to fulfil that duty they furnished themselves with premises thought to be suitable, and they threw them open to such members of the public as might desire to use them. In those circumstances it seems to me that there are serious grounds for saying that the case bears no resemblance to the case where, for social reasons or reasons of that kind, one person allows, or I will use the word

" invites " (but I use it here in a non-technical sense) somebody to come upon his premises ; and it may well be that such a case as the present is to be distinguished from *Ellis* v. *The Fulham Borough Council* (2), which was a case of a public park provided by a local authority. GREER, L.J., appears to have taken the view that even in that case the relationship was that of invitor and invitee, although he did not so hold as a matter of judgment. The other two members of the court, SLESSER and MACKINNON, L.JJ., took the view that the relationship was that of licensor and licensee. Here I do not find it necessary to express any concluded opinion upon the question, and I will assume that the true legal relationship was that of licensor and licensee.

The obligation of a licensor is well known, although the language in which it has been expressed in some cases had led to comment. Avoiding controversial matters, it may be stated as follows : A licensee must take the premises as he finds them, subject to this important qualification, that, if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it. What the suitable steps may be must, of course, depend upon the circumstances of the case.

The obligation of the licensor has in three well-known passages, all of them in cases in the House of Lords, been stated in wider terms, or what appear to be wider terms. I need not take up time by quoting all those passages. Two of them are to be found in the case of *Fairman* v. *The Perpetual Investment Building Society* (3). But I will quote the language of the latest of them. It occurs in a speech of LORD HAILSHAM, L.C., in *Robert Addie & Sons* v. *Dumbreck* (4), at p. 365 :

> In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent [that is to say, less stringent than the duty towards an invitee] the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known —or ought to be known—to the occupier.

It is the words " or ought to be known " which have given rise to controversy, and it has been stated that that phrase, which occurs also in the two other passages to which I have referred, was put in *per incuriam*. In *Ellis* v. *The Fulham Borough Council* (2), there occurs this passage in the judgment of GREER, L.J., on p. 221 :

> In *Addie* v. *Dumbreck* (4) in giving judgment, LORD HAILSHAM, L.C., directly laid down the proposition that in considering cases of this kind there are only three categories in which persons visiting premises belonging to another person may fall. Unfortunately, by what I think was a slip in giving judgment, he stated the rule as between licensor and licensee as being in effect the same as that between invitor and invitee. I do not think the other members of the House agreed with that part of the Lord Chancellor's speech. I therefore treat his speech as if the words " or ought to be known " were eliminated from it, because that would be in accordance with the authorities when we are dealing with a case of licensor and licensee.

Counsel for the respondent put forward what I must confess at first sight appears to me to be a very attractive explanation of that difficulty. What he said was that, if a licensor knows of the existence of what in fact is a trap or a hidden danger, that is sufficient, because he cannot be heard to say that although he knew the physical facts which constituted the danger from a purely objective point of view, the fact that it was a danger did not occur to his mind. In other words, that when the phrase " or ought to be known " was used, it was directed to that view of the position, and refers, not to the physical objective facts, but to the circumstances that those facts constitute a danger. That appears to me to be a very attractive view, but much though I should like to do so, I do not find it necessary to consider whether it is correct or not. It would be necessary to explore with some care the earlier authorities on the subject of licensor and licensee before accepting it. I am prepared to deal with this case on the hypothesis that in order to fix a licensor with liability it is necessary to bring home to him not merely knowledge of the facts which constitute the danger, but his own knowledge that those facts do constitute a danger.

I have referred to various elements of danger in this case. For the purpose of what I am going to say I need not go into any of them except the two which appear to me to be of principal and, indeed, conclusive importance, namely, the absence of light and the absence of control. Those two circumstances together were of such a high degree of danger as to be sufficient to explain this accident without having regard to any of the other considerations, such as the insufficiency of the entrance and the absence of a central hand-rail down the staircase itself.

With regard, therefore, to the absence of light and absence of control, was it known to these appellants that those two matters constituted a danger, or not ? It is, I think, shown quite clearly in the evidence that they knew that those two matters were dangerous. I have already said this, which it is necessary to bear in mind throughout this inquiry, namely, that a large rush of people was anticipated. Now I am going to refer to one or two passages which appear to me to show that the danger of those two matters was brought home to the council.

First of all, on the question of lack of control, the air-raid precautions officer of the appellants said this in his evidence ; these are the questions and answers :

Q.—Do you agree that for safety purposes, in the event of a crowd wanting to get into the shelter, you should have wardens at the top entrance, here, to control the crowds ? *A.*—There is no real necessity until there is a crowd.

Q.—I do not understand that answer. Do you mean that it never struck you as a reasonable precaution to have wardens at those entrances in case the crowd should become large ? *A.*—Yes, if that is what you mean.

Q.—Then do you agree with me that it is an elementary precaution to take, to have wardens at the top to look out ? *A.*—Yes, of course.

Then at a later stage in the evidence :

Q.—And that being so, do you agree with me that it is elementary to have wardens posted at the top to control those crowds ? *A.*—Yes.

Q.—And that without such wardens a very dangerous situation might arise ? *A.*—Yes.

Q.—Might I suggest to you that when you are talking of a dangerous situation you mean a situation during an "alert" ? *A.*—I agree.

The chief air-raid warden was asked in cross-examination this series of questions, and these are the answers that he gave :

Q.—And indeed the crowds, as you say, were such night after night that you thought you ought to have extra police ? *A.*—No. It was not the entry of people into the shelter and the way they got in that prompted me to suggest that we should have police assistance.

Q.—What was it ? *A.*—It was the very fact that the top of the shelter is at a very congested road junction where large numbers of people gather and where there are about a dozen different public-houses within a stone's throw, and close by there is a cinema, and consequently you get a rush of people ; and on this occasion, when the raid occurred at a different time and when the enemy had been receiving very heavy raids from us, the people were in such a state of mind that they were expecting the worst thing to happen.

Q.—That, of course, is what you would expect to happen, is it not ? *A.*—Yes, at that time.

Then a little later :

Q.—You recognised, did you not, and you anticipated that there would be large crowds outside the shelter ? *A.*—I recognised that immediately an alert was sounded people made a rush for the shelter. Yes, I recognised that.

Q.—Did you recognise the fact that if an accident, if a bomb fell, or if there was heavy gun fire, those people might tend to rush to the shelter ? *A.*—Yes, I certainly agree. I had recognised that there was a danger, and I made representations to the police, very strong representations, accordingly, to see if anything could be done to disperse the crowds of people that gathered at that road junction, but I am afraid without avail.

Q.—Your thought, therefore, was that there should be police to disperse the crowd and send them away from the shelter, that was the idea, was it ? *A.*—To prevent the gathering of a large number of people so that there would be a sudden rush, certainly.

I should have been prepared to infer, quite apart from that evidence, that anyone, and the appellants and their officers in particular, must have realised that a crowd of the size expected and in the hurry that was expected, if left uncontrolled to surge down these stairs, was a source of danger ; but the evidence seems to me to establish that they in fact realised it, and, therefore, the inference becomes unnecessary.

With regard to light, the borough engineer and surveyor gave evidence ; and these are the questions and answers :

> *Q.*—So that if you had not even troubled about the long passage but had made your entrance at the side plus a light lock, you would have had no difficulty in lighting those stairs adequately, would you ? *A.*—They were already lighted adequately.

Now, that is an amazing answer ; no more amazing, perhaps, than some of the answers given by other witnesses in this case, whose action or inaction in relation to this shelter might have seemed likely to attract criticism. There was not, in some instances, that ready desire to assist the court which one would have expected. I mention no names. But that answer is quite impossible of acceptance, and it was, indeed, entirely thrown over by counsel for the appellants in opening this case, because it was one of the crucial points in his argument that the light was practically non-existent ; and here is the borough engineer and surveyor saying that the stairs were already lighted adequately. I am quite unable to accept that answer, and, indeed, it is quite inconsistent with the case that was presented to us. The next question and answer were :

> *Q.*—Very well—you would have had no difficulty in having more light on the stairs ? *A.*—No, none whatsoever.

Now, there are certain matters which are set out and summarised in the judgment of the judge which are relevant to this part of the case. The judge discussed the state of knowledge of those responsible for the management of the shelter, and quoted the evidence of a witness who was at one time a warden :

> The lighting on the upper flight of stairs was very bad. I complained continuously to Mr. Hastings, Mr. Griffiths, the deputy warden and chief warden Bridger.

The judge then referred to the evidence of Mrs. Minns, who had said to the chief warden :

> What about having a light put on ? We have to shuffle for the stairs.

He also quoted the evidence of King, a member of the London County Council, who was normally in charge of a shelter in Old Ford Road, and one night, owing to something that had happened at that shelter, he had to take his people to the shelter with which we are concerned.

Here I should like to interpose one fact which I have not mentioned, and that was that for a long period there was no roof over the entrance to this shelter. The entrance itself, and the flight of stairs with which we are concerned, lay unprotected to the sky, and whether or not on a night when there was some light in the sky or some reflection from searchlights the lighting conditions on these stairs were better, I do not know, but one thing is quite certain, that whatever possibilities of improved illumination may have lain in that direction, as soon as the roof was put on they were entirely excluded, and people making their way into the shelter had to rely on the quite useless glimmer of light that was provided.

King had been to the shelter in May or June, 1942. There was no roof on the shelter at that time. What he said was this :

> It was difficult to get down into the shelter because there was total blackness. I had a baby in my arms. I could not see the steps. I had to shuffle my feet to find the first step. I spoke to Mr. Bridger, saying : " Jim, this is a death trap, some lighting is required in the shelter and also some rails to get downstairs," [and, according to the witness Mr. Bridger replied :] " Um, I suppose so."

It is to be borne in mind that King was referring to a period when the roof had not been put on, and the hurricane lamps which during that period had been used were apparently not there ; but the situation with regard to light was certainly no better after the roof was put on than it was before because the light provided was of no practical use whatever.

Then the judge said, at p. 305 :

> I cannot accept the denial of the chief and assistant shelter warden. I am satisfied on the evidence that the condition of the steps and of the entrance at that time was brought to the notice of those responsible for the management of the shelter.

Counsel for the appellants, very fairly and frankly, simplified his task by telling us that he accepted without reserve every single finding of fact of the judge, save as regards the two matters which he was concerned to attack, namely, the trustworthiness of the evidence of the witness with regard to the old lady seeming to slip, and the inference that the judge drew that one or more persons were thrown down by the defective state of the steps. That finding, therefore, stands unchallenged, and establishes the proposition that the fact that these unlighted steps, in all the other circumstances which affected this shelter, did constitute a danger was brought home to the appellants. It seems, therefore, that the position is this: Two explanations, and only two, are put forward to explain this catastrophe, or rather I should say, to explain the incident which led to the gradual crushing of these unfortunate people. The first was that which the judge put in the forefront of his judgment, that, owing to the defective steps one or more persons fell, and the crowd behind proceeded to fall over them. I am dealing with this case without regard to the condition of the steps being one of the matters which led to the persons falling. It is, however, fair to point out that the condition of the steps may well have had this effect, even on that footing, that persons who were feeling forward in the darkness for the next step, and finding that the steps were defective, would for that reason have their progress to a certain extent slowed down.

The other explanation is the one put forward by counsel for the appellants, and I cannot see that there can be more than two possible explanations. He said that this catastrophe was caused by an uncontrolled rush of people forcing their way in at the top of the shelter without realising that by doing so they would necessarily overturn those who were in the front rows, and that that was the cause of the accident.

If that view be accepted, and, if the condition of the steps is eliminated, the question immediately arises: Who was responsible for the state of affairs in which such a situation could develop? Was it due to some default in the execution of their duty by the appellants? I have no hesitation in answering that question in the affirmative, and in doing so I have assumed that the level of duty was, not the lowest known to the law, because that is the case of a trespasser, but the intermediate level of duty which lies between that owed by an invitor towards an invitee, and that owed towards a trespasser, namely, the duty owed by a licensor towards a licensee; and I have assumed in favour of the appellants that in applying the rules relating to that duty, knowledge of the existence of what in fact was a trap is not sufficient; but that knowledge must be established that it was in fact a trap, that it was in fact a danger. I have assumed all those matters, and I come unhesitatingly to the conclusion that liability is established.

I do not think that I ought to leave this case without referring to one further matter. When the case was called on an application was made by the Attorney-General that it should be taken *in camera*. To that application the judge acceded. Now, I must not be misunderstood. The judge acted with perfect propriety in acceding to that application; he could do nothing less. In practice he could do nothing less, although technically the matter was one for his discretion. The Attorney-General acted, as one would expect, again, with perfect propriety in making the application upon his instructions. What I have to say, therefore, involves no criticism whatever either of the judge or of the Attorney-General. I cannot, however, help thinking that it was unfortunate that those instructions were ever given. Nothing is more important, I venture to think, than the public administration of justice. That any idea should creep in, either to the mind of the public or to the minds of government officials, that the hearing of a case *in camera* can be ordered save for the most solid reasons would, I venture to think, be a public misfortune. I am not suggesting that the Ministry, in giving those instructions to the Attorney-General, acted otherwise than in perfect good faith in what they considered to be the national interest It is obviously, in time of war, of the greatest importance that matters which affect public security in a real sense should not be ventilated in public; if it is likely, or even if there is a real possibility, that publicity would assist the enemy, it is, of course, perfectly right and proper that the court should be asked to exercise its very exceptional power to order a hearing *in camera*. In the present case, so far as I understand it, the only ground of public security which influenced the mind of the Ministry lay in the possibility that circumstances might come out in evidence which pointed to there having been a panic. The facts were perfectly well known. The Ministry knew perfectly well that there was no panic, before this trial opened. It is, of course, possible that some witness or some witnesses might in the course of their evidence have described the situation as one of panic. That was always possible, but I cannot regard a possibility of that kind as being a solid ground for departing from the cardinal rule of the administration of justice, that trials should be public. It seems to me that whether a witness or witnesses had said such a thing, or whether they had not, the enemy would have been quite astute enough to invent it. Therefore, without casting any doubt upon the good faith of the Ministry, I feel constrained to say that applications for hearing *in camera* should be made, and should be made only, on solid reasons; and it seems to me that one of the dangers of making applications of that kind is that, gradually and by degrees, the conception of what is really necessary in the public interest becomes whittled down until circumstances which cannot on any serious ground be considered to be matters of national security come to be regarded by the Ministry involved as demanding a secret trial. What I hope is that the most earnest consideration will always be given in future to this matter. Here was a case where the matters involved were going to lead to a critical examination of what an important public authority had done or neglected to do in performing its duties towards the public. It was a case in which conceivably—I say this without suggesting for a moment that the possibility materialised—some officials of the Ministry itself might have been subjected to criticism. The words that I have used must not be taken as meaning that I find that to have been the case, but there was that possibility. If ever there was a case where the public administration of justice became of the highest importance, where the evidence should have been given in open court, so that other witnesses if they wished could come forward and assist the court, and so that no suggestion of secrecy should hang over the trial, it seems to me that this was that case, and it becomes apparent that although the Ministry no doubt honestly thought that the grounds were solid grounds, they were of the flimsiest description, and should not have been allowed to outweigh the urgent public importance of maintaining the publicity of trials in this country. The appeal must be dismissed with costs.

MACKINNON, L.J.: I agree. LORD GREENE, M.R., has dealt so fully with the facts and the law that I should only be repeating what he said if I thought it necessary to add anything. I agree with all that he has said, and in particular I associate myself with his concluding remarks.

DU PARCQ, L.J.: I also agree. LORD GREENE, M.R., has not expressed any final opinion upon the question whether the persons using this air raid shelter, and in particular the deceased persons, were invitees or licensees. I wish to take the same course, but I should regret it very much if anybody thought that I was deciding that those persons were only licensees. I refrain from saying anything more definite because possibly the point might have been more fully argued if it had not been felt, and I think rightly felt, by counsel for the respondent, that on the facts of this case it made no difference in the end. But I am bound to say that the inclination of my mind on the facts of this case, and on the authorities as I understand them, would be to say that the deceased persons were invitees, though I am not finally so deciding. I listened carefully to what LORD GREENE, M.R., said at the end of his judgment as to the desirability of public trials. I also agree with that, and I will add that I think that it is a matter of real satisfaction that, here in this court, the whole of the material evidence has, I think it is right to say, been either read or accurately summarised during the hearing of the appeal, so that it has been possible for such publicity to be given to it as might be thought right. I think that a real public service has been rendered by that, partly because one of the dangers—not by any means the only danger, but one of the dangers—of secret trials is that rumours are likely to be spread, which may be much graver than the facts. I entirely agree with the judgment of my Lord, and I will add nothing further.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted on terms.

Solicitors: *William Easton & Sons* (for the appellants); *Arthur Dollond & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LEVER BROS. AND UNILEVER, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **December 18, 1944.**]

Revenue—Excess profits tax —Capital employed in chargeable accounting period—Contribution to superannuation fund to equalise benefits for employees—Whether company had acquired, otherwise than by purchase, an asset in consideration of contribution—Mere advantage not equivalent to acquisition of asset—" Asset "—Finance (No. 2) Act, 1939 (*c.* 109), *s.* 13 (3), *Sched.* 7, *Pt. II, para.* 1.

The respondent company acquired a controlling interest in two trading companies, one of which had, since 1922, an established contributory superannuation fund for the benefit of its staff. In 1928 the employees of the other trading company were admitted to the fund as if they had been contributors to the fund from the commencement of their service with the firm. In 1932 provision was made for the admission of the employees of the respondent company to the fund as from July 31, 1931, and their benefits were calculated as from the date when they were in fact admitted. In order to remove the disparity, the respondent company paid, in 1940, sums amounting to £1,026,526 to the trustees of the superannuation fund, thereby establishing for their own employees equality of status with the employees of the two trading companies as regards contributions to the fund and benefits receivable under it. The payments were not a commutation of any existing liability, because the increased pensions which the sums were intended to cover were not pensions for the payment of which the respondent company was in law responsible. In the respondent company's accounts the payments were dealt with in the following fashion: They were paid out of reserve funds previously allocated for the purpose, and after payment the reserve funds were written down by an equivalent amount, but no entry was made on the assets side of the balance sheet. The appellant Inland Revenue Commissioners contended that in consequence of the payments made in 1940 by the respondent company to the trustees of the superannuation fund, the average amount of the capital employed in the business of the respondent company during 1940 was less than the average amount of the capital employed therein in the standard period, and that the standard profits for that year must, therefore, for the purposes of the assessment to excess profits tax be decreased by the prescribed percentage of the decrease in the average amount of the capital employed. It was contended for the respondent company that a sum equal to the payments made to the trustees ought to be regarded as " capital employed in the business," since on the occasion of the payments the respondent company acquired an asset, otherwise than by purchase, within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, para. 1 (*c*), and that the value of this asset was the amount in question. As to the nature of the asset, the contention of the respondents rested on a twofold proposition: (i) by the payments in question the respondent company acquired an advantage of like value, consisting in the existence of a solvent and satisfactory superannuation fund, and in the assurance of enhanced loyalty and contentment of their staff; (ii) the asset acquired consisted in a legal right in the respondents to compel enforcement of the trusts of the superannuation deed, and that right was either a right in contract between the respondents and the trustees, or a right derived from the fact that there was under the trust deed, or there might be in certain events, a resulting trust in favour of the respondent company:—

HELD: (i) though the respondent company, by the payments in question, gained an advantage of like value, such advantage was not an asset within the meaning of the Finance (No. 2) Act, Sched. 7, Pt. II, para. 1.

(ii) the respondent company, once the money was paid over to the trustees of the fund, had no contractual right to enforce the trust, and even assuming that there was such a right, that right was of a purely nominal value.

Barclays Bank, Ltd. v. *A.-G.* (2) *applied.*

(iii) even if there was, on the determination of the trusts, a resulting trust in favour of the respondent company, carrying the right as against the trustees to enforce the proper administration of the fund, the interest acquired under this resulting trust was too remote and purely nominal in value.

(iv) if, therefore, a company paid capital out of the business for the purpose of securing an advantage, and that advantage did not constitute an "asset" within the meaning of the schedule, the result was that for excess profits tax purposes the capital employed in the business had been reduced by the amount of that payment.

Decision of MACNAGHTEN, J. ([1944] 2 All E.R. 285) *reversed.*

[**EDITORIAL NOTE.** This decision turns upon the construction to be put upon the word "asset" in Sched. 7 of the Finance (No. 2) Act, 1939. In order to obtain the taxation advantage sought it was necessary for the company to show that they had acquired an "asset." It is held that although they obtained a very real advantage by their contribution to the superannuation fund this did not amount to an asset acquired otherwise than by purchase so as to be capital employed in the business. The MASTER OF THE ROLLS compares the position with that arising when a company makes a payment to extinguish a right of way over the company's land. There is then an advantage improving the value of an existing asset, no more; it cannot be described as the acquisition of an asset.

It is further argued that there is a right, of pecuniary value, to enforce the trust as against the trustee of the fund, but it is held that in such circumstances the trustees' obligations are to the beneficiaries, who alone can enforce them. If there was a resulting trust to the company it was so remote as to be of purely nominal value.

However sound this decision from the point of view of law or finance, it is undoubtedly one likely to be productive of hardship in acting as a discouragement to the payment of sums to superannuation funds, but, as the MASTER OF THE ROLLS points out, the legislature has clearly set out what is to be taken into account in ascertaining the amount of capital employed in a business.

It is thought that the decision in this case does not go further than to establish that a lump sum payment by a business to a pension fund outside its control, for the benefit of its employees, does not create an "asset" within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, para. 1. The example cited in the judgment of the Master of the Rolls tends to obscure the fact that additional expenditure of capital on an existing asset may in certain circumstances and does in most circumstances increase the value of that asset or create a new asset within the meaning of the Schedule.

FOR THE FINANCE (No. 2) ACT, 1939, Sched. 7, Pt. II, para. 1, see HALSBURY'S STATUTES, Vol. 32, p. 1221.]

Cases referred to:

*(1) *British Insulated & Helsby Cables* v. *Atherton*, [1926] A.C. 205; 28 Digest 52, *264*; 95 L.J.K.B. 336; 134 L.T. 289; *sub nom. Atherton* v. *British Insulated & Helsby Cables, Ltd.*, 10 Tax Cas. 155.

*(2) *Barclays Bank, Ltd.* v. *A.-G.*, [1944] A.C. 372; [1944] 2 All E.R. 208; 113 L.J.K.B. 465; 171 L.T. 366.

APPEAL of the respondent Inland Revenue Commissioners from an order of MACNAGHTEN, J., dated June 6, 1944, and reported [1944] 2 All E.R. 285. In order to deal with the main contention of the respondent company, that the asset acquired consisted of a legal right to compel enforcement of the trusts of the superannuation deed, the Court of Appeal referred the matter back to the Commissioners requesting them to answer the following questions: (i) whether there was any and, if so what right belonging to the company as against the trustees of the pension fund arising out of the payments; (ii) whether, if there were no such right, there was an advantage arising to the company from the payments to which a monetary value could be attached; (iii) whether the said right or advantage was an asset within the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, r. 1; and (iv) if so, what amount, if any, should be included as the value of the right or advantage in computing the capital employed in the business. The commissioners found (i) that there was no contract constituted by the deed or by the correspondence between the company and the trustees by reason of which the company acquired the right to compel the trustees to administer the fund in the manner stated, nor was there a resulting trust entitling the company to secure the due administration of the fund by applying to the court for an appropriate order; (ii) that an advantage arose to the company from the payments consisting in the relief from the prospective yearly contributions of certain sums, and that that advantage was equivalent in monetary value to the amounts paid; (iii) that if, contrary to their opinion, a right existed against the trustees (either contractual or in the nature of a resulting trust) the right so acquired by the payments was in the nature of an asset within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, r. 1, but the advantage arising to the company did not in any sense constitute property in the company and was not an asset within the same rule; and (iv) that if, contrary to their opinion, there was a right against the trustees, such right, although an asset, was an asset of no substance, and no monetary value could be attached to it, so as to be included in computing the capital, but if the advantage was an asset, an amount equivalent to the payments should be included as its value in computing the capital.

J. Millard Tucker, K.C., J. A. Wolfe and *F. Heyworth Talbot* for the respondent company, appellants in the court below.

The Solicitor-General (*Sir David P. Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellant Inland Revenue Commissioners, respondents in the court below.

Lord Greene, M.R.: The questions raised by this appeal relate to two sums of £131,196 and £895,329, paid into a superannuation fund by a group of companies which, for the purpose of excess profits tax, are to be grouped together. The respondents are the principal company in that group. Nothing turns upon the fact that it is a group, and that the payments in question were made by the group. For convenience, when referring to the respondents, I will include in that expression the group as a whole. The former of the two sums was paid in connection with the provision of increased widows' pensions and the latter in connection with the provision of employees' pensions. The object of those payments, putting it shortly, was to provide a capital sum, calculated actuarily, sufficient to cover certain payments which the persons interested under the fund would not have received owing to certain matters in the history of the fund into which I need not go. In other words, the payments were made in order to put the fund in a position to pay sums which otherwise it would not have been able to pay. The payment in each case was not a commutation of any existing liability, because it so happened that the increased pensions which these sums were intended to cover were not pensions for the payment of which the respondents were in law responsible.

The question which arises is whether or not a sum equal to those two payments can be treated as "capital" in the business for the purpose of excess profits tax. The relevant statutory provisions are to be found in the Finance (No. 2) Act, 1939. Under sect. 13 (3) of that Act, there is a proviso:

> . . . that if the average amount of the capital employed in the trade or business in any chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased, by the statutory percentage of the increase or decrease in the average amount of the capital employed in the trade or business.

The contention of the respondents is that sums equal to the two sums in question ought to be regarded as "capital employed in the business" of the group for the purposes of that proviso. The second part of the seventh schedule to the same Act lays down rules for ascertaining the amount of the capital employed in a trade or business, so far as it does not consist of money. The relevant provisions are:

> 1 (1) . . . the capital employed . . . shall be taken to be (*a*) so far as it consists of assets acquired by purchase on or after the commencement of the trade or business, the price at which those assets were acquired, subject to the deductions hereafter specified; . . . (*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business, subject to the said deductions.

It is said that on the occasions of these payments the respondents acquired assets otherwise than by purchase, and that the values of them are the amounts in question. The amending provision of the Finance Act, 1940, s. 34 (3) does not, I think, introduce anything which is relevant to the present question.

Before the Special Commissioners it was argued that the respondents had acquired assets equal in value to the amounts in question, those assets being an assurance of enhanced loyalty and contentment of their staffs. The Commissioners did not accept that argument; nor did they accept various other arguments which are set out in the case, with which I need not deal. On appeal by the present respondents to the King's Bench Division, Macnaghten, J., said ([1944] 2 All E.R., at p. 288):

> The view that the appellant got nothing for its money cannot, I think, be maintained. Trading companies do not usually give away their money for nothing and by the payments in question the appellant did acquire the right, as against the trustees of the fund, to compel them to pay the increased benefits to its employees. In common parlance, the transaction was a purchase of benefits by way of allowances and pensions for its employees, their widows and dependants; and thereby to make them more content with their employment, or, at least, to remove a cause of discontent.

He allowed the appeal.

It will be observed that the judgment of Macnaghten, J., was based on the view that the respondents had acquired a right to compel the trustees of the superannuation fund to apply these two sums in such a way as to confer the contemplated benefits on employees and thereby make them more contented. That proposition was one in respect of which, so far as I can discover, no real argument was put forward before the Commissioners. Before the Commissioners the point was this: It was said that by these payments the respondents acquired a benefit consisting of the increased contentment of their employees. Such a benefit, it was said, was an asset within the meaning of Pt. II of the seventh schedule, and the value of the asset was the amount actually paid. Before Macnaghten, J., the argument was different. It was that the asset acquired consisted of a legal right in the respondents to compel enforcement of the trusts of the superannuation deed. Before us the argument for the respondents was developed on the same lines; but we took the view that the material which was available in the stated case was not sufficient to enable us to deal with that aspect of the question, since the matters of fact on which such an argument was based and the relevant documents were not to be found in the case. Accordingly, we thought it right to send the matter back to the Commissioners, with certain questions which the Commissioners have now answered in a supplemental case, annexing to it the relevant documents. The first question is:

> Whether there was any and, if so, what right belonging to the company as against the trustees of the pension fund arising out of either of the two payments mentioned in the case stated?

They answered that as follows:

> We hold that no contract is to be found in the deed, or in the correspondence, such as to give the company a right as against the trustees arising out of either of the same two payments. We find much more difficult the question whether there is a resulting trust in consequence of which the company has an interest in the fund, carrying the right as against the trustees to go to the court for an administration order, and so to enforce the proper administration of the trust for the benefit of all concerned. After considering particularly the terms of cll. 82, 87 and 88 of the deed, we have come to the conclusion, though with grave doubt, that no such right is brought into existence, the possibility of a resulting trust being, in the circumstances, so remote as to be unreal and of no effect. In any case, if such a right does exist, we hold that it was not, to any extent, the source of the advantage (as defined below) arising to the company from the said two payments.

By way of explanation of what is said there, I may mention that the right alleged to have been acquired by the respondents for enforcing the proper administration of these funds was said to be either a right in contract between the respondents and the trustees, or a right derived from the fact, as it was said, that there was under the trust deed, or there might be in certain events, a resulting trust in favour of the respondents, which again would give them the right to require the proper administration of the funds.

The second question was this:

> Whether, if there were no such right, there was an advantage arising to the company from the payments to which a monetary value could be attached?

That was answered as follows:

> We hold that an advantage arose to the company from each of the two payments aforesaid, and that, on the facts of the case, it consisted in relief, not merely from what was recognised or felt in general to be an obligation, but from the prospective yearly contribution of certain sums. We hold that in the case of each payment the advantage must be taken to be equivalent in monetary value to the amount paid.

Then they point out that this advantage was assured to the company by the circumstances which they mention, independently of any right of enforcement by the company.

The third question was:

> Whether the said right or advantage was an asset within the Finance (No. 2) Act, 1939, Seventh Schedule, Pt. II, r. 1 ?

That was answered as follows:

> If, contrary to our opinion, a right exists against the trustees (whether contractual, or in consequence of a resulting trust), we hold that the right so acquired by each of the two payments was in the nature of an asset within the said rule. We hold that the advantage referred to in (*b*) above did not in any sense constitute property in the company and was not an asset within the same rule.

According to that view, if it be correct, therefore, it was essential for the respondents to establish one or other of the rights which they mention in order to get an asset at all for the purposes of the statutory provision. If all they got was a mere advantage, that, the Commissioners held, was not an asset.

The fourth question was:

> If so, what amount, if any, should be included as the value of the right or advantage in computing the capital employed in the business ?

The answer was this:

> If, contrary to our opinion, there was a right against the trustees acquired as aforesaid, we hold that, although an asset, it was an asset of little or no substance, and that no monetary value can be attached to it, so as to be included in computing the capital. If, contrary to our opinion, the aforesaid advantage was an asset, we hold that an amount equivalent to the whole of the two payments should be included as its value in computing the capital.

Before I come to deal more closely with the questions raised, it is, I think, useful to notice the way in which these payments were dealt with in the company's accounts. They were paid, so we were told, out of reserve funds previously allocated for the purpose, and when they had been paid the reserve funds were written down by an equivalent amount, but no entry was made on the assets side of the balance sheet representing the alleged right or the alleged advantage. Counsel for the respondents argued that it would have been perfectly legitimate to enter equivalent amounts on the assets side of the balance sheet, because, he said, these payments, however one regarded them, were similar to payments of debts in advance; although there was no debt, yet it was a business obligation which obviously was going to be carried out, and that, from the pure accountancy point of view, it would have been right, accordingly, to enter those amounts on the assets side. Of course, if that was right, it would involve writing back to reserve the amounts which had been taken from reserve in order to effect the payments, and the result of that would have been to increase the excess of assets over liabilities as shown by the balance sheet. If the amounts were not written back to reserve, the balance sheet, of course, would not balance. It is, perhaps, not without significance that no attempt to arrange the accounts of the company on those lines were made, and I cannot help thinking that it would have required a good deal of courage on the part of directors and auditors to have made the entries in the accounts which counsel for the respondents submitted would have been legitimate. But supposing they had been made, what would they have meant ? The entry of those sums under some appropriate title on the assets side would not have meant that they represented an asset in the sense of something which had an independent existence. What it would have meant would have been, surely, nothing more than this, that the aggregate value of the company's undertaking had been written up. I can well understand the view that where a company has in existence a solvent and satisfactory superannuation fund, its business regarded as a whole is more valuable, and, if it came to sell the business it would get more for it than if the superannuation fund was not in existence or was not solvent. But the value of the payments made can only, as far as I can see, be reflected in an increased value in the undertaking as a whole, and to enter them as separate items in the balance sheet as assets would merely have been a point of accountancy technique; the reality of it would have been that the sums so entered represented merely the amount by which the value of the undertaking could fairly and properly be written up.

I can now come more closely to the arguments that were submitted to us. The argument that there was an advantage, and the supplemental case, of course, quite clearly, finds there was an advantage, was adumbrated (I do not think it was more than that) before us, and it was said that, as the Commissioners had found, the value of that advantage was the sum of the two amounts paid. Let it be so. Is such an advantage an asset within the meaning of the statute ? In my opinion, it quite clearly is not. The word " asset " is one which in this context has, I venture to think, some definite meaning in law as well as in business. If anyone were to ask : Do the assets of the company exceed its liabilities, and, if so, by how much ? I do not think anyone would answer the question by taking into account payments of this description. But the language in the schedule seems to me to be quite clear on this point :

> . . . the capital employed . . . shall be taken to be . . . so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business, . . .

The real fact of the matter is, it seems to me, when a company secures for itself an advantage of this description looked at as a mere advantage, it is not acquiring an asset which has a value. This particular advantage in itself had no value at all. Its only value consists in the improved value of the undertaking as a whole by reason of the existence of a solvent and satisfactory superannuation fund. It was not a thing that could be acquired in the sense in which that phrase is used in the schedule. It frequently happens that a company secures for itself an advantage for which it pays without having anything definite to show for it. One example that occurred to me in the course of the argument was the case where a company, having land subject to a right of way, pays a sum of money in order to get rid of the right of way. It has secured an advantage, but the cash that is paid would never be put into a balance sheet as an asset. It might very well be that as the result of the extinction of the right of way the company's own land had become more valuable, and it might be justifiable to write up its value in the balance sheet by a corresponding amount, but that would not be because the company had acquired an asset ; it would be because the company had got rid of a disadvantage, and by getting rid of that disadvantage had improved the value of an existing asset whose value before was adversely affected. It seems to me quite clear that the mere improvement of an existing asset by getting rid, for example, of a servitude which affects it is not the acquisition of an asset within the meaning of this schedule.

The position of payments of this character into a superannuation fund was dealt with in *British Insulated and Helsby Cables, Ltd.* v. *Atherton* (1). That was an income tax case, and the question was whether the company which had made the payment was entitled to deduct, for the purpose of ascertaining its profits, the sums which it had paid. It was argued for the Crown that the sum paid was in any case not deductible owing to the specific provision in the rules which relates to sums employed, or intended to be employed, as capital in the trade. That argument was negatived, although the Crown succeeded on other grounds, and LORD CAVE, L.C., said this, at p. 212 :

> . . . nor was it (strictly speaking) a sum " employed or intended to be employed as capital in " the trade, for it did not remain in the company's hands but was irrevocably paid away to the trustees of the pension fund.

There are similar observations in some of the other speeches.

What the company did here, I venture to think, was not that it retained capital in the business at all, but that it paid capital out of the business for the purpose of securing an advantage. If a company does that and the advantage which it secures, however important it may be from the business point of view, does not constitute an asset within the meaning of the schedule, the inevitable result is that for excess profits tax purposes the capital employed in the business has been reduced by the amount of the payment, and that, in my opinion, is what happened here, if all that the company did was to secure an advantage. But the main weight of the argument for the respondents was aimed at establishing the proposition that the respondents acquired a real asset in the sense that they obtained the legal right to ensure that they would enjoy this advantage, and they said that the advantage being, as found by the Commissioners, equal to the amounts paid, the right to secure that advantage, if necessary by legal proceedings, was necessarily of the value of the advantage itself. That legal right of enforcement was said to consist either in a contractual right against the trustees or in the existence of a resulting trust under the trust deed.

I will take first the suggestion that there was a contractual right against the trustees (a suggestion which the Special Commissioners did not accept). It was said that under the trust documents themselves there is an undertaking by the trustees towards the respondents to the effect that they (the trustees) will apply these funds in accordance with the trusts, and that the result of that is to give to the respondents a contractual right as against the trustees to secure the carrying out of that undertaking. That right, it was said, could be enforced by means of an injunction to restrain the trustees from dealing with the funds otherwise than in accordance with the trust. The relevant provisions of the trust deed, I think, can be taken to be of this nature: There are certain conveyancing complications in the history of this fund owing to new companies coming into the superannuation scheme, but I can ignore those and examine the position as it would have been if the respondents had been original parties to the deed, and the questions were: Did the trustees undertake a contractual obligation towards them? Regarding the documents in that way, they are documents made between the respondents and the trustees containing appropriate recitals and definitions, and beginning with the words "Now this Indenture witnesseth." Cl. 4 is as follows, just taking what is necessary:

> During the settlement period the trustees shall from time to time . . . apply the income and also . . . the capital of the trust funds in manner following, that is to say:
>
> (*a*) In payment of all proper costs, charges and expenses of the trustees . . .
>
> (*b*) In making such payments as shall from time to time be payable under the regulations in performance of the objects (as hereinbefore declared) of the trusts hereof.

It is said that there you have, on the face of a document, an undertaking by the trustees, as one of the parties to this deed, to the respondents as the other party to the deed, that they (the trustees) will administer the funds in the manner stated, and that, it is said, is contractual. Right through this document one finds, as one would expect, many other paragraphs beginning with the words, or containing the words "The trustees shall," and that, indeed, is common form.

The other clause to which I think it is relevant to refer, is cl. 76; it was under that clause that these payments were made. I need not set out the clause at length, but in relation to the capital sums to which it refers, which include the sums at present in question, it says:

> Such capital sums shall become part of the trust fund for all the purposes of these presents, and the trustees shall, subject to these presents and to the regulations, allocate sums equivalent in the aggregate to such capital sums as and when paid or undertaken to be paid by such post-1930 employer to the provision of such additional pensions or benefits as aforesaid . . .

Then there is some machinery about certificates of the actuarial manager. Those two clauses are the most relevant ones for the present purposes, and I have to examine the suggestion that under them and the other provisions of the deed a contractual obligation arose. In my opinion, the argument fails. What the respondents did when they paid this money to the trustees was to pay it to persons who were undertaking a trust towards the beneficiaries under the scheme. It is not the case, where a person sets up a trust under a document between himself and the trustees, in which the trustees undertake to execute the trust according to the terms laid down, that he obtains against the trustees a contractual right to compel them to enforce the trust. The provisions of the trust, as laid down in such a document, merely constitute the charter under which the trustees undertake to operate for the benefit of the beneficiaries, but that undertaking is not an undertaking towards the settlor; once he has constituted the trust he is no longer concerned with it. The trustees' obligations then are obligations towards the beneficiaries, and it is the beneficiaries alone who can enforce them.

The matter was considered quite recently in the House of Lords in the case of *Barclays Bank, Ltd.* v. *A.-G.* (2). That was a case in which a settlor had, by a deed made between himself and certain trustees, provided funds out of which the trustees were, among other things, to keep up certain policies of assurance on his life and the question was whether, when the trustees had made those payments, the policies had been wholly kept up by the settlor for the benefit of a donee within the meaning of the relevant section of the Customs and Inland Revenue Act of 1889, so as to attract estate duty. The case was decided on the short ground that the policy had been kept up by the trustees out of money which belonged to them, namely, the trust funds provided by the settlor. Those funds, of course, directly the settlement was executed, belonged in equity to the beneficiaries and the settlor had no power to compel the execution of the trusts. I think the passage in which that is most clearly brought out is to be found in the judgment of LORD WRIGHT. He said this on p. 379 ([1944] 2 All E.R., at p. 211) :

> In truth, once there was an express trust to provide for payment of the premiums fully constituted in the terms in which it was, the settlor had thenceforth nothing to do with keeping up the policies. That devolved on the trustees. The first Lord Devonport had divested himself of his property in the fund by his voluntary assignment of it to the trustees to hold on the trusts declared in the deeds. These trusts included keeping up the policies by paying the premiums, but the settlor did not himself pay them. That was the duty of the trustees under the trusts subject to which they held the fund. They did not pay the premiums as agents for the settlor, nor did they do so under any covenant or agreement with him, for there is nothing of the sort in the trust documents.

Then he points out that he could not control the way they could execute the trust ; he was not a beneficiary ; there was no resulting trust under that document. Then LORD WRIGHT went on, at p. 380 ([1944] 2 All E.R., at pp. 211, 212) :

> As he was not a beneficiary he could not invoke the powers of the court if he had found that the trustees were not duly performing the trust. The assignment of the fund to the trustees vested in them an absolute property in law, subject only to the equitable obligation, affecting their conscience, to fulfil the trust under which they held the property, an obligation enforceable only in equity at the suit of the beneficiaries.

LORD SIMONDS says, at p. 382 ([1944] 2 All E.R., at p. 213) :

> And this appears to me more emphatically to be the case when, as here, the settlor has not even a right to intervene and require the trustee to perform his trust.

It is to be observed that the language of the document in that case was the common language which you find in trust documents, as you find in the documents here : The trustees shall do so-and-so and so-and-so. Those words do not import a contractual obligation at all, but merely lay down the terms of the trust under which the trustees are to be bound to act. The trustees thus express their willingness to hold the trust property on those trusts, and as soon as they have done so they are bound. It is illusory, in my opinion, to say that the settlor in such a case obtains a contractual right enforceable against the trustees. I can see nothing in the present case of such a nature as to alter that position. Once the money was paid over it passed from the control of the payer ; it became merged in the general trust fund under cl. 76 of the trust deed, and thereafter the paying company had no contractual right to interfere at all.

The other argument is that there was a resulting trust which would entitle the company to secure the due administration of the trusts and, therefore, obtain the advantage which these payments were intended to secure. The resulting trust is said to arise under Pt. XVIII of the trust deed which contains provisions for the determination of the trusts when the trust funds, in certain events, are to be divided among the persons who, at the relevant date, are found to be included in the expression " the subscribers " as defined by the document. It is said that there might be no such subscribers when the trust came to an end, and in that event any balance remaining would belong to the company. It was said this constitutes a resulting trust of such balance, if any, as might remain. One thing seems to me perfectly clear. That resulting trust (and I will assume that it is a resulting trust) was of such a remote nature and so unlikely ever to produce any concrete result, having regard to the only circumstances in which it could arise, that I do not myself see that any court would listen to an application by the company for an order for the administration of these trusts based upon the allegation that it had a real interest in the funds. The interest that they have got under this resulting trust is completely nominal, so far as one can see, and I apprehend that, if they endeavoured to institute administration proceedings, the court would say to them : Your interest does not justify us in making an administration order ; if these trusts are to be administered a beneficiary must be joined. Therefore, I cannot accept the view that, even assuming everything in favour of the respondents, this gave them a right *ex debito justitiae* to an administration order if the funds were not being properly administered. But there seems to be a further answer to the argument which is to be found in the finding of the Commissioners. The Commissioners said that the advantage was assured to the company by the trusts on which the payments were held independently of any right of enforcement by the company. They point out the extreme improbabilities that the trust would not be enforced in any event, or that it would not in any event be enforced by the persons interested, or that the powers of appointing new trustees would not be effective to secure enforcement. In fact, what that really means is this, as I follow it: The advantage, the existence of which is said to give its value to this legal right, was one which exists already quite apart from the legal right. To say that a mere technical right to enforce a trust is of the value suggested when, in point of fact, that right will never, so far as human eyes can foresee, have to be called into operation, appears to me to be quite wrong. The right is a mere husk from which the grain has already gone, and to say that such a right ought to have attributed to it for the purpose of this schedule a value equivalent to the payment is a proposition which appears to me to be quite insupportable as it appeared to the Special Commissioners. Precisely the same argument applies in reference to the suggested contractual right because, there again, the right by contract to enforce a trust which, in any event, is going to be enforced so far as any eye can foresee, is a thing of purely nominal value. Therefore the Commissioners, I think, were right in saying that on the hypothesis that there was a right, that right had no value at all, whether contractual or as flowing from a resulting trust. That, I think, disposes of all the points in the case.

I would, however, like to add two things. I am not surprised that the respondents have endeavoured strenuously to secure the taxation advantage which they seek, and for this reason: I apprehend that no business man would ever think that a sum of this kind had not been spent for the benefit of the business, or that the spending of it did not enhance the value of the undertaking. From a business point of view, one would have thought that that was clear, and, of course, if you enhance the value of your undertaking you do directly, or indirectly, improve its profit-making capacity. One might possibly have expected that the language used by the legislature would have been wide enough to give a company the benefit of such a payment; but it has not done so. It has used language much more restricted in scope. It has not merely left the inquiry one as to the capital employed in the business, but it has, by the provisions of the seventh schedule, Pt. II, cl. 1, laid down exhaustive categories of what can be taken into account in ascertaining the amount of the capital employed. The language is quite clear: "the amount of the capital employed . . . shall be taken to be." That excludes the possibility of bringing in under the head of "capital employed," something which does not fall within the phrase "assets" which is there used. I merely say that because I am struck with the fact that from the broad point of view the result of this decision might be regarded as a hardship; but the reason for that is that the legislature has quite deliberately adopted this system, and it is certainly not for me to criticise it. All I have to do is to endeavour to understand its language and to apply it, and, in my opinion, the appeal succeeds.

Lastly, I wish to express the thanks of the court to the Special Commissioners for the very prompt way in which they dealt with the case remitted to them, and provided a supplemental case. They were asked, for the convenience of the court, to expedite it as much as possible, and the speed with which they have done it has been a matter of great convenience to the court.

The result is, therefore, that the appeal must be allowed.

FINLAY, L.J.: I so completely agree with the judgment which has just been delivered by LORD GREENE, M.R., that but for the fact that we are differing from a very experienced and careful revenue judge, I should add nothing at all. Out of respect for MACNAGHTEN, J., I add two or three sentences only. In his judgment, in a paragraph just before the one which has been read by LORD GREENE, M.R., MACNAGHTEN, J., said this ([1944] 2 All E.R., at p. 288):

> It was said on behalf of the appellant that, by the payments in question, the appellant acquired an asset of like value in the enhanced loyalty and contentment of its employees;

> but the Special Commissioners rejected this contention. Since the Commissioners have held that the whole of the payments should be treated as a diminution of the capital employed in the business in 1940, they must, I presume, have formed the opinion that the appellant did not get any value for its payments; that it had paid the money for nothing, as if, for instance, it had given the money to the Chancellor of the Exchequer for reduction of the National Debt and had received nothing but a letter of acknowledgment and thanks.

Now with great respect, that is not quite the point. It is quite clear here that the appellants did get a very real advantage, and the finding of the Special Commissioners showed that they thoroughly understood that, but it is not enough to say that they got an advantage. The question is as to assets within the meaning of that word, as it is used in the schedule. One example, in the course of his judgment, was given by Lord Greene, M.R., of a payment whereby a company might gain a very real advantage, a payment which could not be said to create an asset. Other examples could easily be thought of, and it is, I think, plain that the fact that the payment was not, as Macnaghten, J., said, paid for nothing, but that as a result of the payment a real advantage was got by the company, is in no way decisive; indeed, it is only right to say that the judge seems to have taken that view, for in the next paragraph he says:

> The view that the appellant got nothing for its money cannot, I think, be maintained. Trading companies do not usually give away their money for nothing and by the payments in question the appellant did acquire the right, as against the trustees of the fund, to compel them to pay the increased benefits to its employees.

That is the crux of the case, and for the reasons which Lord Greene, M.R., has given, I entirely agree that there the case of the respondents must fail. They did not acquire any such right, and that being so they cannot, in my view, succeed. That, I think, is the crucial point upon which we differ from the judgment of Macnaghten, J., and I entirely agree in every respect with the judgment which has been delivered by Lord Greene, M.R.

Morton, L.J.: I agree, and I only desire to add this: It was suggested in argument by counsel for the respondents that apart from the provisions of the trust deed there was a contract constituted by certain documents which passed between the parties before the sums in question were paid over to the trustees. It seems to me that these documents do not alter the position at all, from the point of view of this appeal. When the payments were made to the trustees the position from that time on was regulated by the provisions of the trust deed, and for the reasons already given by Lord Greene, M.R., the provisions of the trust deed gave no contractual right to the respondents. I agree entirely with what has been said by other members of the court, and I do not desire to add anything further.

Lord Greene, M.R.: I might perhaps add that I entirely agree with what Morton, L.J., has said on the subject of the suggested contract in the correspondence, and other antecedent documents. I omitted to mention it in my judgment by inadvertence.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *L. A. Ellwood* (for the respondent); *Solicitor of Inland Revenue* (for the appellants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

GOLDMAN *v.* EADE.

[King's Bench Division (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **October 26, 1944.**]

Magistrates—Appeal—Case stated—Application to state a case—Application left with clerk of court in presence of justices—No separate copy served on justices—Application insufficient—Summary Jurisdiction Act, 1879 (*c.* 49), *s.* 33 *—Summary Jurisdiction Rules,* 1915, *r.* 52.

The appellant was sentenced by a court of summary jurisdiction to a term of imprisonment and to the payment of a fine. Thereupon, in the presence of the justices, he handed to the clerk of the court an application signed by him, requesting the justices to state a special case. This application was handed by the clerk to the justices. Apart from this application,

no separate copies of the notice were served on each of the justices constituting the court. Subject to the application being sufficient to fulfil the requirements of the Summary Jurisdiction Rules, r. 52, the justices agreed to state a special case. The respondent took the preliminary point that the procedure adopted did not conform with the provisions of the rule, since the rule was mandatory in character and had to be strictly complied with. The appellant contended that the procedure followed
A was sufficient since the rule had been complied with in substance :—

HELD : strict compliance with the provisions of the Summary Jurisdiction Rules, r. 52, was required and the court had, in the circumstances, no power to hear the special case.

[**EDITORIAL NOTE.** This is a short practice point on the construction of the Summary Jurisdiction Rules, 1915, r. 52. In *Westmore* v. *Paine*, [1891] 1 Q.B. 482, it was held under the old rule replaced by r. 52 that it was not enough to serve the application
B on two only out of five justices and in *R.* v. *Stoke-on-Trent Justices*, [1926] 2 K.B. 461 LORD HEWART, L.C.J., said, at p. 467 : " the reasons for putting a strict interpretation upon the language of the older rule are, it seems to me, equally applicable to the language of the modern rule." The court holds accordingly that strict compliance with the rule is necessary.

AS TO APPEALS TO THE HIGH COURT, see HALSBURY, Hailsham Edn., Vol. 21, pp. 722-729, paras. 1251-1260 ; and FOR CASES, see DIGEST, Vol. 33, pp. 411-414,
C Nos. 1210-1240.]

APPEAL by way of case stated from a conviction by the Suffolk justices sitting at Stowmarket. The appellant was found guilty of offences against the Poultry (Control and Maximum Prices) Order, 1943 (S.R. & O., 1943, No. 1614), art. 2 (1), and sentenced to a term of imprisonment and to the payment of a fine. While still in court, the appellant, in the presence of the justices, handed to the clerk of the court an application signed by him, requesting the justices to state
D a special case. This application was handed by the clerk to the justices, and the appellant entered into a recognisance. Apart from the application, no separate copies of the notice, as required by the Summary Jurisdiction Rules, r. 52, were served on the justices. The justices agreed to state a special case, subject, however, to the application being sufficient to comply with the requirements of the Summary Jurisdiction Rules, r. 52.

Alban G. Gordon for the appellant.
E *Valentine Holmes* for the respondent.

VISCOUNT CALDECOTE, L.C.J. : We think that the preliminary objection to the hearing of this special case must prevail. Counsel for the appellant raised the point that, though the rules have not been complied with in their literal sense, something has been done which is sufficient to satisfy the substance of the intention of those rules. Cases have been cited to us which show
F that the court, including the Court of Appeal, have taken a stricter view than that of these provisions. We think that the objection taken by counsel for the respondent is one that stands good on the strength of those decisions, and that we have no power to hear this special case.

Appeal dismissed with costs.

Solicitors : *A. Kramer & Co.* (for the appellant) ; *The Treasury Solicitor*
G (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MARCO PRODUCTIONS, LTD. *v.* PAGOLA AND OTHERS.

[KING'S BENCH DIVISION (Hallett, J.), **November 20, 1944.**]

H *Injunction—Restraining breach of restrictive covenant—Whether necessary to prove that damage will result from breach—Enforcement of contract for personal services.*

On Nov. 6, 1942, the plaintiff company entered into a contract with the defendants, known as " The Four Pagolas," whereby the defendants agreed to act in the company's theatrical productions for the Christmas season, 1942. The contract contained a restrictive covenant in cl. 3 which provided : " The artiste shall not during the engagement or any time prior appear in any other entertainment private or public or exercise his talent for the purpose of the same being broadcast or heard by means of wireless telephone or other wireless means of communication or other similar means or for the purpose of gramophone records or talking pictures, whether paid for same or not, without written consent of the company." Cl. 18 gave the company an option on the defendants' services for the Christmas season, 1943, on the same terms and conditions as the 1942 contract. The 1942 contract was carried out by both parties, but upon the company exercising the option a disagreement arose, and eventually a compromise agreement was entered into on Sept. 10, 1943, whereby the option was to be exercisable for the Christmas season, 1944. This option was validly exercised, and required the defendants to appear in a production at Oxford. In the meantime the defendants had contracted to appear for another theatrical producer for the 1944 Christmas season at Manchester. The plaintiff company claimed a declaration that the agreement of Sept. 10, 1943, was binding and enforceable and that the option conferred by that agreement was validly exercised, and for an injunction to restrain the defendants appearing in any entertainment other than one produced by the plaintiff company. On behalf of the defendants it was conceded that there was a good consideration for the agreement of Sept. 10, 1943, and that the option contained therein had been validly exercised. The court accordingly made an order for the declaration claimed by the plaintiff company. The defendants resisted the claim for the injunction on the grounds (i) that the restrictive covenant was wider than reasonably necessary and, therefore, unenforceable; and (ii) that the injunction ought not to be granted as the plaintiff company had not shown that it would sustain damage from a breach of the restrictive covenant; and (iii) that the enforcement of the restrictive covenant would in effect be to grant specific performance of a contract for personal service; and (iv) that in all the circumstances the court ought not to exercise its discretion in favour of granting an injunction:—

Held: (i) in the restrictive covenant the words "or at any time prior" were unnecessarily wide and unenforceable, but they were severable from the rest of the clause which was valid.

(ii) a plaintiff is not required to prove that he will suffer damage from the breach of restrictive covenant before the court will grant an injunction to restrain that breach.

(iii) on the evidence the granting of an injunction would not necessarily compel the defendants to give specific performance of their positive obligations under the agreement, and in all the circumstances the plaintiff company was entitled to an injunction.

[**EDITORIAL NOTE.** It was held in *Warner Bros. Pictures Inc.* v. *Nelson* (2) that the negative covenants in a theatrical contract may be enforced by injunction when such enforcement does not amount to specific performance of the positive covenants to act. The court here holds on the evidence that the grant of an injunction will not amount to such specific performance, and, further, that proof of damage arising from breach of the negative stipulations is unnecessary. This point, indeed, is well covered by authority and follows from the policy of courts of equity in enforcing the sanctity of contract.

As to Injunction to Enforce Express Covenants, see HALSBURY, Hailsham Edn., Vol. 18, pp. 55-67, paras. 79-91; and for Cases, see DIGEST, Vol. 28, pp. 447-456, Nos. 666-728].

As to Theatrical Contracts, see HALSBURY, Hailsham Edn., Vol. 32, pp. 101-106, paras. 144-148; and for Cases, see DIGEST, Vol. 42, pp. 909-916, Nos. 57-113].

Cases referred to:

(1) *Attwood* v. *Lamont*, [1920] 3 K.B. 571; 43 Digest 20, *131*; 90 L.J.K.B. 121; 124 L.T. 108.

*(2) *Warner Bros. Pictures Inc.* v. *Nelson*, [1937] 1 K.B. 209; [1936] 3 All E.R. 160; Digest Supp.; 106 L.J.K.B. 97; 155 L.T. 538.

*(3) *Lumley* v. *Wagner* (1852), 1 De G.M. & G. 604; 28 Digest 452, *706*; 21 L.J.Ch. 898; 19 L.T.O.S. 264.

*(4) *Grimston* v. *Cunningham*, [1894] 1 Q.B. 125; 28 Digest 434, *572*.

Action for a declaration and injunction. The defendants, known as "The Four Pagolas," entered into a contract with the plaintiff company, on Nov. 6, 1942, whereby "during the engagement or any time prior" in the company's theatrical productions for the Christmas season 1942 they would not appear "in any other entertainment . . . without written consent of the company." Cl. 18 gave the company an option on the defendant's services for the Christmas season, 1943, on the same terms and conditions as the 1942 contract. On the company exercising the option a disagreement arose and, on Sept. 10, 1943, a compromise agreement was entered into whereby the option was to be exercisable for the Christmas season, 1944. This option was exercised and required the defendants to appear in the company's production at Oxford. The defendants, however, had contracted to appear for another theatrical producer at Manchester for the Christmas season, 1944. The plaintiff company claimed a declaration that the agreement of Sept. 10, 1943, was binding and enforceable and that the option conferred by that agreement was validly exercised, and for an injunction to restrain the defendants appearing in any entertainment other than one produced by the plaintiff company. On behalf of the defendants it was conceded that there was a good consideration for the agreement of Sept. 10, 1943, and that the option contained therein had been validly exercised. The defendants resisted the claim for the injunction on the grounds that (i) the restrictive covenant was wider than reasonably necessary and, therefore, unenforceable; and (ii) that the injunction ought not to be granted as the plaintiff company had not shown that it would sustain damage from a breach of the restrictive covenant; and (iii) that the enforcement of the restrictive covenant would in effect be to grant specific performance of a contract for personal service; and (iv) that in all the circumstances the court ought not to exercise its discretion in favour of granting an injunction.

Valentine Holmes for the plaintiffs.

Gilbert Beyfus, K.C., and *J. B. Herbert* for the defendants.

Hallett, J.: As to the declaration, it appears to me that there is no defence. Once it is admitted that there was a good consideration for the contract of Sept. 10, 1943, and that the option conferred by that contract has been validly exercised, this action, so far as the declaration is concerned, appears to me to be undefended. I, therefore, propose to grant the declaration claimed by the plaintiffs, namely, a declaration that there is a binding and enforceable agreement in the terms of the letter from the defendants to the plaintiffs dated Sept. 10, 1943, and that the option referred to therein was validly exercised by notice in writing dated July 30, 1944. The difficulty as to the validity of the restrictive clause arises from the presence in that clause of the four words "or any time prior." The four words which I have quoted, undoubtedly, unless they are in some way controlled, or unless, alternatively, they are excluded, result in cl. 3 being unnecessarily wide. Counsel for the plaintiff company suggested at one time that the four words in question must be read as limited to the period of rehearsal referred to in the preceding cl. 2, but I think he agreed in the end that there was no warrant for such a limitation. He also sought to control those words (using his own expression) by means of the typed-in clause. Clearly an obligation not to appear at any time prior to the engagement in any other entertainment is not reconcilable with an obligation not to appear at any public entertainment at Northampton, or within a radius of 20 miles thereof, at any time prior to the engagement. Counsel for the plaintiff company, however, upon further examination agreed that the fresh difficulties created by any reliance upon the typed-in clause were greater than any assistance which he could derive from that clause. Obviously, a clause precluding an appearance within 20 miles of Northampton is very difficult to justify in the year 1943, when the contemplated pantomime was at Brighton, or in the year 1944 when the contemplated pantomime is to be at Oxford, and so in the end counsel for the plaintiff company relied upon the contention that the words "or any time prior" should be excised from or severed from the rest of cl. 3.

I am clearly of opinion that cl. 3 with those words omitted is a perfectly good restriction upon the activities of the defendants during the engagement; but the question arises whether those words can be excised or severed. I have been referred to a number of cases dealing with that aspect of the matter, including *Attwood* v. *Lamont* (1); but having regard to the difference between the judgment of Younger, L.J., in that case, in which Atkin, L.J., concurred, and the judgment of Lord Sterndale, M.R., it may be that at the present time it is very difficult to lay down with certainty what are the true principles applicable when it is sought to sever one part of a covenant from the rest of the covenant. But in the present case I feel that such difficulties do not arise. If there were one covenant dealing with the obligations of the defendants prior to the engagement and another covenant dealing with the obligations of the defendants during the engagement, the fact that the restriction imposed by the former covenant was too wide could not, in my judgment, affect the validity and enforceability of the latter covenant. Here counsel for the plaintiff company contends, and I think correctly, that this one covenant in cl. 3 is dealing both with the position of the defendants during the engagement and, as I construe the covenant, with the position of the defendants at a time prior to the engagement. Counsel for the plaintiff company contends that because the restrictions upon the defendants during the period prior to the engagement may be unenforceable, it does not follow and should not follow that the restrictions upon the defendants during the engagement are also unenforceable. I accept as correct that contention upon that point. I think that the restrictions upon the defendants during the engagement are clearly not beyond what can lawfully be imposed, and I think that the validity of those restrictions is not affected by the fact that the plaintiffs have sought to impose upon the defendants restrictions which cannot be upheld in respect of the time prior to the engagement.

I come, then, to the next point which has been raised on behalf of the defendants. It is contended that the court cannot grant the injunction claimed, because it is an injunction which will have the effect of ordering specific performance of a contract for personal service. In the first place, counsel for the defendants contends that specific performance of the contract for personal service is what the plaintiffs really desire, and he draws my attention to certain letters written by the plaintiffs, and a letter written by their solicitor. The managing director of the plaintiff company wrote, " as specific fulfilment of your contractual obligation to my company will be insisted upon " ; and later he wrote : " I shall insist upon specific fulfilment of the contract." Finally, the plaintiffs' solicitors write : " proceedings will be instituted at once to compel 'The Four Pagolas' to carry out their contract." No doubt what the plaintiffs hope to secure by this action is fulfilment by the Pagolas of their positive obligation to give this performance for the plaintiffs during the forthcoming Christmas season ; but it seems to me that in all these cases what the plaintiffs hope to procure is the fulfilment by the defendants of their positive obligations. They hope to induce, or in the words of Branson, J., in the *Warner Bros.* case (2), to " tempt " the defendants to perform their positive obligations ; but because they say so frankly, as the managing director of the plaintiff company in his letters and in the witness box has said in the present case, I do not think that the position of the plaintiffs can be any the worse.

Counsel for the defendants says that the effect of granting an injunction against the breach of cl. 3 of the agreement will be to compel the defendants to give specific performance of their positive obligations. On the evidence I am not satisfied that, if the injunction sought is granted, the defendants will be compelled to perform for the plaintiffs. It is to be observed that the period in question is a very short one ; it is the period of the Christmas season, a matter of weeks, and very different from the period which was in question in other reported cases, such as, for instance, the *Warner Bros.* case (2). Next it is to be observed that the employment which the defendants follow is not in the ordinary course a continuous one. One of the defendants, Miss Rothwell, a very intelligent young woman, who keeps the books of the defendants, told me that, according to her books, in the past year the defendants had been 32 weeks in work and 14 weeks out of work ; so that periods out of work are a commonplace with this particular form of entertainment, and, indeed, last Christmas, according to the defendants' own evidence, for four weeks they were out of work because they had refused to perform in the plaintiffs' production and had not succeeded in procuring any other employment at that time. It is quite true I am told they have no other means of livelihood, and no savings and so on, but I am not in the least convinced that, if the injunction claimed is granted, they will be compelled (to use the language usual in the cases) to work for the plaintiffs or starve.

Next, counsel for the defendants contended that although the object of the plaintiffs might be irrelevant, and although the granting of this injunction might not compel the defendants to work for the plaintiffs, none the less I ought not to grant it because it is not shown that any damages will be sustained by the plaintiffs arising out of the breach of the restrictive covenant as distinct from the breach of the positive covenant on the part of the defendants to perform for the plaintiffs. Now the facts with regard to that are these. The entertainment in which the defendants threaten and intend to take part is a pantomime at Manchester, produced by a gentleman called Emil Littler. The entertainment in which the services of the defendants are required by the plaintiffs, according to the plaintiffs' present plan, is a pantomime at the New Theatre, Oxford. That the plaintiffs will suffer damage if the defendants refuse to appear in the Oxford pantomime appears to me to be very probable. I cannot put it higher than that, because it may be that in the five weeks which still remain before the pantomime is to begin, the managing director of the plaintiff company will succeed in securing some other team of performers to fill the gap of only 8 or 10 minutes which will be left in his production by the secession of the Pagolas. I have no evidence about it, but I cannot help feeling that somebody will be found to perform a Russian dance or series of Russian dances for 10 minutes if they really have to be found. Whether in the result the gross takings at the Oxford pantomime will go down seems to me to be a pure matter of speculation. I should have said that the plaintiffs' remuneration depends upon a share, as I understand it, of the gross takings of the production. But upon the whole it would seem reasonably probable that, in one way or another, the plaintiffs will be damaged by the failure of the defendants to perform in accordance with their contract. On the other hand, there is no evidence whatever before me that the plaintiffs will be damaged merely by the defendants performing for this rival producer at Manchester. Nobody can suppose that the audience that would go to the Oxford theatre to see the Pagolas would be diverted to Manchester in order to see them. That as an idea is really ridiculous; but counsel for the defendants argues very strongly that that is a reason why the plaintiffs should not receive the relief which they claim.

In *Lumley* v. *Wagner* (3), a lady, Miss Wagner, was threatening to perform at Covent Garden instead of at His Majesty's Theatre, and one can see that, if there were people who admired her singing they might be induced to go to Covent Garden instead of going to His Majesty's. There is no express reference in the judgment to the question whether her performance at Covent Garden would damage the plaintiff, although there is one passage which I referred to which suggests that the question of damages was in the mind of LORD ST. LEONARDS. In *Warner Bros. Pictures, Inc.* v. *Nelson* (2), BRANSON, J., referred to damage which the plaintiffs apprehended if the defendant appeared in other films; but it is to be observed that he is referring to that merely in connection with the question as to the period during which the injunction should operate and not in connection with the question as to whether an injunction should be granted at all. In *Grimston* v. *Cuningham* (4), there was no evidence at all that the appearance of the defendant for a rival manager would cause damage to the plaintiff manager, Kendal, and on the contrary, having regard to the fact that Kendal's company was then performing in America and that the defendant broke his contract by entering into an engagement in England, the possibility of such damage appears to be remote in the extreme.

In the result, I am not satisfied that before an injunction restraining a breach of the negative covenant can be granted, it is necessary for the plaintiff to establish that they would suffer damage as a result merely of a breach of the negative covenant; in other words, I am not satisfied that the plaintiffs must prove that by acting for and performing for the rival producer the defendants will cause more damage to them than by remaining idle. None the less, counsel for the plaintiffs has frankly conceded that the fact that no damage will be caused to the plaintiffs by the performance for the rival producer is a circumstance which I should bear in mind in considering whether, in the exercise of my discretion, I ought to grant the injunction claimed.

The only remaining point, I think, apart from some points which were not seriously pressed, is whether in all the circumstances I ought to exercise my discretion in favour of granting the injunction. It is that point upon which I have, perhaps, felt the most difficulty and upon which I have, indeed, kept an open mind until the very last word had been said by either counsel. On the one hand, I recognise that, if the injunction be granted, a certain amount of hardship will be caused to the defendants ; I recognise also that the damage sustained or likely to be sustained by the plaintiffs is damage arising from the failure of the defendants to perform for them, and not damage arising from the defendants performing for Littler or some other rival producer. But counsel for the plaintiffs has pointed out that, to quote the words of *Lumley* v. *Wagner* (3) the agreement to perform for the plaintiffs, and during that time not to perform for anybody else, is in effect one contract. The affirmative covenant by the defendants, and the negative stipulation on their part to abstain from the commission of any act which will break in upon their affirmative covenant, are covenants which are ancillary to, concurrent, and operate with each other. Counsel for the plaintiffs submits that the fact that damage will follow from the breach of the contract as a whole is amply sufficient to justify the court in granting an injunction against the breach of the restrictive clause in the contract. He reminds me also, and rightly, that the policy of the Court of Equity is to respect and enforce the sanctity of contracts, although there are limitations as to the methods by which that can be done.

In a passage on p. 620 of *Lumley* v. *Wagner* (3), Lord St. Leonards says : " I disclaim doing indirectly what I cannot do directly " ; and I have been asking myself, during the concluding stages of the argument, whether I can, if I grant this injunction, disclaim doing indirectly that which I cannot do directly. Having given the matter my most earnest consideration, I think this is a case where, upon principles well settled by the authorities, I ought to grant the injunction claimed. There will be an injunction accordingly, and I propose to limit it to a period of four weeks, which I regard as the minimum period of the proposed engagement of the defendants. There will be an injunction to restrain the defendants from appearing as from Dec. 26, 1944, for a period of four weeks in any entertainment other than in one of the plaintiffs' productions. The defendants must pay the costs of the action.

Order accordingly. Stay of execution on terms.

Solicitors : *Lewis & Lewis and Gisborne & Co.* (for the plaintiffs) ; *Clare & Clare* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

CENTRAL LONDON ELECTRICITY, LIMITED *v.* BERNERS AND OTHERS.

[King's Bench Division (Hallett, J.), **October 25, 26, 1944.**]

Companies—Receiver and manager—Appointed by debenture holders—Agent of company by terms of debenture—Written undertaking to pay outstanding and future electricity charges—Implied warranty of authority—Personal liability—Law of Property Act, 1925 (*c.* 20), *ss.* 101, 109 (2).

A company owned certain premises let as furnished flats. In the spring of 1940, the company being in financial difficulties, the first defendant, one of the company's creditors and a debenture holder, in exercise of his powers under the debenture appointed the second defendant receiver and manager. In Sept., 1940, the third defendant was substituted for the second defendant and appointed receiver and manager in his place. The plaintiffs who had supplied the electricity for the premises in question and who were owed considerable amounts by the company for charges in arrears had threatened to cut the supply. The receivers gave a written undertaking to the plaintiffs to pay in their capacity as receivers all outstanding and future charges in respect of electricity supplied. On Jan. 26, 1942, a winding up order was made against the company, and the company having been insolvent at all material times, the plaintiffs commenced proceedings against the defendants. It was contended that the second and third defendant were authorised by the first defendant to pledge his credit for the purpose of obtaining electricity, or, alternatively, that if they, in their capacity as receivers, had no such authority they were liable in damages for breach of warranty of authority. The first defendant relied on cl. 7 of the debenture which stipulated that a receiver and manager should be the agent of the company and he relied further on the Law of Property Act, 1925, s. 109, by virtue of which a receiver appointed under the powers conferred by the Act shall be deemed to be the agent of the mortgagor who was to be solely responsible for the receiver's acts and defaults unless the mortgage deed otherwise provided :—

HELD : (1) the provisions of the debenture did not exclude the statutory provisions. On the evidence, the receivers were not authorised by the first defendant to pledge his credit.

(ii) whether a receiver was to be deemed an agent of the company or an agent of the debenture holder depended on the terms of his appointment as incorporated in the debenture. Since by the provisions of the debenture the receivers were agents of the company, their undertaking to pay outstanding and future charges did not amount to a warranty of authority to bind the debenture holder personally.

[**EDITORIAL NOTE.** Whether a receiver is agent of the company or of the debenture holders depends upon the terms of his appointment and the terms of the debenture. It is here held that in giving an undertaking to pay a creditor the receivers for a debenture holder acted as agents of the company and did not warrant that they were agents of the debenture holder authorised to make him personally liable. On a point of practice it is held that the defendants are entitled to judgment although they did not defend the action, since they had delivered a defence, but had not applied for leave to withdraw it in accordance with R.S.C., Ord. 26, r. 1. The judgment, however, is without costs.

AS TO THE RECEIVER AS AGENT, see HALSBURY, Hailsham Edn., Vol. 28, pp. 3-8 paras. 1-7 ; and FOR CASES, see DIGEST, Vol. 10, pp. 792, 793, Nos. 4974-4980.]

Cases referred to :

(1) *Cox* v. *Hickman*, (1860) 8 H.L.Cas. 268 ; 5 Digest 1106, *9022* ; 30 L.J.C.P. 125 ; 3 L.T. 185.

(2) *D. Owen & Co.* v. *Cronk*, [1895] 1 Q.B. 265 ; 10 Digest 792, *4974* ; 64 L.J.Q.B. 288.

(3) *Gosling* v. *Gaskell*, [1897] A.C. 575 ; 10 Digest 792, *4975* ; 66 L.J.Q.B. 848 ; 77 L.T. 314.

(4) *Re Vimbos, Ltd.*, [1900] 1 Ch. 470 ; 10 Digest 792, *4976* ; 69 L.J.Ch. 209 ; 82 L.T. 597.

(5) *Robinson Printing Co., Ltd.* v. *Chic, Ltd.*, [1905] 2 Ch. 123 ; 10 Digest 792, *4977* ; 74 L.J.Ch. 399 ; 93 L.T. 262.

(6) *Deyes* v. *Wood*, [1911] 1 K.B. 806 ; 10 Digest 792, *4978* ; 80 L.J.K.B. 553 ; 104 L.T. 404.

(7) *Cully* v. *Parsons*, [1923] 2 Ch. 512 ; 10 Digest 792, *4979*.

ACTION against the receivers and managers appointed by a debenture holder, for electricity charges accrued due in respect of the company's premises prior to, and during, their receivership. The receivers gave the following written undertaking :

> In consideration of your agreeing to afford without interruption a supply of electricity to the . . . premises now in my occupation I hereby undertake as receiver for the debenture holders of Gordon Chambers Co., Ltd., to pay you all outstanding and future charges in respect of electricity supplied . . . to such premises. For and on behalf of the debenture holders of the above named company.

The facts and arguments are fully set out in the judgment.

Humfrey Edmunds for the plaintiffs.

S. Seuffert for the first defendant.

HALLETT, J. : This is an action against three defendants. The subject-matter, being concerned very largely with the true construction and effect of a debenture, is one with which I cannot claim to be as familiar as judges sitting in another division, but having come to a very clear opinion upon the matter I do not think anything would be gained if I were to reserve my judgment.

The facts are short, simple and beyond dispute. There was a company called Gordon Chambers Co., Ltd., which owned certain premises at 3, Cork Street, and 20, Jermyn Street, in the west end of London. Those premises, as I understand consist of furnished flats let to a rather good class of tenant, lighted, as one would expect, by electricity, to some extent dependent upon electricity for other purposes, and in one case at least served by electrically operated lifts. They were premises which consumed a good deal of electricity, and which could never be let unless electricity were available. In the spring of 1940, the company had got into low water financially, it owed, I think, over £3,000.

Among its creditors were the plaintiffs in the present action, the Central London Electricity, Ltd. The plaintiffs were in a stronger position than some creditors because unless they were paid or otherwise satisfied they could cut off the electricity supply, and if the electricity supply was cut off all further efforts to carry on the business of the company, so far as these premises were concerned, would be at an end. For some time past the electricity undertaking had been pressing the company to pay the money which it owed and had become threatening, very naturally and properly, upon the subject.

On June 8, 1938, the first defendant, having lent £1,000 to the company, received a debenture. Under cl. 12 of the conditions endorsed upon the debenture, the first defendant had the right, to appoint a receiver and manager upon the happening of certain events. On Apr. 26, 1940, the first defendant did appoint Colonel Barcroft to be receiver and manager of the premises upon the terms and subject to the powers and provisions of the conditions endorsed on the debenture. It was proposed by the electricity undertaking to Colonel Barcroft that he should become personally responsible for the payment of all outstanding and future charges, and a document to that effect was drawn up. But Colonel Barcroft would not sign it and told the electricity undertaking representative, that it was not much good having a personal undertaking from him, the defendant, Barcroft. Colonel Barcroft did, however, execute a document, the operative part of which is as follows:

> I hereby undertake as receiver for the debenture holders of Gordon Chambers Co., Ltd., to pay you all outstanding and future charges in respect of electricity supplied. For and on behalf of the debenture holders of the above named company, J. H. B. Barcroft, receiver.

Subsequently Colonel Barcroft was called up for service and therefore, on Sept. 18, Price, the third defendant, was appointed receiver in his place by a similar written appointment and executed a similar document in favour of the electricity undertaking. By the time that Price signed the document, the amount owing was still more.

On Jan. 26, 1942, a winding-up order was made against Gordon Chambers Co., Ltd. The premises had suffered war damage to such an extent that they had fallen empty. The supply of electricity had been cut off before that date, so the position is, that the whole of the indebtedness to the plaintiffs was incurred by somebody before the winding-up order was made against the company. The company having gone into liquidation and being insolvent at all material times, the electricity company naturally wanted to get its money and commenced proceedings against the three defendants. The first defendant is one Berners, the debenture holder. As against him the case is that the undertaking given by Colonel Barcroft on a date in May and by Price on a date in September, both in 1940, were given by those gentlemen respectively as duly authorised agents in that behalf for the defendant Berners. Agency might be constituted in the present case in one of two ways. Firstly, there might be some express authority given to these gentlemen to pledge the credit of Berners. They have both given evidence that they had no authority at all from Berners, so far as they are aware, to pledge his credit in this matter. I have no doubt that they are telling me what they believe to be the truth. I put it "so far as they are aware," because counsel for the plaintiffs very properly and fairly says that if they acquired authority as the result of having been appointed receivers and managers under the terms of this debenture they are not meaning to swear that they did not get authority in that way. Nor did they intend, according to Colonel Barcroft, to represent that they had any authority. He says he realised that, so far as the electricity undertaking was concerned, it would not be at all satisfied with merely having the company responsible because that had proved to be unsatisfactory already. He said what he thought he was giving the electricity company was an undertaking or assurance that out of the funds coming to him as receiver he would make sufficient provision to satisfy the indebtedness to the electricity underking. Counsel for the plaintiffs has conceded that he fails to establish any authority on the part of Colonel Barcroft and Price unless such authority can be found in their appointment as receivers and managers pursuant to the powers contained in the debenture. I turn to the terms of the debenture. By cl. 7 a receiver and manager shall be the agent of the company and shall have power to do certain things. Then by the closing lines of cl. 14;

> . . . save as aforesaid the debenture holder shall be under no liability to the receiver and manager for his remuneration, costs, charges and expenses or otherwise.

I think the words "save as aforesaid" refer to the fact that under the earlier part of cl. 14 the receiver and manager is empowered to deduct from the net profits of carrying on the business and the net profits of the proceeds of sale certain costs, charges, expenses, remuneration and all out-goings properly paid by the receiver and manager.

Counsel for the first defendant, will rely, if necessary, as I understand it, upon the provisions of the Law of Property Act, 1925, ss. 101, 109. Under sect. 101 a mortgagee in certain events has power to appoint a receiver of the income of the mortgaged property, and under sect. 109 (2):

> A receiver appointed under the powers conferred by this Act . . . shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

I have looked at *Cox* v. *Hickman* (1) and *D. Owen & Co.* v. *Cronk* (2), *Gosling* v. *Gaskell* (3), *Re Vimbos* (4), *Robinson Printing Co., Ltd.* v. *Chic, Ltd.* (5), *Deyes* v. *Wood* (6), and last, but by no means least, *Cully* v. *Parsons* (7). In certain of those cases there was a reference to the Conveyancing Act, 1881, s. 24, which was the predecessor of the Law of Property Act, 1925, s. 109. The question arose for consideration by the court as to whether the statutory provisions were excluded having regard to the contractual provisions. In the present case, as it seems to me the defendant does not need to rely upon the statutory provisions, but if he did require to rely upon the statutory provisions, then I see nothing in the contractual provisions which should be regarded as excluding or displacing the statutory provisions. I can see no evidence here at all upon which I ought to take the view that the two receivers were authorised by the first defendant, as the debenture holder, to pledge his credit for the purpose of obtaining the electricity supply which was necessary to carry on this business. Accordingly, I think the action as against the first defendant, Berners, must fail.

As regards the other two defendants, there are two points which require my consideration. On Feb. 18, 1943, a defence was delivered on behalf of the defendant Price by a firm of solicitors; and on Feb. 27, 1943, a defence was delivered on behalf of the defendant Barcroft by another firm of solicitors. Both those defences are, as I understand the position, still part of the record before the court. On Sept. 24, 1943, Price's solicitors wrote a letter intimating to the plaintiffs' solicitors that it was not their client's intention to defend the action any further, and going on: "In the circumstances will you please treat the defence as being withdrawn." No leave to withdraw the defence has ever been obtained, and I would draw attention to the provisions of Order XXVI, r. 1, of which the material part reads as follows:

> The court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

Now as regards Colonel Barcroft, he was present in court yesterday upon a *subpoena* from the plaintiffs. He was unrepresented, and upon my enquiring he told me that he did not propose to defend the action any further, and that he was taking up the same attitude as his co-defendant Price. In his case also no leave to withdraw his defence has ever been obtained. In my view the plaintiffs, under those circumstances, are not in a position to proceed as upon a default in pleading on the part of those two defendants, and in any case, for reasons which I appreciate, they did not do so; they proceeded to trial before me as against all three defendants. I think the view counsel for the plaintiffs probably took was that there would be a danger in signing judgment against the second and third defendants having regard to the fact that his claim against them was alternative to his claim against the first defendant. I express no view as to whether there was any danger if he had signed final judgment. The fact that the second and third defendants have made no effort to defend themselves at the trial, gives, of course, the plaintiffs certain advantages, but as I see the matter the plaintiffs must still prove their case and establish their cause of action. The cause of action of the plaintiffs as against the second and third defendants is alternative. They say that the second and third defendants personally bound themselves to pay the amounts in question; or alternatively, warranted that they had authority to bind the first defendant personally to pay the amounts in question, and inasmuch as they had no such authority, are liable in damages upon a well-known principle.

The acceptance of a personal obligation to pay is to be found in two documents dated May 22 and Sept. 18, as regards Colonel Barcroft and Price respectively, or is not to be found at all. Similarly as regards the alleged warranty, the representation that Colonel Barcroft and Price had authority to bind Berners personally to pay the amounts in question is to be found, if anywhere, in those two documents. As I understand the doctrine upon which counsel for the plaintiffs relied, it is shortly this: that if a person represents that he has authority to bind someone in a certain way, a warranty or promise that he has such authority may in suitable circumstances be implied.

If the view which I have just expressed be right, the case against the second and third defendants depends entirely upon the true construction and effect of these two documents. It is simpler perhaps if I refer to them as one document, because it is the same document in each case apart from the name. If upon the true construction and effect of that document Colonel Barcroft did not bind himself personally to pay, and did not in the alternative represent that he had authority to bind the first defendant to pay, then I do not see how the plaintiffs can be entitled to succeed in this action.

I come then to consider the effect of the document, and the point which seems to me to be crucial in this: that a receiver for debenture holders of a limited company may be the agent of the company or he may be the agent of the debenture holders. Which he is depends upon the terms of his appointment, and since the terms of his appointment usually, and I should think necessarily incorporate the terms of the debenture, upon the terms of the debenture. If the debenture be in certain terms, then, as it has been held in the cases cited, he is the agent of the company. If, on the other hand, the debenture is in certain other terms, then as in *Re Vimbos* (4) he is the agent of the debenture holders. It may be that for some purposes a receiver may be the agent of one and for other purposes the agent of the other, as is suggested by WARRINGTON, J., in *Robinson Printing Co., Ltd.* v. *Chic, Ltd.* (5), but this much I should have thought was well known, or certainly ought to be known—that whether a receiver for debenture holders is the agent of the company or is the agent of the debenture holders depends upon the terms of his appointment and more particularly upon the terms of the debenture.

In the present case I have held that the receiver was the agent of the company and not the agent of the debenture holders as far as entering into this agreement with the plaintiffs was concerned. What counsel for the plaintiffs has to establish as against the second and third defendants is that they represented and impliedly warranted to the plaintiffs that they, in their capacity as receiver, were agents of the debenture holders authorised to make the debenture holder personally liable for the charges to which the agreement relates; and I ask myself: Do I find, in this document which each of them signed, a representation that they were authorised to make the debenture holder personally liable for the outstanding and future charges there in question? I do not think I do. It is only fair to say I am quite satisfied that the plaintiffs were not content merely to take a promise from the company, because the company was hopelessly insolvent and the plaintiffs knew that. The plaintiffs very reasonably wanted something further. What they accepted—very likely not realising the position—was a document in this form:

> In consideration of your agreeing to afford without interruption a supply of electricity to the above premises now in my occupation I hereby undertake as receiver for the debenture holders of Gordon Chambers Co., Ltd., to pay to you all outstanding and future charges in respect of electricity supplied, etc., to such premises. For and on behalf of the debenture holders of the above named company. J. H. B. Barcroft, receiver.

Clearly he was not undertaking a personal liability. I do not think that there is a sufficiently clear representation that he had authority to bind the debenture holder personally, bearing in mind that a receiver for debenture holders under the terms of the ordinary form of debenture is the agent for the company. It may seem a curious position that those who deal with such matters now regularly, as the cases show, adopt a form of debenture which is designed to put the liability for the running expenses of the receiver upon the company and not upon the debenture holders, but I think it would be wrong to say that this document is a representation that the debenture was in the older form which leaves the debenture holder as the principal of the receiver in respect of any engagements which the receiver may enter into whilst continuing the business, no doubt, for the benefit of the debenture holders; and unless there was such a representation, it seems to me that the alternative claim must fail.

For these reasons I think that, notwithstanding their failure to contest the action, the second and third defendants are entitled to succeed. On the other hand, I am quite clear that they ought not to recover any costs at all. They have left the plaintiffs' case to fail by reason of its own weakness and not by reason of the strength of anything they have put forward, and I think the judgment here should, therefore, be a judgment without costs. There will be judgment accordingly.

Judgment with costs for the first defendant, and without costs for the second and third defendants.

Solicitors: *Attenboroughs* (for the plaintiffs); *Saxton & Morgan* (for the first defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

DUKE OF MARLBOROUGH *v.* ATTORNEY-GENERAL.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **December 11, 1944.**]

Conflict of Laws—Settlement—Marriage settlement drafted in English form in New York—American securities—Settlor domiciled in New York—American and English trustee—Matrimonial domicil English—Certain terms of settlement referable to English law—Proper law governing settlement—Intention of parties not expressly stipulated—Surrounding circumstances—Performance of stipulations.

Estate and Succession Duty—Estate settled by statute and non-alienable—Redemption of statutory pension—Money paid into court—Investment in freehold property—Deed of re-settlement—Estate disentailed—Trust for sale—Conversion—Whether freehold property settled by statute—" Lands or chattels "—5 and 6 *Anne* (*c.* 3) (*Dukedom of Marlborough*)—5 *and* 6 *Anne* (*c.* 4) (*Marlborough pension*)—19 *and* 20 *Victoria* (*c.* 59) (*Charge of Marlborough pension on Consolidation Fund*)—*Consolidated Fund* (*Permanent Charges Redemption*) *Act,* 1873 (*c.* 57)—*Finance Act,* 1894 (*c.* 30), *ss.* 1, 5 (5)—*Settled Land Act,* 1925 (*c.* 18), *s.* 75.

(I) By a marriage settlement, drafted in English form and executed in New York on Nov. 6, 1895, on the marriage of Miss Vanderbilt with the 9th Duke of Marlborough, certain capital stock of the Beech Creek railway company was assigned to two trustees, of whom one was American, the other English. The trusts were a life interest to the 9th Duke, and after his death a life interest to his wife, and, on the death of the survivor, an absolute trust to the late Duke's successor in the dukedom " being an heir male of the late Duke's body." Miss Vanderbilt, the settlor of the railway stock, was at the time of the settlement domiciled in New York but the matrimonial domicil of the parties was to be English. The American securities could by the terms of the settlements be sold and the proceeds re-invested in English securities. The statutory power of appointing new trustees was vested in the husband and wife, and the survivor of them, and there was a provision that " in addition to the indemnity given by the law " the trustees should not be answerable for lending money on the security of hereditaments with less than a marketable title. Finally, there was a provision for the making of an application to the Chancery Division of the High Court of Justice under the Infants Settlement Act with a view to making Miss Vanderbilt's settlement binding on her by English law. The 9th Duke died on June 30, 1934. The question to be determined was, whether the proper law of the settlement was English in which case succession duty and estate duty became payable in respect of the American securities :—

Held : (i) in the case of a marriage settlement the law under which title was claimed was the proper law governing the settlement, and succession duty became exigible only where the proper law of the settlement was English (or Scottish) law.

Wallace v. *A.-G.* (1), *A.-G.* v. *Belilios* (2), *A.-G.* v. *Jewish Colonization Assocn.* (7) *applied.*

(ii) the determination of the proper law depended on the intention of the parties, either as expressed by the terms of the settlement or as derived by implication from the surrounding circumstances and the performance of its stipulations.

Hamlyn v. *Talisker Distillery* (8) *applied.*

(iii) on the true construction of the settlement and in consideration of the fact that the matrimonial domicil of the parties was English, the proper law governing the settlement was English law. Succession duty and estate duty became, therefore, payable in respect of the American securities.

(II) In 1705 the Blenheim Parliamentary Estates were settled on the first Duke of Marlborough, his heirs and assigns. In the following year an Act was passed settling the dukedom of Marlborough in default of heirs male of the first Duke and directing that no one taking the Blenheim estates should be entitled to alienate it. By a further Act of the same year a pension or annuity of £5,000, payable out of the revenues of the Post Office, was settled on the Duke, his heirs and assigns upon the same limitations as those affecting the Blenheim estates. The pension was eventually charged on the Consolidation Fund of the United Kingdom and in or about 1884 the pension was redeemed and the redemption moneys paid into court. Some years later the redemption moneys in court were invested in freehold property in the city of London. In each case a conveyance was made, with the approval of the court, to the then Duke and his heirs settling the property in the same way as the Blenheim estates had been settled by statute. The propriety of this course of dealing having been called into question, the 9th Duke took proceedings in 1901 for the purpose of establishing his right to exercise the powers of a tenant for life under the Settled Land Act in relation to the city freeholds. In 1905 an order was made by the court to the effect that the settled city freeholds should be disentailed and resettled. A deed of re-settlement was made in pursuance of this order whereby the freeholds were settled on trust for sale and re-investment ; the moneys to be paid out of court as directed by the order, with any proceeds and all resulting investments were collectively defined as " the trust fund," the income of which was to be applied to the person or in the manner in which the pension would have been payable or applicable had it not been redeemed. The rents and profits of unsold hereditaments were to be paid or applied in a similar manner. No sale or purchase or investment could be made without the consent of the then Duke. Every new trustee of the settlement was to be approved by the Treasury which was also to have notice of every application to the court relating to the settlement. It was contended that the London freeholds were " lands or chattels " within the meaning of the Finance Act, 1894, s. 5 (5), and that the words " lands or chattels " in the subsection were intended to apply to every kind of property, real or personal :—

Held : (i) the London freeholds, if they were to be treated as converted into personalty, were not " chattels " within the meaning of the Finance Act, 1894, s. 5 (5).

Re Exmouth's Annuity (9) *applied.*

(ii) neither the annuity nor the redemption moneys as settled by the Acts could be considered " land or chattels " within the meaning of the subsection. Since by the terms of the deed of re-settlement the London freeholds were subject to a trust for sale, they had to be considered as being personal estate, and were, therefore, not " lands " within the meaning of the Finance Act, 1894, s. 5 (5).

Re Goswell's Trusts (15) *distinguished.*

[**EDITORIAL NOTE.** It has been suggested that succession duty is payable when the *forum* for proceedings under a marriage settlement is English. This is here held to be incorrect. It is necessary instead to ascertain the "proper law" of the settlement, that is, the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities. The law applicable depends, in the words of Lord Watson in *Hamlyn* v. *Talisker Distillery* (8), upon "their mutual intention, either as expressed in their contract or as derivable by fair implication from its terms." It follows that evidence of surrounding circumstances is admissible, while direct evidence of intention is not.

On the construction of the Finance Act, 1894, s. 5, the court, following *Re Exmouth's Annuity* (9), holds that "chattels" in that section is not equivalent to personal property but is limited to chattels in the nature of heirlooms.

On the question of conversion it is held that, as there is an immediate trust for sale, the necessity for the consent of the Duke of Marlborough, or an order of court, does not, on authority, prevent conversion taking place.

As to Proper Law of the Contract, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-270, paras. 321-323; and for Cases, see DIGEST, Vol. 11, pp. 437-440, Nos. 989-1005.

As to Settled Property, see HALSBURY, Hailsham Edn., Vol. 13, pp. 233, 234, para. 223; and for Cases, see DIGEST, Vol. 21, pp. 7, 8, 44-48, Nos. 24-27, 283-310.]

Cases referred to:

*(1) *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (1865), 1 Ch. App. 1; 21 Digest 63, *413*; 35 L.J.Ch. 124; 13 L.T. 480.

*(2) *A.-G.* v. *Belilios*, [1928] 1 K.B. 798; Digest Supp.; 97 L.J.K.B. 139; 138 L.T. 294.

(3) *Winans* v. *A.-G.*, [1910] A.C. 27; 21 Digest 65, *430*.

(4) *Toronto General Trusts Corpn.* v. *The King*, [1919] A.C. 679; 21 Digest 99, *t*; 2 W.W.R. 354; 46 D.L.R. 318.

*(5) *Re Cigala's Settlement Trusts* (1878), 7 Ch.D. 351; 21 Digest 101, *732*; 47 L.J.Ch. 166; 38 L.T. 439.

(6) *A.-G.* v. *Campbell* (1872), L.R. 5 H.L. 524; 21 Digest 99, *719*; 41 L.J.Ch. 611.

*(7) *A.-G.* v. *Jewish Colonization Assocn.*, [1901] 1 K.B. 123; 21 Digest 97, *714*; 70 L.J.Q.B. 101; 83 L.T. 561.

*(8) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202; 11 Digest 389, *643*; 71 L.T. 1.

*(9) *Re Exmouth's Annuity*, [1925] Ch. 280; Digest Supp.; 94 L.J.Ch. 208; 133 L.T. 39.

(10) *A.-G.* v. *Dodd*, [1894] 2 Q.B. 150; 21 Digest 129, *952*; 63 L.J.Q.B. 319; 70 L.T. 660.

(11) *Re Ffennell's Settlement, Re Ffennell's Estate, Wright* v. *Holton*, [1918] 1 Ch. 91; 20 Digest 348, *874*; 87 L.J.Ch. 54; 118 L.T. 171.

(12) *Re Wagstaff's Settled Estates*, [1909] 2 Ch. 201.

(13) *Re Johnson, Cowley* v. *Public Trustee*, [1915] 1 Ch. 435; 20 Digest 348, *871*; 84 L.J.Ch. 393; 112 L.T. 935.

(14) *Sykes* v. *Sheard* (1863), 2 De G.J. & Sm. 6; 20 Digest 348, *877*; 3 New Rep. 144; 33 L.J.Ch. 181; 9 L.T. 430.

*(15) *Re Goswell's Trusts*, [1915] 2 Ch. 106; 20 Digest 350, *885*; 84 L.J.Ch. 719; 113 L.T. 319.

(I) Appeal of the plaintiff from an order of Vaisey, J., dated Mar. 15, 1944, holding that the settlement was an English settlement in every sense with its proper *forum* of administration in England, that being the country of the matrimonial domicil of the parties. The judge took the view that the liability to succession duty depended on the *forum* to which recourse would normally and naturally be had by the parties for the determination of their rights under the settlement, and that *forum* was English.

(II) Appeal of the plaintiff and Cross-Appeal of the defendant from an order of Vaisey, J., dated Mar. 30, 1944, holding that the Pension Fund freeholds did not come within the Finance Act, 1894, s. 5 (5), since they were neither "land" nor "chattels," and since the properties were not settled "by," but only under, or pursuant to, or in accordance with, an Act or Acts of Parliament. As to the cross-appeal, the judge held that the investments and sum of cash representing proceeds of sales of portions of the Parliamentary Estates were "lands" within the meaning of the subsection and that they, equally with the unsold portions of those estates, were entitled to the benefit of the subsection. These investments and that sum of cash had to be regarded as "lands" under the temporary guise of personal property. (Settled Land Act, 1925, s. 75).

C. E. Harman, K.C., and *J. A. Wolfe* for the plaintiff.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *J. H. Stamp* for the defendant.

Lord Greene, M.R. [delivering the judgment of the court on the first point]: The first question that arises on this appeal is whether or not on the death of the 9th Duke of Marlborough succession duty and consequently (under the Finance Act, 1894, s. 2 (2)), estate duty became payable in respect of the American securities held under one of the settlements which were executed on his marriage in the year 1895 to Consuelo Vanderbilt. Vaisey, J., held that the duties were payable, and at the end of the argument we intimated that we agreed with his conclusion. As, however, the questions raised involve A some important matters of principle we thought it desirable to give our reasons in writing.

The facts which give rise to the controversy are stated in the judgment of Vaisey, J., and we need not repeat them. Counsel for the appellant and for the Crown were in agreement in submitting that in the case of a marriage settlement the question whether succession duty is payable under the Succession Duty Act, 1853, s. 2, is to be answered by reference to the law governing the B settlement—in other words, the proper law of the settlement. They agreed that duty attaches if and only if the proper law of the settlement is English—or Scottish, as the case may be. This proposition is, in our opinion, based on a correct view of the law. But as there are to be found in the authorities certain observations which suggest that succession duty is attracted where the *forum* for proceedings under the settlement is English—a test different from that of the C proper law of the settlement—and as Vaisey, J., appears to have favoured that opinion, we think it right, first of all, to make some examination of the law on the subject in order to justify our own view.

The examination necessarily starts with the case of *Wallace* v. *A.-G.* (1), where Lord Cranworth, L.C., held that no succession duty was payable on legacies bequeathed by a testator domiciled in France. He formulated the question in these words, at p. 7: D

> The question, therefore, is whether, where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person "becoming entitled" to that property within the true intent and meaning of the second section.

He treated the question, therefore, as one of the construction of the words "become entitled" in the section. He answered it by saying:

> I think not. I think that in order to be brought within that section, he must be a E person who becomes entitled by virtue of the laws of this country.

Again, at p. 8, he says:

> . . . the only safe way of solving this question . . . is to consider the duty as imposed only on those who claim title by virtue of our law.

If this language is carefully studied it is apparent that Lord Cranworth was F thinking, and thinking only, of the law which confers the title and was not thinking of the court in which the claim to title is to be enforced. In the case of a testator it is the law of his domicil which governs the construction of the will and the validity of its dispositions. It is by reason of that law that the beneficiary claims title, whatever the *forum* may be in which he happens to make his claim. The law "by virtue" of which a person claims title and the *forum* in which he claims it are two quite different things. The *forum* may be G that of the country by virtue of whose law the title is claimed; or it may not. The claimant may even have a choice of *fora*; but whatever *forum* has jurisdiction the law by virtue of which the title is claimed remains the same *scilicet* the law of the domicil.

If the principle laid down by Lord Cranworth in the case of wills is applied to the case of a marriage settlement the result does not appear to us to admit of doubt. In the case of a will the law under which title is claimed is the law of H the domicil. In the case of a marriage settlement the law under which title is claimed is the law which governs the settlement. This law can only be the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities. There is, as it seems to us, a precise analogy between the law of the domicil in the case of wills and what is conveniently called "the proper law" of the settlement in the case of marriage settlements. What is the proper law of the settlement may, of course, give rise to controversy as it has done in the present case and the question what weight ought to be given to the various factors which may properly be taken into consideration may not always admit of a ready answer. But the principle that the matter to be ascertained is the proper law of the settlement appears to us to flow inevitably from Lord Cranworth's original decision.

We find support for this view in the judgment of Sargant, L.J., in *A.-G.* v. *Belilios* (2). After quoting the principle as laid down by Lord Cranworth that in order to come within the section the successor must become entitled by virtue of the laws of this country, the Lord Justice proceeded as follows, at p. 819:

> It is argued for the Crown that subsequent decisions show that his limitation was too broad; and it is no doubt the case that in subsequent judgments the test adopted by Lord Cranworth has not been always applied in the precise terms employed by him. But I do not think that his language has ever been disapproved or, indeed, adversely criticised. And, in the cases in which the courts have since had to consider whether the documents in question created a taxable succession, I think that the various indications on which they have relied have almost always been indications as to the law under which the succession arises, and that the question so often put as to whether the documents form an English settlement is substantially the same as Lord Cranworth's test. And, further, it is to be noted that the test suggested in *Wallace* v. *A.-G.* (1), has been adopted in two comparatively recent cases of high authority: *Winans* v. *A.-G.* (3) and *Toronto General Trusts Corpn.* v. *The King* (4).

The whole of this judgment will be found to repay a careful examination. But there are two earlier decisions which we must mention. The first is *Re Cigala's Settlement Trusts* (5). That was a case of a marriage settlement executed in English form in England on the marriage of an English lady to a domiciled Italian. Of the four trustees, three were English and one Italian. The wife settled investments of her own which were partly French and partly British. The matrimonial domicil was clearly Italian since the spouses went to Italy immediately after the marriage and lived there until their deaths. On the death of the husband the question arose whether succession duty was payable on the French investments. Sir George Jessel, M.R., held that duty was payable and there can be no question as to the correctness of the decision. There are, however, some phrases in the judgment which we find it difficult to follow. Sir George Jessel, M.R., begins his judgment by referring to the form of the settlement and the fact that it was written in the English language and (what seems to us to be a matter of little, if any, importance) was executed in England in contemplation of a marriage which was to take place in England; and to the fact that three of the four trustees were English. This, he considered, made it an "English settlement." He also points out that the settlor was English and that the French investments although foreign in character were subject to the rule "*mobilia sequuntur personam.*" He also refers to the fact that at the date of the hearing all the trustees were English and subject to British jurisdiction, and that the *forum* for deciding upon the claim of the children was a British court. It must be conceded that in this judgment no reference is made in terms to the proper law of the settlement, and one at least of the considerations to which Sir George Jessel, M.R., attached importance, namely, that all the trustees were then English so that the *forum* was necessarily English could have no bearing on that question. Moreover, he appears to attach no importance to the fact that the matrimonial domicil was Italian, although it was clearly insufficient to outweigh the other considerations pointing to English law as the proper law of the settlement.

We are not prepared to accept in its entirety the opinion of Sargant, L.J., in *A.-G.* v. *Belilios* (2), with regard to this decision, namely, that the reasoning of Sir George Jessel, M.R., does not run contrary to the decision in *A.-G.* v. *Campbell* (6). The greater part of the matters referred to by Sir George Jessel, M.R., were undoubtedly relevant to the question what was the proper law of the settlement. But Sir George Jessel, M.R., was apparently attaching weight to the situation as it existed at the date of the husband's death when, as he said, the *forum* was English. It may well be the case that the proper law of a settlement can be changed by subsequent events. But we do not see how this can happen without the concurrence of the beneficiaries agreeing to a change in the proper law and thereby in effect making a new settlement. It cannot, we think, be effected by a change in trusteeship and this appears to have been the view taken by this court in *A.-G.* v. *Belilios* (2) (see particularly the observations of SARGANT, L.J., at p. 822).

Another matter relied on by SIR GEORGE JESSEL, M.R., causes us some difficulty, namely, the situation of the settled property. In determining what is the proper law of the settlement the nature and situation of the property settled is, no doubt, a matter to be taken into consideration. But the relevant date for this purpose can only be the date of the settlement itself since we do not see how a change, for example, from foreign investments to English investments can turn what was originally a foreign settlement into an English settlement. A
As in the case of trustees, so in the case of investments a change may be quite fortuitous and cannot affect the question what law governs the settlement. SIR GEORGE JESSEL, M.R., did not, as we read his judgment, rely on any change in the investments, but he referred to them as "English property" for the reason, as we have pointed out, that the lady who settled them was at the date of the settlement a domiciled English woman. We do not ourselves think that in the case of a marriage settlement what we may call the national character B
or location of settled property (which, as we have said, is a relevant consideration) is to be ascertained by reference to the rule "*mobilia sequuntur personam*." That character and location is, we think, a relevant consideration for what it is in fact, not for what (for some purposes) it notionally is by virtue of a conventional rule of law. In the case of a wife who acquires the domicil of her husband on marriage it does not appear to us to be right to attribute to personal property which she settles a character and location by reference to her ante-nuptial C
domicil which *ex hypothesi* is going to be changed immediately after the marriage takes place. Moreover, in the case of both spouses, the matrimonial domicil is the one which must be taken to be in their contemplation when they execute the settlement. For these reasons, although, as we have said, the character and location of the settled property are relevant matters to be taken into consideration in deciding what is the proper law of the settlement they are not, in D
our opinion, to be ascertained by reference to anything but the true facts relating to the property.

The next case is *A.-G.* v. *Jewish Colonization Assocn.* (7). There a domiciled Austrian assigned property to an English company by deed under which the settlor was to receive the income during his life and after his death the company was to apply the property for the benefit of Russian Jews. The settlement was written in the English language and was in English form. The company was E
one which apart from formal matters conducted its business from its principal office in Paris. At the death of the donor when duty was claimed the greater part of the investments were foreign investments and only a small proportion were British. Speaking of this case SARGANT, L.J., points out that it would not have been necessary for the court "to apply foreign law for the purposes of administration." There was, he said, in *A.-G.* v. *Belilios* (2), at p. 820 :

> . . . a duly constituted English trust to be administered as such, though the origin F
> of the constitution of the trust has been foreign.

This, in our opinion, places the decision on the correct basis, namely, the proper law of the contract which was undoubtedly English. But there are some observations which might suggest that this court was applying a different test. Thus SIR ARCHIBALD SMITH, M.R., says, in *A.-G.* v. *Jewish Colonization Assocn.* (7), at p. 130 : G

> . . . the Baron had resort to an English corporation . . . in order that his donation . . . might, if need be, be administered by English judges according to English law.

This may perhaps be understood as meaning that the *forum* contemplated had importance as such. We should prefer ourselves to say that the *forum* which the parties contemplate in so far as it can be ascertained from the transaction is an important matter to be considered in deciding what is the law which the parties H
contemplate as governing the transaction. Again, at p. 131, SIR ARCHIBALD SMITH, M.R., appears to attach importance to the fact that the :

> . . . deed . . . appointed English trustees subject to the English law, and any action brought to enforce the provisions of the deed would have to be brought in an English court of justice.

At p. 133 he quotes with approval the words of SIR GEORGE JESSEL, M.R., in *Re Cigala's Settlement* (5) :

> "This is . . . personal property in the hands of English trustees, and you cannot get

it from them except by an action in England. That is the true test."

SIR ARCHIBALD SMITH'S references to *forum* must not, we think, be read as meaning that *forum* is of itself the test since the *forum* may be different at different times. But in the case before him the *forum* which he found was contemplated had a special weight in deciding what was the proper law of the contract since the trustees were an English corporation which was clearly intended to act in perpetuity. The possibility of a change in the trusteeship A and consequently in the *forum* could not have been present to the mind of the donor. The judgment of COLLINS, L.J., is, we think, based on the view that the proper law of the contract is the decisive matter and his reference to "the jurisdiction of the English law" on p. 135 cannot be read as suggesting that *forum* by itself constitutes the test. His statement on the same page that in order to succeed the company must show that the donor intended to preserve the "foreign locality" of the settled property :

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> . . . that is, that it should continue to follow the person, not of the new owner, but of the original donor.

must, we think, be understood as meaning that the company must show that the law contemplated by the donor as governing the settlement was not English law but the law of his domicil, namely, Austrian law. The judgment of STIRLING, L.J., appears to throw doubts on the binding character of LORD CRANWORTH'S C rule (see p. 142), doubts which cannot now be regarded as well-founded. He also in some passages in his judgment appears to regard the test of *forum* as the general test, but, if this is the right construction to be placed upon his words, we cannot agree with them for the reasons which we have already sufficiently explained.

After a careful consideration of these and other authorities we have come to the conclusion that in the case of a marriage settlement succession duty is D exigible only where the proper law of the settlement is English (or Scottish) law, that is to say (to use the language already quoted of SARGANT, L.J.), "the law under which the succession arises." The question, therefore, in the present case is whether that law is the law of England or the law of the State of New York. On what principle is it to be answered ? On the same principle, as it seems to us as a similar question arising in the case of any other personal E contract. For this we cannot do better than quote the words of LORD WATSON in *Hamlyn* v. *Talisker Distillery* (8), at p. 212 :

> When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the F contract and the course of performing its stipulations contemplated by the parties; . . .

At the outset of the inquiry in the present case lies a question as to the admissibility of certain direct evidence as to the actual intention of the parties, particularly the intention of W. K. Vanderbilt himself. We cannot see on what principle evidence of this character is admissible and counsel for the appellants was unable to refer to any case in which it was admitted for the purpose of determining the proper law of a contract. The language of LORD WATSON G appears to us quite clearly to imply that such evidence is inadmissible. The question what law the parties to a contract contemplate as governing its meaning and operation is, we venture to think, a question of construction the answer to which depends, as LORD WATSON says, upon :

> . . . their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms.

H For this purpose, all such evidence of surrounding circumstances as is generally admissible for the purpose of construing a written contract is admissible in order to ascertain its proper law. Direct evidence of intention is, in our opinion, clearly inadmissible for that purpose.

When we turn to the settlement in this case and such surrounding circumstances as are admissible, we find the following matters to be considered. Miss Vanderbilt, the settlor of the railway stock, was at the date of the settlement domiciled in the State of New York, but the matrimonial domicil of the parties was clearly to be English. The securities which she settled were American securities but the terms of the settlement permitted their sale and the reinvestment of the proceeds in English securities. W. K. Vanderbilt himself was domiciled in the State of New York. Of the two trustees, one was W. K. Vanderbilt, the other was Ivor Guest, a domiciled Englishman resident in England, so that presumably both the courts of the State of New York and the English court would have been competent to enforce the trusts of the settlement. The settlement was executed in New York in triplicate, one part being handed to the English trustee, who brought it to England. For some reason he did not have it stamped, but this can have no bearing on the question what is the proper law of the settlement. The settlement itself was drafted in English form. Taking into account these considerations alone and attaching particular weight to the fact of the matrimonial domicil being English, we should have had little hesitation in deciding that the proper law of the settlement was English. But there are certain provisions in the settlement which appear to us to place this beyond all possible doubt. The first is the reference to " the statutory power of appointing a new trustee," a phrase which would be quite meaningless if the law of the State of New York were contemplated. The next provision is the special indemnity given to the trustees " in addition to the indemnity given by law to trustees." The law referred to can only be the law of England since the evidence shows that the law of the State of New York, although it recognises the validity of a contractual indemnity to trustees, does not of itself provide for any indemnity. The last provision is that for the making of an application to the English courts under the Infants Settlement Act with a view to making Miss Vanderbilt's settlement binding on her by English law. It is true that this only affects her own part of the settlement. It points, however, quite clearly to English law as being the proper law of the settlement so far as her part in it was concerned, and we can see no reason for thinking that W. K. Vanderbilt's part of the settlement was intended to be governed by a different law to that which was to govern the settlement of her property by his daughter. In the result, although we differ from the view which VAISEY, J., appears to have taken as to the proper test for deciding whether duty is payable and as to the admissibility of some of the evidence which he took into consideration, we are in agreement with the conclusion at which he arrived on this part of the appeal.

MORTON, L.J. [delivering the judgment of the court on the second point]: The next question to be decided on this appeal relates to certain freehold properties in the city of London purchased with the redemption monies of an annuity granted in the reign of Queen Anne. We shall refer hereafter to these properties as " the London freeholds," and the question is whether the London freeholds are " lands or chattels " to which the Finance Act, 1894, s. 5 (5) applies. The circumstances in which this question arises are as follows :—

By the Act 5 and 6 Anne (ch. 4), it was provided that an annuity or pension of £5,000, charged upon and payable out of the revenues of the Post Office as therein mentioned, should be payable to John First Duke of Marlborough during his life, then to his Duchess for her life, and after the death of the survivor of them and failure of the First Duke's male issue to his daughters and their issue in manner provided by the Act. We refer to this annuity hereafter as " the pension." It is not in dispute that the Act so settled the pension that no one of the persons successively in possession thereof was or is capable of alienating it. By the Act 19 and 20 Victoria (c. 59), the pension (which had become reduced from £5,000 to £4,000 *per annum*) was charged upon the Consolidation Fund of the United Kingdom instead of upon the revenues of the Post Office. By the Consolidated Fund (Permanent Charges Redemption) Act, 1873, power was given to redeem any annuity as defined by that Act (which definition included the pension) subject, in cases where the owner was a limited owner, to payment of the redemption money into court to an account to be entitled " *Ex parte* the owner of the annuity, In the matter of the Act," and to its being applied by or under the direction of the court for the benefit of the person entitled thereto. We refer to this Act hereafter as " the Act of 1873."

In or about the year 1884, the pension was redeemed under the 1873 Act and the redemption monies were paid into court to an account entitled " *Ex parte* the Duke of Marlborough's pension settled by the Acts 5 and 6 Anne (c. 3 and 4), In the matter of the 1873 Act," and were invested in the purchase of a sum of £34,419 19*s*. 1*d*. Bank of England Stock to the like account. In the year 1892 the 9th Duke, father of the plaintiff, succeeded to the Dukedom and to an interest for his life in the pension. Before the execution of the deed to which we shall next refer, the redemption money had been invested in the purchase of the London freeholds. By a deed of Apr. 11, 1905, made between the 9th Duke of the first part Sir Charles Rivers Wilson and Mackworth Bulkley Praed of the second part and the said Sir Charles Rivers Wilson, Mackworth Bulkley Praed and the Hon. Ivor Churchill Guest of the third part the London freeholds were settled upon certain trusts to which we must refer later. The facts in regard to the purchase of the London freeholds, and the events leading up to the settlement of Apr. 11, 1905, are very fully and clearly set out in the judgment of VAISEY, J., and we gratefully adopt his statement of these events. The 9th Duke died on June 30, 1934.

The present Duke, who is the plaintiff in these proceedings, contended before VAISEY, J., and before us that the London freeholds were "lands or chattels" to which the provisions of the Finance Act, 1894, s. 5 (5) apply. That section is in the following terms:

> Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty.

It was held by VAISEY, J., that the London freeholds were neither lands nor chattels within the meaning of that subsection. In his view they were not "lands" because they were subject to a trust for sale under the deed of Apr. 11, 1905, and were thus to be regarded as converted into personal estate for all relevant purposes. In deciding that they were not "chattels" he followed the decision of EVE, J., in *Re Exmouth's Annuity* (9). His decision covers certain other points, but we must first consider whether the judge was right in holding that the London freeholds were neither lands nor chattels within the subsection. If he was right in so holding, no other question arises on this part of the appeal. It is now contended on behalf of the appellant, the present Duke (1) that in considering whether any property comes within the subsection the court should not consider what was the nature of the property originally settled by Act of Parliament, but should consider only what was the nature of the property at the death of the person whose death gives rise to a claim for duty, that is, at the death of the 9th Duke on June 30, 1934; (2) that the words "lands or chattels" in the subsection are intended to cover every kind of property, real or personal; (3) that the London freeholds were on June 30, 1934, and still are "chattels" or alternatively "lands" within the meaning of the subsection.

We are prepared to assume for the moment, in favour of the appellant, that his first contention is correct. As to his second contention we are satisfied that the words "lands or chattels" cannot have been intended to cover real and personal estate of every kind. The opening words of the Finance Act, 1894, s. 1, are as follows:

> In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty" . . .

The comprehensive phrase "all property, real or personal" is to be noted. Coming to sect. 5, the opening words of subsect. (1) are "Where property in respect of which estate duty is leviable is settled by the will of the deceased." Subsect. (2) refers to "any settled property," subsect. (3) to "settled property" and subsect. (4) to "property comprised in a settlement." Then follows subsect. (5), which begins "Where any lands or chattels are so settled, etc." In our view, the conclusion is quite irresistible that the legislature is here turning to a case in which particular kinds of property are settled in a particular way. If the subsection had been intended to apply to every kind of property so settled, it seems quite inconceivable that the legislature would have employed so marked a change of wording at this point. In that event the subsection would surely have begun "Where any property real or personal, is so settled, etc." or "Where any property is so settled, etc."

We now turn to the question whether the London freeholds (assuming for the moment that they are not " lands ") are " chattels " within the meaning of the subsection. We think there can be only one answer to this question. No doubt the word " chattels," in a suitable context, may cover a wide field of property, but we have to form a view as to its meaning in this subsection. The same question was considered by Eve, J., in *Re Exmouth's Annuity* (9), and that judge expressed himself as follows, at p. 285 :

> In my opinion the original annuity was inalienably settled by the Act creating it and the same attributes attached to the redemption moneys, but I cannot bring myself to hold that these moneys are chattels within the meaning of that word in the subsection. No doubt " chattels " is a word of wide signification and in certain circumstances has been held to cover every sort of personal property, including money, choses in action, and the whole of a testator's residuary personalty ; but this very elasticity of meaning demands a close scrutiny of the context in which the word is used before its true meaning can be satisfactorily determined.
>
> Now in this subsection it cannot, I think, have been intended to exclude from aggregation under sect. 4 all personalty capable of being included in the word " chattels," if settled in manner therein stated ; otherwise one would have expected to find some such expression as " where any property real or personal is so settled " in the place of the words " where any lands or chattels are so settled." It follows that some restriction must be imposed on the word " chattels," and surely in collocation with settled lands settled chattels conveys a very definite meaning. It does not suggest personalty generally but those particular items of it which are usually settled upon trusts that follow as far as may be the devolution of the settled land, in other words, heirlooms. It appears that there are in existence certain chattels—pictures and plate—of the nature of heirlooms inalienably settled by statute to which therefore the special modification contained in the subsection is applicable, and in these circumstances it is not necessary to cast about for an explanation of the language employed. In my opinion that language cannot properly be construed as contended for by the applicants.

We agree with this reasoning, and, therefore, hold that the London freeholds, if they are to be treated as converted into personalty, are not " chattels " within the meaning of the subsection.

We must next consider whether the London freeholds are " lands " within the meaning of the subsection, and we shall continue to assume, in favour of the appellant, that the position must be considered as at the death of the 9th Duke on June 30, 1934. At that date, the London freeholds were undoubtedly lands in fact, and it is contended by counsel for the appellant that the trusts of the deed of Apr. 11, 1905, were not such as to convert them into personalty. Counsel conceded, however, that, if the deed did operate to convert the London freeholds into personalty for the purposes of transmission and devolution, they must also be regarded as converted into personalty for fiscal purposes. Turning to the deed of Apr. 11, 1905, and passing over the lengthy recitals for the moment, cll. 1 and 2 contain conveyances of the London freeholds to the three trustees. Cl. 3 is as follows :

> The said Sir Charles Rivers Wilson Mackworth Bulkley Praed and Ivor Churchill Guest or the survivors or survivor of them or other the trustees or trustee for the time being hereof (hereinafter called the trustees or trustee) shall stand possessed of all the lands messuages tenements and hereditaments hereinbefore conveyed upon trust to sell the same.

We pass over cll. 4 to 9 with the comment that they do not impose any fetter upon this trust for sale. Cl. 10 gives the trustees power, subject to any contrary direction by the court, to retain unsold any properties then or thereafter subject to the settlement during such period as they may think fit. Cl. 11 is in the following terms :

> Notwithstanding anything herein contained no sale of any hereditaments for the time being subject to the trusts hereof or of any right or interest therein or thereover and no purchase of any hereditaments under any power herein contained and no investment of any capital money for the time being held on the trusts hereof and no change of any investment for the time being held on the trusts hereof shall (except in pursuance of an order of the court) be made by the trustees or trustee without the previous consent in writing of the present Duke during his life and after the death of the present Duke without the previous consent in writing of the person in whom the Dukedom of Marlborough settled by the said Act 5 and 6 Anne, c. 3, shall for the time being be vested thereunder if such person shall be of full age Provided that if the present Duke during his life or such other person as aforesaid after his death shall at any time from

> unsoundness of mind or for any other reason be incapable of giving such consent then and so often as the same shall happen no such consent shall be necessary during the continuance of such incapacity.

Counsel submitted that this clause, for a period which might last for ever, imposed such fetters upon the trust for sale contained in cl. 3 of the deed that it did not operate to effect a conversion. Alternatively, counsel submitted that no trust for sale arose until the consent of the holder of the Dukedom of Marlborough had been given, or an order of the court authorising the sale had been made, or the holder of the Dukedom was incapable of giving his consent. The doctrine of conversion, no doubt, arose from the rule of equity which considers that as being done which ought to be done, and the courts might have taken the view in the past that, if a sale under the trust for sale in a deed is only to take place with the consent of A.B., no conversion takes place until such consent is given to the trustees. It might have been held that then, and only then, does it become the duty of the trustees to sell, and then, and only then, does conversion take place in equity. It is, however, well settled that, if real property is vested in trustees upon trust for sale with the consent of A.B., the consent is treated as intended to regulate the exercise of the trust for sale but not to prevent the trust for sale from being an immediate trust; and, if there is an immediate trust for sale, whether subject to consent or not, the trust operates at once to effect a conversion: see, for instance, *A.-G.* v. *Dodd* (10), and *Re Ffennell's Settlement* (11). It is also well settled that the existence of a power to postpone sale does not prevent conversion taking place. *Re Wagstaff, Settled Estates* (12) and *Re Johnson* (13).

Counsel for the appellant relied in particular upon the cases of *Sykes* v. *Sheard* (14) and *Re Goswell's Trusts* (15). The former of these cases was a contest between a vendor and purchaser of land, and SIR JOHN ROMILLY, M.R., after stating his views on the construction of a somewhat curious will, held that the purchaser's contentions were correct and that the vendor had not shown a good title. The vendor appealed and the case came before KNIGHT BRUCE and TURNER, L.JJ. KNIGHT BRUCE, L.J., said:

> I am of opinion that this title is much too doubtful to be forced upon the purchaser.

TURNER, L.J., said:

> This case turns upon the construction to be put upon the words "consent in writing of my sons and daughters." Even if we were clearly of opinion that after the death of any of the sons or daughters the consent of the survivors would satisfy the words, we could not feel any reasonable certainty that future judges would be of the same opinion, in the event of the sale being hereafter impeached by any of the persons beneficially interested.

It is clear that the Lords Justices felt considerable doubt as to whether the construction which SIR JOHN ROMILLY, M.R., had placed upon the will was correct, and we share those doubts. The question whether the testator's will operated to convert his real estate was not discussed, and we do not regard this case as of any assistance on the question which we have to decide. In the case of *Re Goswell's Trusts* (15), YOUNGER, J., had to consider the effect of a deed in unusual terms, executed in unusual circumstances. After reviewing certain authorities, he expressed himself as follows, at p. 113:

> The result of the authorities accordingly appears to me to be that there is no rule which requires the court to place any other than a natural construction upon such a clause as has here to be construed, and certainly not in a case like the present where the consent required is one which is to be given by the settlors themselves and no others, where the deed itself appears to contemplate that the real estate comprised in it retains after execution of the deed its character of realty, and where unaccompanied by the request there is in terms no trust for sale at all.

On the construction of the deed, he held that the real estate comprised therein and still unsold was not converted. In our judgment, that case turned entirely upon the construction of an unusual document and the decision in no way affects or qualifies the general rules which we have already stated.

In the present case, the first trust in the deed is the trust for sale contained in cl. 3. It is expressed in the clearest possible terms and is, on the face of it, an immediate trust for sale. It is true that, under cl. 11, the trustees cannot sell without obtaining either the consent of the Duke of Marlborough for the time being (if of full age and sound mind) or an order of the court, but, in our view, in the light of the authorities already referred to, this fact cannot operate to prevent the trust for sale contained in cl. 3 from being an immediate trust for sale, effecting an immediate conversion of the London freeholds. Even if the recitals were disregarded, we think it is quite clear that the deed would have so operated. If, however, the operative part of the deed had left this matter in any doubt, that doubt would have been completely removed by the recitals. They reveal at once that the object of the deed was to make it clear that the London freeholds " ought to be deemed temporary investments only " of the pension redemption money " and as in equity personal estate," and that they should " be made subject to a trust for sale accordingly."

For these reasons, we feel no doubt that the London freeholds must be considered as being personal estate at the date of the death of the 9th Duke, and are not " lands " within sect. 5 (5), even if we assume, in favour of the appellant, that the death of the 9th Duke is the relevant date at which to consider the nature of the property. If, however, we ought to consider the nature of the property which was originally settled by the Act 5 and 6 Anne, Ch. 4, or the nature of the property settled by the 1873 Act, it becomes even more clear that the Finance Act, 1894, s. 5 (5), cannot apply in the present case. The former Act settled the pension, and the latter Act settled the monies applied in redeeming the pension, and, in our view, neither the annuity nor the redemption monies could possibly be " lands or chattels " within the meaning of the subsection. The Attorney-General argued that the real question was, " Did the relevant Acts of Parliament settle lands or chattels ? " and that any subsequent changes in the nature of the property were quite irrelevant. There is, we think, much weight in the arguments put forward by the Attorney-General, but it is unnecessary to state them fully or to arrive at a final conclusion upon them, since, in our view, the appeal must fail, whether we consider the nature of the property originally settled or the nature of the property which passed on the death of the 9th Duke. Vaisey, J., went on to express a view upon the question whether the London freeholds were or were not " settled . . . by Act of Parliament," within the meaning of sect. 5 (5). On the view which we take of the case, this question does not arise, and we do not desire to make any observations upon it which would necessarily be *obiter dicta.* At the same time, we do not wish it to be thought that we agree with the view of the judge on this part of the case. For the reasons already stated, we are of opinion that the London freeholds do not come within the Finance Act, 1894, s. 5 (5), and that the appeal on this point must be dismissed.

We must now deal with the cross-appeal by the Crown, in regard to the investments representing proceeds of sales of portions of the Parliamentary Estates settled by an Act 5 and 6 Anne, c. 3. Vaisey, J., dealt with this question in the following words :

> By a parity of reasoning applied to the converse case of the investments and sum of cash representing proceeds of sales of portions of the Parliamentary estates I hold that these were lands within the meaning of the subsection, and that they, equally with the unsold portions of those estates, are entitled to the benefit of the subsection. It was admitted, I think, by counsel for the defendant, that this result would follow if I decided, as I have decided, that the pension fund freeholds were, so to speak, merely personal estate masquerading as realty. These investments and that sum of cash are, in my judgment, to be regarded as " lands " under the temporary guise of personal property ; see the Settled Land Act, 1925, s. 75.

Before us, the Attorney-General conceded that the cross-appeal must be dismissed, for the reasons stated by the judge, if we decided that the London freeholds were not " lands " within the Finance Act, 1894, s. 5 (5). In our view, the concession was rightly made.

Accordingly, the cross-appeal must be dismissed.

Appeal and cross-appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Nicholl, Manisty, Few & Co.* (for the plaintiff) ; *Solicitor of Inland Revenue* (for the defendant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

THE OWNERS OF CARGO ON THE GREYSTOKE CASTLE *v.* THE OWNERS OF THE CHELDALE.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), **December 20, 1944.**]

Shipping—Collision—Apportionment of liability for collision—Limitation decree—Agreement between owners of ships in settlement of liability by the offending ship on the basis of apportioned liability—Cargo-owner not a party to the agreement—Payment of general average contribution by cargo-owner to carrying ship—Right of cargo-owner to recover general average contribution from owners of offending ship.

The appellants were owners of the steamship, Cheldale, and the respondents were the owners of cargo on the steamship, Greystoke Castle. On Feb. 17, 1940, the Cheldale was in collision with the Greystoke Castle off Durban, as a result of which the Cheldale was sunk. The Greystoke Castle had to put into Durban as a port of refuge in order to effect repairs; in doing so she incurred general average expenditure amounting to £18,061 3*s.* 3*d.* The owners of the Cheldale commenced a collision action on Feb. 23, 1940, against the owners of the Greystoke Castle to which the owners of the Greystoke Castle counterclaimed. Both ships were held to blame; the Cheldale for a quarter and the Greystoke Castle for three-quarters. On Feb. 4, 1941, the owners of Greystoke Castle started an action for limitation of liability and paid into court the whole amount of their £8 a ton for liability; and on May 7, 1941, limitation was decreed. On July 4, 1941, the owners of the Greystoke Castle claimed in the reference under the limitation proceedings for damages to their ship and also for their £18,061 of disbursements, but they did not in these or in the collision proceedings put forward any claim, or in any way purport to be acting, on behalf of the cargo. On May 22, 1942, an agreement was made between the owners of the Greystoke Castle and the owners of the Cheldale that the latter should pay the former £4,515 5*s.* 10*d.* being the whole quarter of the former's £18,061 3*s.* 3*d.*, for which, *inter alia*, the owners of the Greystoke Castle had counterclaimed in the collision action. The owners of cargo on the Greystoke Castle had no part in, or notice of, that agreement as they were contractually debarred from claiming against the owners of the Greystoke Castle for damage to their cargo; but, on July 24, 1941, they issued a writ against the owners of the Cheldale claiming damages for injury to their cargo and the general average contribution payable by them to the owners of Greystoke Castle. On Aug. 8, 1941, the owners of the Cheldale admitted liability in principle subject to the limit of their quarter of the blame for the collision. When the matter came for assessment in Dec., 1943, the registrar in his report made an award that the respondents (then the plaintiffs) were entitled to recover (i) damages for injuries sustained by their cargo; and (ii) the amount contributed by them in general average. This award was subsequently confirmed by the court. The owners of the Cheldale moved in objection to the report so far as it concerned the recovery of general average contribution. The questions for the determination of the court were: (i) whether, when general average expenditure was incurred by the master of the Greystoke Castle in order to save the adventure from imminent danger caused by the negligence of the Cheldale, the owners of cargo on the Greystoke Castle had a right of action against the owners of the Cheldale to recover the amount of their general average contribution; (ii) whether a previous payment by the owners of the Cheldale to the owners of the Greystoke Castle of the whole of its general average expenditure without deduction of general average contributions payable by the other interests in the adventure defeated the right of action by the owners of cargo on the Greystoke Castle against the owners of the Cheldale:—

HELD: (i) the owners of the Cheldale were liable for the general average contribution payable by the owners of cargo on the Greystoke Castle, but their liability was limited to one-quarter of that claim of the owners of the Greystoke Castle.

The Marpessa (1) *overruled.*

(ii) neither a general average sacrifice nor a general average expenditure fell to be compensated by the owners of the Cheldale without taking into account the resultant general average position as a whole.

[**EDITORIAL NOTE.** The principle of liability in collision cases being the same as in other cases of tort, it is here held, overruling the *Marpessa* (1), that in a case of collision the owners of cargo on the innocent ship may recover the amount of their general average contribution from the wrong-doer. The innocent ship, having incurred general average liability on behalf of the whole adventure, can claim against the wrong-doer only its own share of the total incurred on behalf of all interests, leaving the cargo owner to recover his share from the wrong-doer. If the wrong-doer settles with the innocent ship for a sum including the share of the cargo owner this is to that extent a voluntary overpayment which will not bar the cargo owner from recovery. The general average position should be considered as a whole, and where the claim comes before the registrar these various interests are completely assessed but here the amount payable by the wrong-doer was settled between the solicitors.

As to General Average, see HALSBURY, Hailsham Edn., Vol. 30, pp. 592-604, paras. 750-763; and for Cases, see DIGEST, Vol. 41, pp. 592-606, Nos. 4157-4338.]

Cases referred to:

*(1) *The Marpessa*, [1891] P. 403; 41 Digest 810, *6723*; 61 L.J.P. 9; 69 L.T. 356.

(2) *The Minnetonka*, [1905] P. 206; 41 Digest 810, *6725*; 74 L.J.P. 97; 93 L.T. 581.

Appeal by the defendants, the owners of the Cheldale, from an order of Lord Merriman, P., dated June 15, 1944. The facts are fully set out in the judgment of Scott, L.J.

F. A. Sellers, K.C., and *O. L. Bateson* for the appellants.

Sir Robert Aske, K.C., and *A. J. Hodgson* for the respondents.

Scott, L.J.: This appeal by the owners of the Cheldale raises one issue of general principle and another of lesser importance. The latter depends on a mixed question of fact and law; but logically it only arises if the judgment under appeal was wrong on the first issue.

The main question is whether when general average expenditure is incurred by a master of ship A. in order to save the adventure from imminent danger caused by the negligence of ship B., the owners of cargo on ship A. have a right of action against ship B. to recover the amount of their general average contribution. I have no doubt that they have, but the contrary was decided in the case of the *Marpessa* (1), and it is contended by the appellants that a practice in the Admiralty Registry conforming to that decision and followed for half a century, ought to be regarded as settled law. I do not think so. I have stated the main issue in terms of the wrong-doing ship being alone to blame, because that is the necessary assumption to test the question of law. In the present case both were held to blame; but that is irrelevant. The cargo carrying ship also limited her liability; but that, too, is irrelevant.

The second question was whether, even if the *Marpessa* (1) ought to be overruled, a previous payment by the wrong-doing ship to the innocent ship of the whole of its general average expenditure without deduction of general average contributions defeats the right of action by the cargo owners on the innocent ship against the wrong-doer. On this issue there was also a dispute of fact as to whether such payment had been made. I am satisfied that it had not been. The facts are a little complicated; but in order to dispose of the second question, which was strenuously argued by counsel for the appellants, as well as of the first question, a historical summary is necessary.

The Cheldale was on Feb. 17, 1940, in collision with the Greystoke Castle off Durban, as a result of which the Cheldale was sunk with loss of life. The Greystoke Castle had to put into Durban as a port of refuge in order to effect repairs and be able to complete her voyage from the Far East to New York. In doing so she incurred general average expenditure to the amount, as finally ascertained at a later date (June, 1941) by the general average statement, of £18,061 3*s.* 3*d.* An adjustment as between ship, freight and cargo made at New York (the proper place for adjustment) showed the contribution towards that expenditure, due from her cargo, to be a certain figure, which for the moment I will call £x. *Prima facie* that debt of cargo to the carrying ship was a direct consequence of danger to the adventure created by the collision. The appeal is about the liability of the Cheldale in tort to the cargo-owners on the Greystoke Castle for £x—a quite simple point, though superficially complicated by the history of the matter subsequent to the collision.

On Feb. 23, 1940, six days after the collision, the owners of the Cheldale started a collision action in the Admiralty Division here against the Greystoke Castle (1940, C.814), and in it the Greystoke Castle counter-claimed. On Nov. 27, 1940, Langton, J., held both ships to blame, the Cheldale for a quarter and the Greystoke Castle for three-quarters. On Feb. 4, 1941, the Greystoke Castle started a limitation action ((1941, L.291), "L" being the initial of the Lancashire Shipping Co., Ltd., the owners of the Greystoke Castle) ; and paid into court the whole amount of their £8 a ton liability. On May 7, 1941, Langton, J., decreed limitation. On July 4, the owners of the Greystoke Castle made their claim in the limitation proceedings for damage to their ship and also for their £18,061 of disbursements, but did not in those proceedings or in the collision proceedings put forward any claim on behalf of cargo, or in any way purport to be acting on behalf of cargo. Nor did the owners of cargo on the Greystoke Castle make any claim in any proceedings as against the Greystoke Castle ; the reason being that the Greystoke Castle was fully protected against any such claim by a negligence clause in its bills of lading. But being debarred from claiming redress at the hands of the Greystoke Castle, her cargo-owners on July 24, 1941, as they were entitled to do, issued a writ against the Cheldale (1941 C.840). On Aug. 8, 1941, the owners of the Cheldale made an admission of liability in principle subject to the limit of their quarter of the blame attaching to them for the collision. On Nov. 19, 1941, claims were put forward at the reference in the limitation action (1941, L.291) on behalf of the owners of the Cheldale and of representatives of her crew who had lost their lives in the collision.

On May 22, 1942, an agreement was made in the limitation action between the owners of the Greystoke Castle and the owners of the Cheldale that the latter should pay the former £4,515 5*s.* 10*d.*, being the whole quarter of the former's £18,061 3*s.* 3*d.* spent in disbursements for which (*inter alia*) they had counter-claimed in the collision action. That agreement was made by a letter signed by the two firms of solicitors acting respectively for the owners of the Greystoke Castle as plaintiffs in the limitation action and the defendants in it, described in the writ as the owners of the Cheldale her master and crew, and personal representatives of deceased members of the crew and "all persons claiming to have sustained damage by reason of the collision."

The owners of the cargo on the Greystoke Castle had no part in or notice of that agreement ; nor was it necessary that they should, for they were contractually debarred from claiming against the Greystoke Castle and had already served their writ against the Cheldale. For some reason not explained to us, the reference in the action 1941 C. 840, brought by the owners of the cargo on the Greystoke Castle against the Cheldale did not come on for 30 months—viz., not until Dec., 1943. The owners of cargo carried by the Greystoke Castle were claiming in that reference, as against the Cheldale quarter share of blame, in respect both of damage to their several parcels of cargo and of the contributions for which they were liable to the owners of the Greystoke Castle (as ascertained in the general average statement) towards the Greystoke Castle's expenditure of £18,061 3*s.* 3*d.* The liability of the Cheldale was limited to their own one quarter of that claim of the Greystoke Castle in respect of its total expenditure, viz., to £4,515 5*s.* 10*d.*, because of the decree by Langton, J., in the collision action.

In regard to the Greystoke Castle's total expenditure, all of which was properly incurred by her at the time, it is essential to remember, when considering the liability of the wrong-doing ship to make it good by way of damages, that it is only the real loss incurred by the innocent ship which is recoverable by her. To the extent to which the ship interest is entitled to reimbursement by contributions from the freight interest and the cargo interest, the wrong-doer is entitled to say to the innocent ship : "I have by my tort caused you only your net loss. You are by maritime law, and apart from special contracts, entitled to recover contributions, and you must give me credit for those. You have a lien on the cargo for the cargo-owners' contribution and that goes to reduce the loss my tort has caused to you ; and you must give me credit for that. If you do not recover what you are legally entitled to recover, that is your look out ; you cannot say I caused your failure to recover." It is thus only the net or real loss by way of disbursements as a result of the collision which constitutes any part of the damages recoverable by the innocent ship from the wrong-doer. Neither a general average sacrifice nor a general average expenditure falls to be compensated by the wrong-doing ship without taking into account the resultant general average position as a whole. In a case of collision the innocent ship, forced by the imminent danger to incur direct liabilities to third parties for work done, incurs them in general average on behalf of the whole adventure, and cannot claim against the wrong-doer more than its own proper share of the total so incurred by her on behalf of all interests—usually ship, freight and cargo. The original liability to third parties is primarily incurred in the endeavour to save the whole adventure from impending danger of loss, and that endeavour is, by the law of the sea (and not merely by the contract of carriage) imposed as a duty on the master of the ship. It follows necessarily that only the net out-of-pocket loss of the ship under that head can be recoverable by the carrying ship from the wrong-doing ship.

The true test of the legal rights and obligations must be sought in the simple case of the wrong-doing ship being alone to blame ; and in that case the position is for the above reasons clear beyond argument. The result of an apportionment of blame, as of a statutory limitation of liability, is to affect the figure recoverable, but not to touch the legal principle of liability involved. In my view, therefore, in principle the Cheldale was only liable to the Greystoke Castle in respect of that portion of the £18,061 3*s.* 3*d.* for which the Greystoke Castle would otherwise remain permanently out of pocket after crediting the amounts it was entitled to receive by way of contribution from cargo and freight. Parenthetically I may add that the owner of the freight is often the same person as the owner of the ship, but that does not prevent the freight from being treated as a separate interest in general average and notionally bound to find the contribution due in respect of freight. Insurances almost invariably make that treatment necessary for business purposes.

If the Greystoke Castle thus got only her legally recoverable net disbursements out of the Cheldale, the Cheldale would only be paying to her the correct figure of the Cheldale's legal liability. If she paid more it would be a voluntary payment, not legally exigible from her by the Greystoke Castle ; and would be irrecoverable by the Cheldale from the Greystoke Castle as such voluntary payment, the mistake being one of law, not of fact. Conversely, if the Cheldale only paid to the Greystoke Castle that ship's proper share of the general average disbursements, the Cheldale would have no pretext for disclaiming liability to the party interested in the Greystoke Castle's freight, or to the owner of cargo in the Greystoke Castle their respective contributions as damages for the wrong done to each of those parties.

In the result, in my opinion, it makes no difference to the rights of action of the Greystoke Castle cargo-owners against the Cheldale, whether the Cheldale did, or did not, pay to the Greystoke Castle on the basis of the whole of the Greystoke Castle's disbursements being brought into account without deduction for contributions, in the ascertainment in the registry of the Cheldale's one-fourth share in the blame for the collision.

The Marpessa (1) was in my opinion wrongly decided. To say that general average disbursements whether primary by the innocent ship, or secondary by way of contribution to the primary sufferer from the other general average parties, are not the direct consequence of the negligence of the wrong-doing ship (which was the *ratio decidendi* in that case) is contrary to the fundamental principle of causation in our law of torts. The common law of the sea in regard to general average imposes the duty to disburse on the master of the ship ; and equally imposes the duty to contribute on the other parties to the adventure whenever an event causes danger of loss to the whole adventure. The collision was such an event and the legal obligation to contribute towards the sacrifice or expenditure required to save the adventure attaches to all interests alike as a direct consequence of the danger. That the Greystoke Castle was three-quarters to blame is irrelevant to principle ; it only affects the amount. In the *Minnetonka* (2) I am not satisfied that the Court of Appeal was really dealing with the principle, which the *Marpessa* (1) judgment sought to enunciate, and I, therefore, disregard what was said there ; but otherwise I agree entirely with the President's judgment in the present case which confirmed the excellent report of the registrar.

The other issue involved in the appeal was raised by counsel for the respondents as an additional answer to the arguments of counsel for the appellants which were based on the assumption that an actual payment by the Cheldale to the Greystoke Castle on the basis of one-quarter of the whole £18,061 3*s.* 3*d.* would have made a difference in the result. Counsel for the respondents pointed out that in fact no such payment was made even in account; and it is to be noted that the registrar gave the Cheldale an opportunity of making the point on an adjourned hearing if the owners of the Cheldale wanted it; but they did not avail themselves of the offer. I see no evidence of such payment even in account ever having been made; for under R.S.C., Ord. 56, the registrar's report has no operative effect till formally confirmed by the judge: see note to r. 10 in Yearly Practice.

The argument of counsel for the appellants has no foundation in fact, as the report was only confirmed by the President on a basis which excluded it. In addition, the whole of the facts of the case, including the position of the contributories as stated in the adjustment, were fully known to the advisers of the Cheldale long before the reference first opened in Dec., 1943; whatever they did, they did with their eyes open.

The Cheldale is plainly liable to the owners of the cargo for that fraction of their contributions which is represented by the degree of fault for the collision attributable to the Cheldale under the judgment of BUCKNILL, J. We are not asked to go into any question of figures and the decree of the President should stand.

The appeal must be dismissed with costs. If a reference is necessary we will hear counsel.

MACKINNON, L.J.: I arrive at the same result, perhaps by a slightly different path. The case seems to involve questions as to the principles to be applied in the Admiralty Registry in assessing the amount of damages in a collision action between two vessels. The application of such principles in the present case is complicated by two facts; firstly, that the Cheldale was only held liable for one-quarter of the damages sustained by the Greystoke Castle and her cargo, and, secondly, that the liability of the Cheldale limited under the Merchant Shipping Act (under the £8 a ton provision) was less than the full amount of such damages.

Leaving aside the complications, I will consider the principles applicable in a simple case where ship A. has been held solely to blame for a collision with ship B. On an ensuing reference to the registrar and merchants their task is to assess (*a*) the damages sustained by ship B., and (*b*) the damages sustained by the owners of the cargo on ship B. If these two enquiries are conducted at separate times, and not, as they ought with obvious convenience to be, at the same time, it is clear that some heads of damage may appear both under (*a*) and (*b*). The claim of the ship B. might be (i) for the physical damage done to the ship, and (ii) for the damage to the cargo for which under their contract of carriage they were liable to the owners of cargo. (Under modern bills of lading such a liability is unlikely, but the shipowner might be carrying cargo with no elaborate bill of lading, and, therefore, be liable for damage to the cargo by any cause other than the Act of God, and the King's enemies).

If the claim of the cargo-owners on ship B. was heard at a later date that claim might be for the damage done to the cargo, that is, the same claim as *ex hypothesi* the owners of ship B. had already put forward under heading (ii) above. So, as in this case, the claim of the cargo-owners might well include the amount of their contribution in general average towards port of refuge expenses incurred by the shipowner, all of which were previously included by the shipowner in his claim.

It is argued on the authority of the *Marpessa* (1) that a claim for damages based on the liability imposed on the claimant towards a third party by the express or implied terms of the contract between the claimant and the third party (for example, shipowner's liability for damage to his cargo, or liability of cargo-owner for general average contribution towards expenses paid by the shipowner) must be disallowed. It is said that such damages are too remote. I think this proposition is erroneous and that the *Marpessa* (1) was wrongly decided as a matter of principle.

Manifestly in a claim against a tortfeasor, for example, one who has negligently damaged his neighbour's premises by fire, the neighbour can claim as part of his damages the amount of his liability to a third party—for example, the owner of goods which he was storing without an exception of damage by fire. A tortfeasor who happens to be a shipowner is liable to the common law liability of a tortfeasor and cannot be in any privileged position. In the result, I think the so-called principle of the *Marpessa* (1) was entirely wrong.

It is obvious, however, that if and so far as the same head of damages, in whole or in part, appears both in the claim put forward by the shipowner and in that put forward by the cargo-owner, those claims cannot both be allowed in full by the registrar and merchants. The wrong-doing ship can only be liable once for that head of damage. If both claims are heard together there is no difficulty whatever in securing this result. If they are heard separately on different days the registrar, if he found part of the claim before him (for example, by the shipowner for the loss of cargo he was liable for) was of a sort that might equally be advanced by the other claimant (for example, cargo-owners for their lost cargo) he would clearly do one of two things, either (1) adjourn the hearing until the other possible claimants were summoned and were present, or (2) before allowing the claim of the shipowners as to the cargo to require evidence from them that the cargo-owners approved of this claim by him because, having been paid by him, they did not propose to make a substantive claim against the ship in fault. Similarly, if he observed that part of the shipowner's claim was for port of refuge expenses for part of which as their general average contribution there might be a claim by the cargo-owners when they formulated their claim, he would either (1) adjourn the reference until the cargo-owners appeared and claimed, or (2) require evidence that the cargo-owners approved of the shipowner claiming all his expenses because the shipowner had agreed with them not to ask for any contribution from them. By this procedure the registrar would secure the proper assessment of the damages sustained by the innocent ship and her cargo and their payment to those who had suffered them without any duplication of any claims and any consequent injustice to the ship in fault.

In this case, unfortunately, the claim of the ship Greystoke Castle did not come before the registrar. If it had, the above procedure would have been followed and no difficulty would have arisen. But the solicitors for the Cheldale and the solicitors for the Greystoke Castle settled the amount of the claim of the Greystoke Castle. The claim of the Greystoke Castle included these port of refuge expenses. The solicitors for the Cheldale agreed to the propriety of that claim without troubling (as the registrar would have done) either to have the assent of the cargo-owners or satisfactory evidence from the shipowner that he was not claiming any contribution from the cargo-owners so that a claim for that contribution could not be subsequently advanced by the cargo-owners. By that mistake the solicitors failed to protect their client from the possibility of such a claim by the cargo-owners. When that claim is put forward it could, of course, be met by the defence: You have not in fact paid this contribution. The shipowner having claimed the whole expenses from us has assured us, as is the fact, that he has not, and will not, claim any contribution from you. Therefore, you have not paid, and will not have to pay, this amount, and, therefore, cannot claim it from us. But if that answer is not available, if in fact the shipowner has exercised his claim for contribution, and has in fact exacted it, what answer is there to the claim of the cargo-owner that as a result of the negligence of the ship in fault he has suffered pecuniary damage by having to pay his share of the port of refuge expenses? In principle I can see none. In business, since all the parties really concerned are sets of underwriters, the difficulties, if there be any, can be solved in two minutes by a simple readjustment of accounts.

These seem to me the relevant principles. In the result on the question of principle so unnecessarily raised in this case, I think this appeal fails and should be dismissed, with costs.

I agree, however, that in fact, owing to the result of the agreement between the solicitors of the Cheldale and the Greystoke Castle the amount assessed as the total amount for which the Cheldale was (apart from her right of limitation) liable is too much by reason of the duplication of that part of the amount which is equal to the contribution of the cargo-owners in general average. That injustice ought to be rectified. As I have said, if the various underwriters concerned behave sensibly the rectification can be carried out by agreement in two minutes. If, however, good sense does not prevail and legal rights must be fought out to the bitter end, I think the case must be remitted to the registrar for further hearing. He will ascertain whether, in fact, the owners of the Greystoke Castle have exacted their right of contribution from the cargo-owners (as counsel for the respondents tells us they have) or have not. If they have, it will be apparent that the solicitors of the Cheldale were in error in agreeing with the solicitors of the Greystoke Castle to include the whole of the expenses in the claim of the Greystoke Castle, and the owners of the two ships ought to bear the costs of the further hearing before the registrar.

If, on the other hand, the owners of the Greystoke Castle have not claimed, and disavow any intention of claiming any contribution from the cargo-owners, then the owners of the cargo ought not to have claimed the amount of such a contribution from the owners of the Cheldale, and they (the cargo-owners) ought to pay these further costs. In either case, of course, the total amount of the claims of both parties against the Cheldale, now swollen by the duplication of the amount of the contribution, will be reduced by the amount of that contribution and justice will be finally secured on the principles of law and still more, those of common sense.

DU PARCQ, L.J.: I do not think that there is any difference of opinion between my Lords as to those questions of principle which have necessarily to be decided in this appeal. I am content to say, therefore, that I agree in thinking that the appeal should be dismissed and that I concur in the view which they take as to those questions. The form of the order may be a matter for discussion.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Botterell & Roche*, agents for *Ingledew, Mather & Dickinson*, Newcastle-on-Tyne (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., ESQ., *Barrister-at-Law.*]

YUILL *v.* YUILL.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **November 20, 1944.**]

Practice—Appeal—Divorce—Trial judge taking large part in examination of witnesses—Discretion of judge—No ground for new trial—Submission to trial judge of no case—Judge ruling against submission without ordering party to elect—No election—Right to call evidence not lost—Conflicting evidence—Demeanour of witnesses—Duty of judge to test demeanour of witness against whole evidence—Power of appellate court to draw own inferences.

The petitioner husband sought the dissolution of his marriage with the respondent on the ground of adultery. During many months down to Sept., 1942, the respondent had committed adultery with the co-respondent in the matrimonial home during the absence of the petitioner. About the middle of Sept., 1942, condonation took place and there was only one act of adultery alleged to have been committed subsequent to the condonation, namely, on Aug. 3, 1943. During the trial a large part of the examination of the witnesses was conducted by the judge himself. When the case for the petitioner was closed, counsel for the respondent made a submission that there was no case to answer. The judge ruled against the submission without, however, having called upon counsel for the respondent to elect whether to call evidence or rely on his submission, and heard the evidence of the respondent and the co-respondent. He came to the conclusion that upon the petitioner's evidence he ought not to draw the inference that adultery had taken place on Aug. 3, and accepted the evidence of the respondent and co-respondent basing his belief that they were substantially truthful upon "a careful observation of their demeanour" and the opinion which he had formed of their "type and characteristics." He, therefore, dismissed the petition. On appeal it was contended for the petitioner (i) that since the submission of no case had failed the petitioner was entitled to a decree, or, alternatively, that the evidence of the respondent and co-respondent ought to be disregarded; (iii) that the trial was unsatisfactory owing to the fact that the judge took an undue part in the examination of witnesses and a new trial ought to be ordered; (ii) that on the evidence adduced at the trial as a whole the evidence of the petitioner ought to be accepted and that of the respondent rejected. It was contended for the respondent that an appellate court ought not to depart from the view the trial judge had taken of the witnesses whom he had an opportunity to see and hear while giving evidence:—

Held: (i) on a submission of no case a party did not *ipso facto* lose the right to call evidence if the submission failed. The right was lost only when an election, express or implied, had actually taken place.

(ii) the part which a judge should take while witnesses were giving their evidence rested with his discretion, and the mere fact that the judge took a large part in the examination of witnesses did not justify the court in ordering a new trial.

(iii) an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question, and it was open to the appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded.

Hvalfangerselskapet Polaris A/S v. *Unilever Ltd.* (4) *applied.*

(iv) on the facts of the case the petitioner was entitled to a decree *nisi.*

[**EDITORIAL NOTE.** Three practice points are here considered. On the first the court holds as applicable to the Divorce Division the practice which has been laid down in other courts as proper to be followed when counsel desires to make a submission of no case. As to such a submission, reference may also be made to *William H. Muller* v. *Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E.R. 1363.

The second point is the discussion of the desirable limits of judicial intervention in the conduct of examination and cross-examination by counsel.

The third point is a consideration of how far it is open to the Court of Appeal to review the decision of a trial judge involving the demeanour of witnesses. The court holds that this may in a few cases be justified, applying the reasoning in the *Hvalfangerselskapet Polaris A/S* case (4).

As to Powers on the Hearing of the Appeal, see HALSBURY, Hailsham Edn., Vol. 26, pp. 120-128, paras. 238-248; and for Cases, see DIGEST, Vol. Practice, pp. 769-771, Nos. 3348-3361.]

As to Submission of No Case, see YEARLY PRACTICE OF THE SUPREME COURT, p. 620.]

Cases referred to:

(1) *Alexander* v. *Rayson*, [1936] 1 K.B. 169; Digest Supp.; 105 L.J.K.B. 148; 154 L.T. 205.

(2) *Parry* v. *The Aluminium Corpn., Ltd.* (1940), 162 L.T. 236; Digest Supp.

(3) *Laurie* v. *Raglan Building Co., Ltd.*, [1942] 1 K.B. 152; [1941] 3 All E.R. 332; 111 L.J.K.B. 292; 166 L.T. 63.

*(4) *Hvalfangerselskapet Polaris A/S* v. *Unilever, Ltd., Lever Bros., Ltd., and Another* (1933), 41 Ll.L.Rep. 182 (K.B.D.); 42 Ll.L.Rep 217 (C.A.); 46 Ll.L.R. 29 (H.L.).

Appeal of the petitioner from a decision of Wallington, J., dated Sept. 5, 1944, dismissing the petition for a divorce. The relevant facts and arguments are set out in the judgment of Lord Greene, M.R.

H. B. Durley Grazebrook, K.C., and *William Latey* for the appellant (petitioner).

P. L. E. Rawlins and *Horace Vester* for the respondent.

Lord Greene, M.R.: Before I come to the principal question in this case it will be convenient to dispose of two arguments submitted by counsel for the appellant. The first is as follows. In the court below, when the case for the appellant was closed, counsel for the respondent made a submission. It was intended to be a submission of no case—not, as I understand, in the sense that the evidence led by the appellant was insufficient in law to support a decision in his favour—but by way of an invitation to the judge to dismiss the petition without calling on the respondent. Wallington, J., did not at the time appreciate the nature of counsel's submission: in particular it did not occur to him that in taking the course which he did the respondent's counsel was in any way intending to call no evidence. In the result he did not follow the practice which, we are informed, has been adopted in the Divorce Division of calling upon the respondent's counsel to elect whether to call evidence or to proceed with his submission. The submission having failed, counsel for the appellant contended before WALLINGTON, J., that the respondent's counsel, by making the submission, had lost his right to call evidence and that the judge's ruling necessarily meant that the appellant was entitled to a decree. This contention was rejected by WALLINGTON, J. It was, however, repeated before us and we were invited to say that the appellant ought in the circumstances to have been granted a decree as a matter of course and to allow the appeal accordingly. Alternatively, it was said that if the mere fact that the judge had ruled against the submission of no case was insufficient, we ought in considering the facts to disregard the evidence led by the respondent.

This argument is, in our opinion, based on a misapprehension of the meaning of the practice which in appropriate cases is followed where counsel for a defendant desires to make a submission of no case. The practice is discussed in *Alexander* v. *Rayson* (1), *Parry* v. *The Aluminium Corpn., Ltd.* (2), and *Laurie* v. *Raglan Building Co., Ltd.* (3), and I will assume that it is a proper practice to follow in the Divorce Division. It does not mean that counsel by submitting no case *ipso facto* loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this [election expressly or (as in *Laurie* v. *Raglan Building Co., Ltd.* (3)) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission.] This argument, therefore, fails.

The other argument was to the effect that the trial was unsatisfactory owing to the fact that the judge took an undue part in the examination of witnesses. It was said that the judge put many more questions to witnesses than all the counsel in the case put together and that he in effect took the case out of counsel's hands to the embarrassment of counsel and the prejudice of his case. The part which a judge ought to take while witnesses are giving their evidence must, of course, rest with his discretion. But with the utmost respect to the judge it was, I think, unfortunate that he took so large a part as he did. I wish to say at once that having read the many pages of the transcript over which the judge's questions extend to the exclusion of counsel, often at the most critical points of the examination or cross-examination, I can find no trace whatever of any tendency to take sides or to press a witness in any way which could be considered undesirable. It is quite plain to me that the judge was endeavouring to ascertain the truth in the manner which at the moment seemed to him most convenient. But he must, I think, have lost sight of the inconveniences which are apt to flow from an undue participation by the judge in the examination of witnesses. It is, of course, always proper for a judge—and it is his duty—to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself. I think it desirable to throw out these suggestions in case they may be found helpful in the future. So far as the present case is concerned, although the part taken by the judge has in my view a bearing upon another branch of the case, I am quite unable to accept the argument that anything that took place would justify this court in ordering a new trial.

I now come to the principal question in the case which is one of pure fact, namely, did the respondent commit adultery with the co-respondent in the co-respondent's lorry on Aug. 3, 1943 ? During many months down to the middle of Sept., 1942, adultery had taken place in particularly flagrant circumstances in the matrimonial home during the absences of the appellant. At a date near the middle of Sept., 1942, condonation admittedly took place, and the only act of adultery alleged subsequent to the condonation was that now in issue, namely, on Aug. 3, 1943. It was argued that even if the act of adultery was not actually committed on Aug. 3, yet what then took place coupled with the meetings which preceded it amounted to an amorous association which was sufficient to revive the condoned adultery. Quite apart from the question whether anything short of a matrimonial offence can revive a condoned act of adultery (upon which I express no opinion) I agree with the judge that on any view of the law the facts (if adultery is not established) would be insufficient to bring about revival. It seems to me that there is no room for a middle view on the evidence. It was either adultery or nothing on Aug. 3, and there is no evidence of acts of familiarity during the preceding meetings.

The judgment of Wallington, J., falls into two parts. Having regard to the argument which had been addressed to him on the subject of counsel's submission of no case, he first examined the evidence called on behalf of the appellant without regard to the evidence of the respondent or the co-respondent. He came to the conclusion that upon the appellant's evidence he ought not to draw the inference that adultery took place in the lorry on Aug. 3. He accepted the appellant and Young as witnesses of truth but he refused to draw the inference for two reasons. The first was that he did not think that they could have seen from their post of observation everything which they said that they saw ; the second was that he thought that it was impossible to commit adultery in the available space. I will deal with the last point first. The judge appears to have relied to some extent on his own knowledge of the lay-out and dimensions of the cabs of lorries. He also, I infer, thought the suggestion to be that when the respondent and co-respondent disappeared from the view of the appellant and Young they must have lain on the floor—a thing which I agree would probably have been impossible. But their disappearance from the view of these witnesses was clearly consistent with their bodies being supported in a semi-recumbent position by parts of the seat next to the driver's seat. I am afraid that I cannot agree with the judge's view as to the impossibility of adultery being committed in the circumstances stated by the appellant and Young —if their evidence is to be accepted. These two persons had had a long history of passionate intimacy. There was no element of unfamiliarity or reluctance to contend with. The respondent, as will appear later, had been seeking out the co-respondent in spite of the promises which she had made to the appellant. She had written him a love letter although, for reasons which will appear later, she never posted it. To hold that these two persons could not have overcome such inconveniences as existed is, in my opinion, an inference which ought not to be drawn.

On the question of the ability of the appellant and Young to see what they said they saw, it is to be noticed that the cross-examination directed to this point was of a very meagre description and neither witness was really shaken upon it. In considering the probabilities it is important to remember that the witnesses were evidently able to see two things quite clearly. They could see the co-respondent seated in the driving seat ; and they could see with particularity his actions in taking his lunch—eating, and drinking out of a bottle. That their observation in this latter respect was unhampered and accurate is entirely borne out by the evidence of the respondent and the co-respondent. If they could see this they must (as indeed counsel for the respondent was constrained to admit) obviously have been able to see the other movements of the co-respondent, including in particular his disappearance from their sight. It was suggested in argument that the respondent, however visible the co-respondent may have been, must have been invisible to the witnesses since his body as he sat in the driver's seat would have prevented them from seeing her. I see no real warrant for this suggestion. Their vision may, it is true, have been obstructed as to parts of her body ; but at any rate there appears to me to be no reason for thinking that they could not have seen her movement in raising herself up in the manner which they described. The judge described the evidence of these witnesses as "nebulous." I do not so regard it. Indeed, the details which they described were, as it seems to me, particularly clear. The judge also said that they had to draw inferences. When asked to give his explanation of the matters to which this observation referred, counsel for the respondent said that he thought that it referred to the statement that his clients appeared to be kissing. I can see nothing to criticize in this. On the contrary, it appears to me to show that the witnesses were being careful not to state more than they in fact saw, and the expression surely means no more than that the attitudes adopted were those of persons kissing one another. I do not propose to go into the details of what the witnesses say that they saw. If their evidence is to be believed and the past association of the parties and the circumstances of their meeting are borne in mind, the inference that adultery took place appears to me to be irresistible once the suggestion that this was physically impossible is put aside.

But our task is to consider the evidence as a whole. WALLINGTON, J., in the latter part of his judgment dealt with the evidence of the respondent and the co-respondent which he held to be substantially truthful on certain vital matters, in particular the origin of the meeting on Aug. 3 and the events of that day. The evidence of the respondent was to the effect that she went out to meet the co-respondent on Aug. 3, in order to tax him with having caused rumours to circulate as to their relations; that she went with him in the lorry in order to achieve this object; that she asked him no more than two or three questions on the subject and he denied the accusation; that they spent the rest of the time in the lorry seated on their respective seats and talking about indifferent matters such as tomatoes and chickens. The co-respondent in substance gave evidence to the like effect. Now this evidence is in direct conflict with that of the petitioner and Young and is, of course, quite inconsistent with the movements to which they deposed. If the story is true, the statement that the respondent and the co-respondent disappeared from sight must have been pure imagination on the part of those witnesses since, if accepted, it entirely destroys the allegation that the parties remained in their seats in friendly conversation. Again, the purpose of the meeting as alleged by the respondent seems to me (for reasons which will appear later) very difficult to believe; and her conduct in remaining in the lorry for a long time after that purpose had been achieved was scarcely the conduct of a woman who was anxious to put a stop to rumours regarding her relations with the co-respondent.

The improbabilities of the story are increased when the circumstances which led up to the meeting are examined. About the month of May, 1943, the appellant noticed a change in the respondent's attitude to himself similar, as WALLINGTON, J., found (in spite of the respondent's denial), to that which had caused the earlier unhappiness between them. She refused to have relations with him (on one occasion only, according to her) and when accused by the appellant of still loving the co-respondent she said, according to the appellant, "He is a b—— sight better man than you will ever be." This statement by the appellant she swore was an invention. On July 3, the appellant discovered a love letter written by the respondent to the co-respondent. The respondent realised that her husband had discovered it and she did not post it. In the words of WALLINGTON, J.:

> . . . it is impossible to resist the conclusion that it disclosed a continuing affection on the part of the respondent for the co-respondent and a desire for his society.

With regard to her evidence upon the subject, the judge said it was "not wholly satisfactory"; she had said that sometimes she did intend to send it and sometimes she thought she would not. If by the words "not wholly satisfactory" the judge meant to convey that the evidence was in part, at any rate untrue, I can understand it. If it does not mean this, I have difficulty in understanding what it does mean. The most striking things about this letter were the direction given to the co-respondent as to communicating with the respondent and the enclosure of an envelope addressed to a certain lady with the letter "N" written on the flap. The object of this was to inform the lady in question that the letter enclosed in the envelope was intended not for her but for the respondent. Thus the respondent was proposing to arrange for the services of a go-between, a detail of intrigue scarcely consistent with her statement that the letter was written in a fit of misery and that she did not know what her mind was at that time. One thing she did say, that when she wrote the letter she was, to use her own words, "wishing I had someone to love me—a black man would have done—anybody who would be kind to me." The reference to a black man is no doubt a picturesque exaggeration, but the answer is significant. I cannot resist the conclusion that the respondent intended to post the letter and that she was only prevented from doing so by her admitted realisation that her husband had discovered it, although he did not in fact tell her so.

She did in fact admittedly see the co-respondent on several occasions before Aug. 3. I will not pause to examine the evidence with regard to them. But on July 29 she went by train to Billingham taking her cycle with her, and on her own admission waited at the roundabout for half an hour for the purpose of seeing the co-respondent. As he did not appear she went along the Stockton Road and waited for an hour or possibly less, hoping to see him. When the appellant asked her for an explanation of this incident she admitted to him (as she herself said) that she had seen the co-respondent eight times since the reconciliation. She denied the appellant's statement that he asked her whether she was carrying on the same association as previously and that she replied that she was and still intended to do so. She admitted that she offered to give him written evidence which would enable him to obtain a divorce, but said that she only made the offer in fun. Her explanation was that she thought the appellant was asking about her association with the co-respondent merely for fun. This remarkable statement, be it observed, was made by a wife who knew at the time that her husband had discovered the letter which she had written to her former lover. I find it impossible to believe that she was speaking the truth about this interview. The only reference to it in the judgment of Wallington, J., is to the effect that there was on this occasion a quarrel between her and the appellant "of a bitter character." This statement is quite inconsistent with the account of the interview given by the respondent, which the judge must have disbelieved, as I disbelieve it. I do not find it necessary to examine the other evidence given by the respondent or that given by the co-respondent with regard to the events leading up to the meeting of Aug. 3. From a careful perusal of the whole of her evidence I have come to the conclusion that she was deliberately seeking out the co-respondent with the intention of renewing her previous relations with him, and that in pursuance of this design she brought about the meeting of Aug. 3; and that with regard to that meeting the evidence of the appellant and Young ought to be accepted and that of the respondent and co-respondent rejected.

But it is said that we are not entitled to take this view because the judge believed the evidence of the respondent and the co-respondent and based his belief, as he said, upon a careful observation of their demeanour and the opinion opinion which he formed of their "type and characteristics." He said that much of their evidence—particularly that of the respondent—was given in a very unsatisfactory manner and that the respondent was on some occasions resentful and consequently reckless in her answers. Both of them, he said, were affected by nervousness and embarrassment and he was "not satisfied that they were deliberately dishonest in the box." He was, however, satisfied, despite his serious criticism, that they were substantially truthful in their testimony on the vital matters which he mentioned.

We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part upon his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value. There is one further consideration which is particularly relevant to the present case. A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue.

That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded has indeed been recognised by the House of Lords itself. The case to which I refer was one in which I was engaged as counsel in the Court of Appeal and in the House of Lords, and I think it right to place the matter on record as the only report of the case does not bring out the relevant circumstances. The case is that of *Hvalf. Polaris and Another* v. *Unilever, Ltd., and Others* (4). In one respect it resembles the present since the trial judge had himself taken a most active part in the examination of the witnesses. As appears from the printed record, he expressed the following opinion with regard to two of them, at p. 197 :

> It is necessary for me, in view of this contradiction, to decide which evidence to accept. I have already expressed my opinion as to the reliability of Blom as a witness. I did not form anything like so good an opinion of either Young or Bjelke. Their evidence and the manner in which they gave it were both unconvincing . . . Bjelke, who was called to corroborate Young's evidence as to his second conversation with Blom, says nothing of any communication by Young to Blom of Young's controlling interest in the Polaris Company. Finally, these alleged communications of his interest do not fit into his story. I think they were invented on the spur of the moment where it appeared important to show that Blom must have known for certain that the Polaris company would want to use a tanker.

When the case came to the Court of Appeal SCRUTTON, L.J., who delivered the leading judgment, said, at p. 220 :

> As to this last allegation, the judge below having seen the witnesses and heard the conflicting evidence, declines to accept Young's version. It is impossible for this court to interfere with this finding.

There were two issues in the case, one of construction and one a claim to rectification. It was on the latter issue that the evidence in question was relevant and although in the House of Lords the appeal was ultimately decided on the issue of construction, the issue of rectification was fully argued and the whole of the evidence examined in the greatest detail. In the result the House was satisfied by this examination that the strictures passed by the trial judge on the two witnesses in question were unjustified and that their evidence was truthful. The following passages are to be found in the opinion of LORD ATKIN, at p. 36 :

> Similarly, Blom failed to recollect a telephone conversation on Feb. 10, 1930, testified to by Young, in which he was corroborated by the bank clerk, Bjelke. The conversation is entirely consistent with the probabilities and the business conditions proved to be in existence at the time. Blom's version of a conversation at a later date in March is not. I cannot see that Blom's recollection affords any ground for distrusting the evidence of either Young or Bjelke. The result produced on my mind is that there is no satisfactory reason shown for any imputation on the substantial accuracy or good faith of any of the witnesses called by the plaintiffs; . . .

Lord Warrington said, at p. 70 :

> In this view of contruction the claim of the appellants to rectification does not arise, and it is unnecessary to discuss the question whether or not the findings of fact arrived at by Branson, J., and not set aside by the Court of Appeal, were correct or not. I desire to say, however, that having since the hearing reperused the material evidence, I entirely concur with the remarks on this point contained in the opinion of Lord Atkin, which I have had the opportunity of reading.

Lord Russell of Killowen, said, at p. 72 :

> I concur with the motion proposed, but I desire to add this, that having carefully studied the shorthand notes of the evidence I can find therein no trace of any matter or thing which would justify the view that the evidence given by the witnesses on behalf of the appellants was otherwise than truthful and accurate.

Lord Wright said, at p. 48 :

> Indeed, Young (who, I am convinced, was a fair and candid witness, though subjected to severe and not quite merited cross-examination) had in fact contracted on Feb. 8, 1930, to purchase from British shipbuilders for £146,000 a tanker, which he intended to have transferred to the Polaris company (in which he controlled a majority of shares), for use in the season. I also desire to express my concurrence in what has been observed by Lord Atkin in regard to the accuracy and good faith of the appellants' witnesses.

That case shows how important it is that the judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence. If there the trial judge had done this as it was done in the House of Lords he could not have expressed the opinion which he did as to the demeanour of the witnesses.

In the present case the judge cannot, I think, have subjected the evidence to an adequate scrutiny before expressing the view which he did as to the demeanour of the respondent and the co-respondent. I will not repeat what I have said as to the incidents of Aug. 3, the love letter (as to which the judge expressed an unfavourable view), with regard to the evidence of the respondent, and the quarrel of July 30 (as to which the judge did not believe the respondent). There is, however, another matter upon which I find the evidence of the respondent and the co-respondent frankly unbelievable, the incident of Sept. 11, 1942, which took place before the reconciliation. The evidence of the appellant and Young was that they found the respondent and co-respondent in bed together asleep and in the dark, the respondent in pyjamas, the co-respondent naked except for his vest. Both of them denied that they had committed adultery on this occasion although they had done so on numerous occasions in the same place. Wallington, J., accepted their denial of adultery and it may well have been true. But he does not comment upon their story as to how they came to be in the situation in which they were found, nor does he anywhere say that he believed it. It is not one of the specific matters upon which he expresses himself satisfied with their evidence, and I find it impossible to suppose that he gave to it the importance which it deserved as bearing upon their credibility. All that he did was to refuse to draw the inference that adultery had taken place. He did not say that he accepted the statement that the respondent was lying on, not in the bed, nor did he suggest that the evidence of the appellant and Young as to what they saw ought not to be accepted. He said, however, that the conduct of these two persons :

> . . . on that occasion cannot be too strongly condemned and they put themselves in such a position that they could not fairly complain if they were found guilty.

If the story was untrue, it is impossible to regard these people as honest witnesses. The story, in my judgment, was flagrantly untrue. It was as follows. The co-respondent came to the house finding the respondent in pyjamas over which, according to her account, she was wearing something in the nature of a dressing gown. She did not want to see him and told him so. Nevertheless she allowed him to remain and they had supper together. She then lay down on (not in) the bed and fell asleep, leaving the co-respondent seated on a chair. The next thing she knew was that her husband was hitting the co-respondent who was lying beside her in (not on) the bed, wearing only his vest. The co-respondent in substance repeated the story. Can anyone believe it ? I certainly cannot, when I remember the previous relations of these parties and, in particular, that this same bed had been the scene of their previous acts of adultery committed during the absence of the husband, an absence which they both expected on this occasion. If true, it would mean that the respondent so far repressed her desire that the co-respondent should depart as to entertain him at supper in her night clothes, that she then went to sleep in his presence lying on the bed, that he then undressed, turned the lamp either out altogether or so low as to leave the room practically in darkness and then got into bed beside her without distrubing her, whereupon they both slept peaceably until they were awakened by the unexpected appearance of the appellant and Young. The irresistible inference to my mind is that they deliberately got into bed together although they may not have actually committed adultery.

I conclude by referring to the fact that the respondent in giving her evidence was quite clearly on many occasions fencing with the questions put to her. She was rebuked many times by the judge for doing this as appears on the shorthand note of the evidence but not on the judge's own note. We were informed by counsel that the judge was not furnished with a transcript of the shorthand note so that when considering his judgment he had nothing before him to remind him of what he had said and of how often he said it. When the questions and answers are read together the clear impression left on my mind is that the respondent was doing her best to avoid answering the questions put to her, an impression which the answers read apart from the questions could not have produced. The only remaining question relates to the discretion of the court which the appellant asks to have exercised in his favour. If WALLINGTON, J., had thought that the appellant had proved his case he would, as he said, have been disposed to accede to this request. I have considered the circumstances and the discretion statement and I think that the view which the judge was disposed to take on this matter was a proper one. There will be a decree *nisi* with costs against the co-respondent. The decree will be dated as of Sept. 5, last.

I should add that MACKINNON, L.J., has read this judgment and agrees with it.

DU PARCQ, L.J. : I also agree with the judgment which has been delivered, and I could not state my own reasons without repeating what has been said by LORD GREENE, M.R., with which I am in complete agreement.

Appeal allowed. Decree nisi granted, dated as of Sept. 5, 1944. *Co-respondent to pay the costs of the petitioner, appellant to pay the costs of the respondent wife.*

Solicitors : *Sayer, Ledgard & Smith*, agents for *Newby, Robson & Cadle*, Stockton-on-Tees (for the appellant) ; *Isadore Goldman & Son*, agent for *A. N. Levinson*, West Hartlepool (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

plied. LLEWELLYN *v.* HINSON. 48] 2 All E.R. 95. *Applied.* BANKS *v.* COPE-BROWN. [1948] 2 All E.R. 76. *Applied.* TURNER *v.* BAKER. [1949] 1 All E.R. 560.

ished. BAKER *v.* TURNER. All E.R. 834.

NEALE *v.* DEL SOTO.

[COURT OF APPEAL (Scott, Finlay and Morton, L.JJ.), **December 8, 1944.**]

Landlord and tenant—Rent restriction—Standard rent—Apportionment—Sole use of 2 *unfurnished rooms and joint use of other rooms—" Part of a house let as a separate dwelling "—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (*c.* 17), *s.* 12 (2), (3), (8)—*Rent and Mortgage Interest Restrictions* (*Amendment*) *Act*, 1933 (*c.* 32), *s.* 16 (1).

Under a verbal tenancy agreement with the respondent, the appellant had the sole use of 2 unfurnished rooms in a house and also shared with the respondent the use of certain other rooms including the kitchen and bathroom. The appellant applied for the apportionment of the rent of the 2 unfurnished rooms for the purpose of determining their standard rent under the Rent and Mortgage Interest Restrictions Acts, 1920-1939. It was contended on his behalf that (i) there were 2 lettings, that of the 2 unfurnished rooms and a separate joint tenancy of the other rooms, and (ii) the 2 unfurnished rooms constituted " a separate dwelling," within the meaning of sect. 12 (2) of the 1920 Act :—

HELD : (i) there was only one letting which included the 2 unfurnished rooms and the joint use of the other rooms.

(ii) the 2 unfurnished rooms were not " a part of a house let as a separate dwelling," within the meaning of the Act, since there was really a sharing of the house.

[**EDITORIAL NOTE.** It appears from this decision that when unfurnished rooms are let to a tenant together with the use of other rooms jointly with the landlord it is a question of degree whether the rooms are "let as a separate dwelling" for the purpose of apportionment of rent under the Rent Restriction Acts. Here the joint user involved such important rooms as the kitchen and bathroom, and it is held that the agreement really amounted to a sharing of the whole house.

As to Apportionment of Standard Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and for Cases, see DIGEST, Vol. 31, pp. 570-572, Nos. 7182-7198.]

Cases referred to:

(1) *Smith* v. *Prime* (1923), 129 L.T. 441; 31 Digest 563, *7108*.

(2) *Hornsby* v. *Maynard*, [1925] 1 K.B. 514; 31 Digest 566, *7135*; 94 L.J.K.B. 380; 132 L.T. 575.

Appeal by the plaintiff from a decision of His Honour Judge Topham, K.C., given at the Southampton County Court, and dated July 11, 1944. The respondent was the occupier of a seven-roomed house, the standard rent of which was 30*s*. a week. By a verbal agreement the respondent let to the appellant, for £1 2*s*. 6*d*. a week, 2 unfurnished rooms for his sole use together with the joint use with herself of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory. The appellant applied for the apportionment of the rent of the 2 unfurnished rooms as on Aug. 7, 1943, for the purposes of determining the standard rent of the said rooms under the Rent and Mortgage Interest Restrictions Acts, 1920-1939. The facts are set out in the judgment of Morton, L.J.

Sydney E. Pocock for the appellant.

B. J. M. MacKenna for the respondent.

Morton, L.J.: In this case the county court judge dismissed an application by the appellant for the apportionment of the rent on Aug. 7., 1943, of two unfurnished rooms forming part of 174, Wilton Road, Southampton, for the purpose of determining the standard rent of the said rooms under the Rent and Mortgage Interest Restrictions Acts, 1920-1939. The letting was an oral letting, except in so far as its terms are recorded in the rent book, a document which, according to the evidence, was not produced until some time after the tenancy began. Of the sections relevant for the present purpose, the first is the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), which is as follows:

> This Act shall apply to a house or a part of a house let as a separate dwelling . . .

There follow certain restrictions as to the annual amount of the standard rent, and so on. The relevant words of that subsection for the present purpose are "or a part of a house let as a separate dwelling," and what we have to determine is whether the county court judge was right or wrong in the view which he took that the two rooms in question were not let as a separate dwelling within the meaning of the Act.

Sect. 12 (3) of the same Act is merely relevant as the section under which the application for apportionment was made. Sect. 12 (8) is as follows:

> Any rooms in a dwelling-house subject to a separate letting wholly or partly as a dwelling shall, for the purposes of this Act, be treated as a part of a dwelling-house let as a separate dwelling.

I do not think that subsection really adds anything for the present purposes because it will still be necessary for us to find whether the rooms in question are subject to a separate letting, even if we apply subsect. (8) to the present case. The definition in sect. 16 (1) of the Act of 1933 does not throw any further light upon the matter, for it is as follows:

> "Dwelling-house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.

The agreed facts, as set out in the notes of the county court judge, are as follows:

> Standard rent of whole 30*s*. per week. Applicant had sole use of one small back sitting room and one front bedroom, respondent retained sole use of one front sitting room downstairs, breakfast room downstairs, mid-bedroom and 2 small bedrooms. Joint use of garage, kitchen, bathroom, lavatory, coalhouse, conservatory.

The county court judge, after hearing certain oral evidence to which I need not refer in detail, found as follows:

> I find as a fact from the evidence, as also appeared in the rent book before it was

> altered, that what was let was two unfurnished rooms for the sole use and occupation by the applicants [I think that should be "applicant"] and the garage, kitchen, bathroom, lavatory, coalhouse and conservatory for use and occupation by them jointly with the respondent.

In another portion of his judgment, the county court judge described the case as follows:

> . . . when, as in this case, a person has got in a lease at a rent two rooms and the use in common with the owner of other rooms such as the kitchen, that is a sole tenancy of two rooms and a joint tenancy, as it were, of the other rooms, since he has a right to use them in every way, not merely as an accessory to something else.

It was contended by counsel for the appellant, relying on that latter passage, that the county court judge had taken the view that there were in fact here two lettings. I do not so read his judgment. I think there was only one letting, and that the county court judge recognised that fact; the use of the phrase "as it were" indicates that he was not speaking of a separate joint tenancy in the full sense of those words.

Two cases were referred to in argument before us, and also before the county court judge. The first was *Smith* v. *Prime* (1), which I do not find of any assistance for the present purpose; it was a decision upon different words in a different section of the Act. The other was *Hornsby* v. *Maynard* (2), in which the facts were so different from the present case that again I find the decision of no assistance. In the present case, were the two rooms in question "a part of a house let as a separate dwelling?" In my view, they were not. What was let was the two rooms together with the use in common with the owner of the house of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory. The dwelling which was let was the two rooms together with the use of the other rooms which I have just mentioned, and it would be a misuse of language, to my mind, to say that the two rooms and nothing more were let as a separate dwelling. The real substance of the matter is that there was a sharing of this house; each party had the exclusive use of some rooms and the two parties together had the use in common of certain other rooms. Strange results might follow if we were to find that a letting such as this was a letting of the two rooms as a separate dwelling. For instance, if the owner of a house let out to a tenant an attic bedroom with the right to use jointly with the landlord all the other rooms in the house, it might be said that that was a letting within the Act, that there could be apportionment within the Act, and that a statutory tenancy would arise of the single attic bedroom plus these rights.

We were also referred to the Representation of the People Act, 1867, and to the Parliamentary and Municipal Registration Act, 1878, but I think it would be dangerous to draw any conclusion from any definitions which one finds in these Acts.

It was suggested in the course of the argument that if the county court judge's decision is upheld in this case the result might follow that a letting of two rooms together with the use in common with the landlord of, for instance, the lavatory, would be outside the Act. I am content to leave that matter to be dealt with if, and when, it arises, but it may be that this question is a question of degree and, as the county court judge has observed in the course of his judgment, in the present case a very substantial part of the dwelling was shared, including such a very important room as the kitchen. For these reasons, I am satisfied on the facts of this case that the county court judge's decision was right, that the letting of these rooms together with the use in common with the owner of the garage, kitchen, and so on, is not a letting of the rooms as a separate dwelling within the Act, and this appeal ought to be dismissed.

SCOTT, L.J.: I agree.

FINLAY, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Lovell, Son & Pitfield,* agents for *Paris, Smith & Randall,* Southampton (for the appellant); *Sharpe, Pritchard & Co.,* agents for *Bell, Pope, Bridgwater & Hughes,* Southampton (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Approved. FOWLER *v.* BRATT. [1950]
1 All E.R. 662.

JONES *v.* LOWE.

[KING'S BENCH DIVISION (Hilbery, J.), **November 3, 1944.**]

Agency—Estate agent—Commission—Agreement to pay commission on introduction of purchaser—Agent finds client willing to purchase at agreed price—Vendor refuses to sell—" Purchaser."

On July 30, 1943, the plaintiff, an estate agent, entered into a verbal agreement with the defendant to find a purchaser for her house. On the same day the plaintiff wrote a letter to the defendant confirming the agreement and stating " in the event of my introducing a purchaser I shall look to you for payment of the usual commission." In Feb., 1944, the plaintiff found a client ready and anxious to purchase the house at the agreed price but, before the contract was completed, the defendant withdrew the house from the market. The plaintiff brought an action claiming (i) commission due to him on the verbal contract, or (ii) alternatively, remuneration for his services on a *quantum meruit* :—

HELD : (i) commission payable on the introduction of a purchaser is payable only on the conclusion of a legal and binding contract of purchase and sale.

Luxor (Eastbourne), Ltd. v. *Cooper* (1) *applied.*

(ii) since the terms of the verbal contract had been reduced into writing and had been accepted by the conduct of the defendant, no term could be implied other than those expressed and the plaintiff could not, therefore, claim on a *quantum meruit.*

[**EDITORIAL NOTE.** The agreement here was for the payment of commission " on introducing a purchaser," not upon completion of the purchase. The judge holds, basing his decision on the language used by LORD RUSSELL in the *Luxor* case (1), that commission is only earned if the person ready and willing and able to purchase goes as far as signing a legal contract binding him to go through with the purchase. This is a matter of construction, however, and the apparent hardship to the estate agent may be avoided by a more precise wording of his agreement in view of this decision.

AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-259, paras. 432, 433 ; and FOR CASES, see DIGEST, Vol. 1, pp. 508-512, Nos. 1753-1769.]

Cases referred to :

*(1) *Luxor (Eastbourne), Ltd.* v. *Cooper,* [1941] A.C. 108 ; [1941] 1 All E.R. 33 ; 110 L.J.K.B. 131 ; 164 L.T. 313.

(2) *Trollope (George) & Sons* v. *Martyn Bros.,* [1934] 2 K.B. 436 ; Digest Supp. ; 103 L.J.K.B. 634 ; 152 L.T. 88.

ACTION by an estate agent claiming commission alleged to be earned by the introduction of a purchaser for a house belonging to the defendant. The plaintiff claimed (i) £86 5*s.* as commission due on a verbal contract, or (ii) alternatively a like sum for his services on a *quantum meruit.* The facts are fully set out in the judgment.

Paul Wrightson for the plaintiff.

L. J. Solley for the defendant.

HILBERY, J. : In this case Cyril Jones, a house agent practising at Maidenhead and a Fellow of the Auctioneers' and Estate Agents' Institute, claims in the first place £86 5*s.* as commission due to him on a verbal contract which he alleges was made on July 30, 1943, whereunder he says the defendant, in consideration of the plaintiff introducing a purchaser to the defendant for a property known as Norfolk Lodge, Oldfield Road, Maidenhead, agreed to pay the plaintiff the usual commission in accordance with the scale fixed by the Auctioneers' and Estate Agents' Institute of the United Kingdom ; and, alternatively, the plaintiff claims a like sum on a *quantum meruit.*

The plaintiff has given evidence ; the defendant gives no evidence, but relies upon the contention that the plaintiff's claim must fail as a matter of law. The plaintiff's evidence of the contract between the parties is that on July 30, 1943, the defendant, for whom he had previously done business, came to him at his office and asked him if he had any houses suitable for resale at a profit, and whether he had any applicants for Norfolk Lodge, the property she was then occupying. The plaintiff replied that he had a large number of applicants to whom he would like to send particulars, and inquired what price the defendant was asking ? The defendant said that she thought she ought to get £3,750. The plaintiff's comment was that it was a high price, and, indeed, it was. The plaintiff said he would try to find someone who would pay that price, and on the same day he wrote a letter setting out in writing the terms upon which he was prepared to act in the matter. His letter was in these terms :

> I write to confirm the instructions you gave me, when you called at this office to-day, to offer this property for sale, quoting £3,750 for the freehold. I am at once sending particulars to several likely applicants and in the event of my introducing a purchaser I shall look to you for payment of the usual commission, which is in accordance with A the scale authorised by the Auctioneers' and Estate Agents' Institute, of which I am a Fellow.

The defendant did not write any letter in answer to that. In no way and at no time did she dissent from those proposed terms. The plaintiff busied himself in sending particulars of the property to various persons who were possible applicants or likely to be interested in the property. At that price of £3,750 he could not get possible buyers to become interested, and on Oct. 25, B the defendant instructed him that she would take the reduced price of 3,000 guineas. The plaintiff returned to his work and labour with his possible applicants, and he succeeded in interesting a Mr. Cooke in the property at the price of 3,000 guineas. He got a firm offer from Cooke for the property at this price of £3,150 on Feb. 5, 1944. Cooke's offer was made subject to a surveyor's report being satisfactory, and in the usual way the matter was made subject to a contract being agreed between the solicitors. The offer was reported to C the defendant and to her solicitors, and on Feb. 10 Cooke informed the plaintiff that his surveyor's report upon the structure was satisfactory and that he was ready and willing, and indeed anxious, to go on with the purchase. It will be remembered that July, 1943, in this country was a time when we experienced a lull for a considerable time from enemy air-raids, and at that time the market in properties outside London was not the hard and rising market D that it had formerly been, with prices mounting sky high and readily obtainable ; and in Oct., 1943, when the defendant lowered the price which she was asking for the property, the lull—the respite from enemy air action—was still with us, and the market was not anything like what it had been. But in Feb., 1944, there was increasing enemy activity directed on London, with the result that properties of which vacant possession could be given in and around the small towns lying outside the London area, but within easy reach of the centre of E London for business purposes, were commanding, once again, rising prices. It was in that market of rising prices that the defendant found herself in the difficulty that she expresses in the letters about giving vacant possession of this property, and in a position in which she was not yet pledged in law on a contract that bound her in law to Cooke. On Feb. 21 she telegraphed to Cooke : " House withdrawn from market writing Lowe." On Feb. 20 she wrote to Mrs. Cooke saying :

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> I know how anxious you are to come in, also I find I will not be able to buy a house for anything like the price you are giving for this. They are asking much higher prices for houses very inferior to this one, so altogether I have been very worried. Yes, I am afraid my mother will have to have an operation, so that her suddenly being taken ill was serious. If I could possibly have managed it, I would have suggested coming over to see yourself and Mr. Cooke ; anyway, we can have a talk on Tuesday.

G But on Feb. 21, the day after that letter, she sent the telegram that the house was withdrawn from the market. In another letter she explains the difficulties she was in about giving up the house, Norfolk Lodge, because of friends who had been bombed out having come to stay. Cooke has told me he was anxious to go on and complete the purchase, and his solicitors saw no reason, in so far as the draft contract that came to them was concerned, to suppose that the contract would not go through. There was nothing to prevent it going through ; H it was a perfectly normal purchase and sale except that the defendant withdrew the house from the market and refused to go on. Cooke immediately set about trying to find another house. The plaintiff had other houses on his books and he immediately put before him another house which he subsequently bought. About March, the defendant seems to have expressed her willingness to take up the matter once more with Cooke, but it was too late because Cooke had bought elsewhere. At the same time that the defendant was expressing a willingness to go on with Cooke but was then informed that Cooke had decided on another house, she put the house again on the plaintiff's books at £3,500, which was an improvement of £350 on the price which she would have been getting from Cooke.

Those are the circumstances in which the plaintiff brings his action. The first question that I have to decide is: Has the plaintiff performed his part of the contract so that the commission has become due and payable under the contract? That depends upon construing the words selected by the plaintiff himself and put into writing by him as the words defining and describing what he was employed to do. He has himself selected the language in which he defines and describes what he was employed to do, and he says that his commission is to be payable in the event of his introducing a purchaser. What is the proper construction of the word "purchaser"? What has he to do to introduce a purchaser? Had I been free from authority, I should have thought that there were strong grounds for saying that, in such circumstances, what every owner truly expects an estate agent to do is to look round for him—the estate agent keeping an office to which people resort who are looking for houses —and to put the property fairly before such persons and to try to persuade them to buy his house; and if he introduces a person who is perfectly prepared to go through with the purchase at a price which the vendor has told the agent is the price that will satisfy him, the agent has done all that the parties contemplate him doing; they do not contemplate him having anything to do with the matter being completed—what they are looking to him to do is to find the person who will pay the price that is asked, and the contract is entered into upon the basis that such a person will be the person to whom the owner of the property will sell. That is what they both contemplated him doing, and it does seem to me that it is very hard that an agent, who really has done what the parties seem to have contemplated was the full extent of what he was to do, should not be entitled to say: "I have done what I bargained to do because I have introduced somebody who was willing to purchase, though he never became the actual purchaser." But I do not feel that it is open to me to put that construction on the words in the contract. I think that the observations made by their Lordships in *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (1) in the House of Lords, more particularly those observations made by Lord Russell of Killowen and Lord Romer, show that their Lordships are clearly of the opinion that if an agent is employed to introduce a purchaser, and, short of that purchaser entering into a binding and legal contract of sale, the house is withdrawn from the market, the agent cannot say that he has earned his commission. Lord Russell of Killowen says, at pp. 125, 126 ([1941] 1 All E.R. at pp. 44, 45):

> I do not assent to the view, which I think was the view of the majority in the first *Trollope* case (2), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owners' hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (*a*) on a *quantum meruit*, or (*b*) as damages for breach of a term to be implied in the commission contract. As to the claim on a *quantum meruit*, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal . . . I can find no safe ground on which to base the introduction of any such implied term. Implied terms, as we all know, can only be justified under the compulsion of some necessity. No such compulsion or necessity exists in the case under consideration. The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through, if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion . . . There is no lack of business efficacy in such a contract, even though the principal is free to refuse to sell to the agent's client. The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case it can be said with truth that a "purchaser" has been introduced by the agent; in other words the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of that vested right.

Lord Russell of Killowen is expressing the view as one beyond question that, if the agent's commission is payable on his introducing a purchaser, he does not earn the commission by the introduction of somebody ready and willing and able to purchase, but he will only earn that commission if the person ready and willing and able to purchase gets as far as signing a legal contract binding him to go through with the purchase.

It is quite clear in the case that I have under consideration that Cooke did not enter into the legal and binding contract for sale which was contemplated, and which had only got as far as the draft passing between the solicitors. LORD RUSSELL of KILLOWEN in *Luxor (Eastbourne), Ltd.* v. *Cooper* (1), said at p. 129 ([1941] 1 All E.R., at p. 47) :

> It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price ; but such a construction of the contract would in my opinion require clear and unequivocal language.

There again, having regard to the former passages which I have read, it is quite clear that Lord RUSSELL OF KILLOWEN is drawing a distinction between the contract that he has already dealt with, namely, where the commission is payable for introducing a "purchaser," and one where the contract is construed as one for the introduction of a person willing to buy. LORD ROMER is clearly of the same opinion, because, at p. 154 ([1941] 1 All E.R., at p. 64), he says :

> Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal.

In that passage Lord ROMER is contrasting the situation of the agent who is employed to find a purchaser, where he is entitled to his remuneration if he gets a purchaser who enters into a binding contract to purchase, and the situation of the same agent so employed who has only got as far as finding a person ready and willing and able to purchase at the price agreed ; and that is the clearest indication that LORD ROMER is of the same opinion as LORD RUSSELL OF KILLOWEN. It seems to me that I should be flying in the face of those opinions expressed by the highest authorities in the land if I were to construe this contract for the payment of a commission on the plaintiff introducing a purchaser as one which was performed by the plaintiff by the introduction of a ready, willing and able purchaser who did not in fact in the circumstances—because the defendant would not go on—ever get as far as signing a binding contract of purchase and sale. I feel constrained by those speeches in the *Luxor* case (1) in the House of Lords to give it the construction which I have given. I think it is a construction which can be summed up in almost one sentence : Where a person chooses to say, "My commission will be payable on my introducing a purchaser," he is saying "My commission will be payable only when someone I introduce has purchased."

In those circumstances, the question is : As the plaintiff fails on the contract has he a claim on a *quantum meruit ?* The plaintiff has reduced into writing the terms of the offer, and those terms were accepted by the conduct of the defendant ; those terms having been reduced into writing, I think the authorities are overwhelming that there is no room left for the implication of any term other than those expressed, or of any such implied term to pay a reasonable remuneration, as could be implied in law to give the plaintiff a claim upon a *quantum meruit.* The claim must in the circumstances fail and there must be judgment for the defendant. I gather from what I have been told that it was the plaintiff who chose this tribunal, wanting what he considered to be a more authoritative decision upon the subject, and as he has chosen this tribunal for that reason and the defendant has only chosen to defend herself in the tribunal which the plaintiff has chosen, there must be costs on the High Court scale.

Judgment for defendant with costs.

Solicitors : *Rutland & Crauford,* agents for *C. R. Thomas & Son,* Maidenhead (for the plaintiff) ; *H. L. Lumley & Co.* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

Applied. GIBSON *v.* SOUTH AMERICAN STORES, LTD. [1949] 2 All E.R. 18.

Dictum of LORD GREENE, M.R., at p. 201, *applied.* *Re* SCARISBRICK'S WILL TRUSTS. [1950] 1 All E.R. 143.

Dictum of LORD GREENE, M.R p. 205, *considered.* *Re* SCARISBR WILL TRUSTS. [1951] 1 All E.R.

Re COMPTON, POWELL *v.* COMPTON.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **December 20, 1944.**]

Charities—Charitable purposes—Gift for education of descendants in perpetuity of three named individuals—Specified class comprising twenty-eight members—Special direction as to kind of education—Principle of "poor relations" cases not to be extended—Gift lacking public character—Family trust. A

By her will the testatrix provided, *inter alia*, that certain money was to be held by her trustees "and invested in trustee stocks under trust for ever . . . for the education of Compton, Powell and Montagu children . . . not over the age of 26 . . . It is not to be used as a pension or income for anyone and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children to be servants of God serving the nation B not as students for research of any kind . . . Compton children are the lawful descendants of H. C. Compton, of Manor House, Minstead, Powell children are the lawful descendants of Weyland Powell, of Foxham Park, Lyndhurst, and Montagu children the lawful descendants of William, Earl of Sandwich, father of the Earl of Sandwich hereinbefore mentioned . . ." The number of the descendants of the three named persons who were under the age of 26 at the death of the testatrix was 28. The points at C issue were: (i) whether a trust for the education of the descendants in perpetuity of three named individuals, irrespective of their means, was a valid charitable trust; (ii) if not, whether the present trust was a valid charitable trust by reason of the fact that the kind of education which was required was such as "to fit the children to be servants of God serving the nation"; (iii) whether the decisions upholding gifts to the poor kindred of a testator as good charitable trusts ought to be extended by way of D analogy to cover a trust for the purposes of education of an equally limited class:—

HELD: (i) a gift for the education of descendants of named persons introduced into their qualification a purely personal element and such gift was, therefore, to be regarded as a family trust and not as one for the benefit of a section of the community. E

Re Drummond, Ashworth v. *Drummond* (5) and *Re McEnery* (11) *applied.* *Re Rayner, Cloutman* v. *Regnart* (9) *overruled.*

(ii) the direction as to the kind of education to be provided was as such not sufficient to make the gift a charitable one.

(iii) the rule that gifts for the relief of poverty of members of a specified family were charitable was good law, though anomalous, and such anomaly ought not to be extended to the case of an educational trust without a F poverty qualification.

Decision of COHEN, J. ([1944] 2 All E.R. 255) *reversed.*

[**EDITORIAL NOTE.** The court here approves the rule laid down in TUDOR ON CHARITIES as universal that "the law recognises no purpose as charitable unless it is of a public character." It is accordingly held that a gift under which the beneficiaries are defined by reference to a personal relationship to a named person cannot be a valid charitable gift. G The rule established by the line of cases deriving from *A.-G.* v. *Price* (14) and holding that a gift to the poor relations of the testator is valid is considered anomalous and should not be extended to educational trusts for members of specified families, where no element of poverty is required in the donees.

It was argued that the type of education required by the direction in the will was of such benefit to the community as to make the bequest charitable, but the court holds that the direction would be complied with by the usual public school education and cannot be regarded as charitable in the legal sense. To decide otherwise would enable H any testator by a simple direction such as this to create a perpetuity and avoid taxation.

AS TO GIFT FOR THE EDUCATION OF A PARTICULAR CLASS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 117, 118, para. 154; and FOR CASES, see DIGEST, Vol. 8, pp.245-248, Nos. 51-73.]

Cases referred to:

*(1) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 11 Digest 19, *224*; 52 L.J.Q.B. 193; 48 L.T. 239.

*(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53.

*(3) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501 ; 8 Digest 259, *206* ; 64 L.J.Ch. 856 ; 73 L.T. 202.
*(4) *Verge* v. *Somerville*, [1924] A.C. 496 ; Digest Supp. ; 131 L.T. 107 ; *sub nom. Verge* v. *Somerville, A.-G. for Australia* v. *Somerville*, 93 L.J.P.C. 173.
*(5) *Re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90 ; 8 Digest 244, *28* ; 83 L.J.Ch. 817 ; 111 L.T. 156.
*(6) *Spencer* v. *All Souls College* (1762), Wilm. 163 ; 8 Digest 367, *1724*.
*(7) *A.-G.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722 ; 8 Digest 332, *1171* ; 38 L.J.Ch. 656.
*(8) *Re Lavelle, Concannon* v. *A.-G.*, [1914] 1 I.R. 194 ; 8 Digest 246, *64 i*.
*(9) *Re Rayner, Cloutman* v. *Regnart* (1920), 89 L.J.Ch. 369 ; Digest Supp. ; 122 L.T. 577.
*(10) *Laverty* v. *Laverty*, [1907] 1 I.R. 9 ; 8 Digest 252, *d*.
*(11) *Re McEnery*, [1941] I.R. 323.
(12) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574 ; 8 Digest 248, *75* ; 40 L.J.Ch. 640 ; 24 L.T. 869.
*(13) *Isaac* v. *Defriez* (1754), Amb. 595 ; 44 Digest 890, *7479* ; 17 Ves. 373, *n*.
*(14) *A.-G.* v. *Price* (1810), 17 Ves. 371 ; 8 Digest 242, *12*.
*(15) *White* v. *White* (1802), 7 Ves. 423 ; 8 Digest 242, *10*.
*(16) *Bernal* v. *Bernal* (1838), 3 My. & Cr. 559, *n* ; 44 Digest 533, *3499* ;
*(17) *Brown* v. *Whalley*, [1866] W.N. 386.
*(18) *Gillam* v. *Taylor* (1873), L.R. 16 Eq. 581 ; 8 Digest 242, *14* ; 42 L.J.Ch. 674 ; 28 L.T. 833.
*(19) *A.-G.* v. *Northumberland (Duke)* (1877), 7 Ch.D. 745 ; 8 Digest 306, *856* ; 47 L.J.Ch. 569 ; *varied without affecting this point* (1878), 38 L.T. 245.

APPEAL by the next of kin from a decision of COHEN, J., dated June 14, 1944, and reported [1944] 2 All E.R., at p. 255, who held that since it was established by authority that a trust for relieving the poverty of the relations of a testatrix of one or two families was a public trust, it followed that, if the educational purpose can be established, it did not prevent the trust being a valid charitable trust if the educational purpose was expressed in relation to a comparatively narrow group such as the three families in the present case. The relevant facts and arguments are set out in the judgment of LORD GREENE, M.R.

J. N. Gray, K.C., and *B. G. Burnett-Hall* for the appellants (defendants).

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *H. O. Danckwerts* for the Attorney-General.

C. E. Harman, K.C. and *H. E. Salt* for one of the children, an infant.

N. C. Armitage for the respondent (plaintiff trustee).

LORD GREENE, M.R. : The question which falls for decision in this appeal is whether a certain bequest for educational purposes contained in the will of the testatrix is a good charitable gift. That question COHEN, J., answered in the affirmative. He felt himself constrained so to do by reason of certain authorities which for convenience I will refer to as " the poor relations " cases. If he had not felt himself bound by analogy to have regard to those authorities he would have decided otherwise. We are invited by the appellants to say that the " poor relations " cases were wrongly decided : alternatively that they do not cover the present case and that the principle (whatever it may have been) upon which they were based ought not to be extended by analogy to bequests for educational purposes such as that with which we have to deal.

The legacy in question is given in the following terms :

> The money which was not brought into the family by my mother is to be held by my trustees and invested in trustee stocks under a trust for ever to be called the Mary Catherine Compton and her daughter Alice Theophila Compton trust for the education of Compton and Powell and Montagu children but Compton and Montagu children are to have the preference as scholarships for the time thought best by the trustees not over the age of 26 years. It is not to be used as a pension or income for any one and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children to be servants of God serving the nation not as students for research of any kind. No person shall be allowed as a family who is not born in wedlock and who is not of sound mind and body. Compton children are the lawful descendants of H. C. Compton, of Manor House, Minstead. Powell children are the lawful descendants of Weyland Powell, of Foxham Park, Lyndhurst, and Montagu children the lawful descendants of William, Earl of Sandwich, father of the Earl of Sandwich hereinbefore mentioned. The trustees are always to be one Compton and one Powell at the least and are never to be less than four.

There is now no dispute as to the subject matter of this bequest. The only question is as to the validity of the trusts declared by the testatrix. There are a number of points to be noticed in the language of the bequest which I will set out *seriatim.* (i) The trust is to last for ever and accordingly is obnoxious to the rule against perpetuities unless it is a valid charitable trust ; (ii) the persons to benefit are the descendants, rich and poor, of three named individuals ; (iii) the pecuniary benefits are to take the form of " scholarships," a word which is not, I think, used in any technical sense but merely means that yearly sums are to be provided for the education of the beneficiaries for so long as the trustees may think proper in each case. The trusts could, I think, be properly performed by paying, in whole or in part, for education at a school or at a university or even for a private tutor ; (iv) the direction that the money is not to be used as a pension or income appears to me to mean no more than that a selected beneficiary is not to be entitled to receive income as of right : the words must be read in the light of the direction that payments are to be held as scholarships at the pleasure of the trustees. In other words, the money is to be used and used only for defraying the costs of education and it can be withheld whenever the trustees think fit ; (v) the type of education for which the money is to be used is defined both positively and negatively. It is not to be used to fit the beneficiaries to be students for any kind of research, words which I think would exclude a grant to enable a beneficiary to conduct research, for example, on some point of history or science. On the positive side, the money is to be used " to fit the children to be servants of God serving the nation." These words are of very wide import and would cover many kinds of education. There is no need to consider how far the direction would extend but it would, in my opinion, clearly cover what is generally regarded as the ordinary public school education. The words are most apt to describe the ideals of such an education as that for which Dr. Arnold stood and which at any rate since his time have always been regarded as the dominant purpose of a public school education. This particular direction is of importance since a separate argument was based upon it.

The questions for decision may be thus stated. (i) Is a trust for the education of the descendants in perpetuity of three named individuals, irrespective of their means, a valid charitable trust ? (ii) If not, is the present trust a valid charitable trust by reason of the fact that the kind of education which is required is such as " to fit the children to be servants of God serving the nation " ? These questions are clearly of general importance. The second question is not merely important for the purposes of this particular will since, if the first question be answered in the negative and the second in the affirmative, it will be a simple matter to convert a gift which is not charitable into a good charitable gift. There is one matter of fact to which some importance was attached in the course of the argument. The number of the descendants of the three named persons who were under the age of 26 at the death of the testatrix is stated to have been 28. This was, of course, a mere accident. They might have been three or they might have been a hundred. In the future the numbers may be large or they may be small. Families not infrequently die out and it may well be that at some future date there may be only one potential beneficiary in existence. It is not to be assumed that the number of potential beneficiaries will necessarily always be substantial. In any event, mere numbers cannot raise a family or private benefaction into the class of charitable gifts. No doubt in deciding whether a gift which in its nature is not a mere private or family benefaction is or is not for the benefit of a section of the community so as to make it a good charitable gift the question of the number of potential beneficiaries is a relevant one. But if a gift is in its nature a private or family benefaction it cannot be regarded as a charitable gift merely because the number is or may at some future date become considerable.

The fundamental requirement of a charitable gift is, in my opinion, correctly stated in the following passage in Tudor on Charities, 5th Edn., at p. 11 :

> In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community.

Authority for this proposition is to be found in numerous cases. In *Goodman* v. *Mayor of Saltash* (1), Earl Cairns, said, at p. 650 :

> Such a condition would create that which in the very wide language of our courts is

called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities.

In *Pemsel's* case (2) LORD MACNAGHTEN said, at p. 580:

> The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the court derived from the piety of early times, are considered to be charitable.

In *Re Foveaux* (3) CHITTY, J., said, at p. 504:

> To be a charity there must be some public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice.

In *Verge* v. *Somerville* (4) LORD WRENBURY, delivering the judgment of the Privy Council, said, at p. 499:

> To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.

The proposition is true of all charitable gifts and is not confined to the fourth class in LORD MACNAGHTEN's well known statement in *Pemsel's* case (2). It does not, of course, mean that every gift that tends to the public benefit is necessarily charitable. What it does mean is that no gift can be charitable in the legal sense unless it is of the necessary public character. When I come to deal with the "poor relations" cases it will be found that a hundred and fifty years ago the essential nature of this requirement was perhaps not as clearly appreciated as it is to-day.

No definition of what is meant by a section of the public has, so far as I am aware, been laid down and I certainly do not propose to be the first to make the attempt to define it. In the case of many charitable gifts it is possible to identify the individuals who are to benefit or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit when they receive it by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are A.B., C.D., and E.F., but because they are poor inhabitants of the parish. If in asserting their claim it were necessary for them to establish the fact that they were the individuals A.B., C.D., and E.F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to establish their status, have to assert and prove, not that they themselves are A.B., C.D., and E.F., but that they stand in some specified relationship to the individuals A.B., C.D., and E.F., such as that of children or employees. In such a case too, a purely personal element enters into and is an essential part of the qualification which is defined by reference to something, *i.e.*, a personal relationship to individuals or an individual which is in its essence non-public. An example of this class of case is to be found in *Re Drummond* (5). There a testator bequeathed shares to his trustees upon trust to pay the income to the directors of a company for the purpose of contributing to the holiday expenses of certain of its workpeople. The qualification therefore was that of a particular relationship (namely, that of an employee of the specified class) to a named person, i.e., the company. After dismissing the argument that the bequest ought to be construed as being one in relief of poverty, Eve, J., dealt with the contention that the gift was :

> . . . a gift for general public purposes, to be applied for the benefit of a particular section of the public.

The following quotation from the judgment (at p. 96) brings out the point which I am endeavouring to make :

> [Counsel for the Attorney-General] argues that the trust is really a trust for public purposes, the securing of a holiday for a large body of the inhabitants of this particular city, and the benefiting thereby of the general health of the community ; that it only differs from the cases on which he relied in that it fixes the qualification, not with reference to any particular place of residence, or to the possession of any particular franchise, but with reference to employment in a particular business, and a particular department in that business, and he contends that, if a public trust can be created for the occupiers for the time being of a few small cottages in a Hampshire village, a similar trust can certainly be created for the large aggregation of persons constituting for the time being the employees in some of these great industrial undertakings. I think the answer to that argument has been supplied by [counsel for the heir-at-law of the testator] in the course of his reply. This is not a trust for general public purposes ; it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals, and that being so it is outside the line of authorities cited, and not being for public purposes it is not charitable, but is void as infringing the rule against perpetuities.

The fact that in cases where a personal element forms an essential part of the qualification the numbers involved may be large does not appear to me to make any difference to the principle to be applied. Once that element is present numbers can make no difference. The gift is in such a case a personal gift. It may, of course, fail for uncertainty, but that is neither here nor there. As a personal gift it will be obnoxious to the rule against perpetuities ; but it would not have been affected by the Statute of Mortmain. I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named *propositus* cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim upon it.

I will postpone for the moment the consideration of what I have called " the poor relations cases " and I will now turn to the particular case of educational trusts. The references to such trusts in the preamble to the Statute of Elizabeth are as follows : the maintenance of schools of learning, free schools and scholars of universities ; the education and preferment of orphans. The references to scholars and orphans cannot be construed (at any rate nowadays) as referring to individuals. So to construe them would involve a departure from the principle that a trust in order to be charitable must be for the benefit of the community or a section of the community. It is no doubt true that the conception of an educational charity has been extended beyond the rather narrow classification in the preamble. But the authorities cited to show that a trust for the purpose of educating members of a specified family or specified families is a valid charitable trust do not, I think, establish that proposition. In Tudor on Charities, 5th Edn., I find this statement, at pp. 30, 31 : " Bequests for the education of the donor's descendants and kinsmen at a school or college " are valid charitable bequests. The authorities cited are three and I must examine them. The first is *Spencer* v. *All Souls College* (6). That was a case in which Wilmot, J., sat as an assessor to the Archbishop of Canterbury, the visitor of the college, upon appeals by certain " founder's kin " who claimed the right to be elected as fellows of the college against the decision of the warden and fellows who had elected other persons. The Statutes of the Founder, Archbishop Chicheley, laid it down that in all elections of fellows :

> *Principaliter et ante omnes alios, illi qui sunt vel erunt de consanguinitate nostra et genere, si qui tales sint, ubicunque fuerint oriundi, dum tamen sint reperti habiles et idonei, secundum conditiones superius and inferius recitatas, sine aliquo probationis tempore, in veros dicti Collegii Socios ab initio eligantur and etium admittantur : Quibus deficientibus* . . .

In other words, preference was to be given to the founder's kin, a very common provision in the case of ancient foundations. The College contended that the relationship of the appellants to the founder was so remote as not to fall within the *consanguinitas et genus* prescribed by the founder. Wilmot, J., in his opinion declined to accept the contention that a line ought to be drawn beyond which a candidate ought not to be regarded as founder's kin. The primary object of the founder in that case was to endow a college for the advancement of learning: the preference to his own kin was merely a method of giving effect to this intention. The validity of such dispositions had never been questioned from remote ages and was not questioned in that case. "Founder's kin" fellowships in the Universities of Oxford and Cambridge were for the most part abolished under the powers conferred by the Oxford University Act, 1854, and the Cambridge University Act, 1856, respectively. The *All Souls* case (6), in my opinion, affords no support to the proposition for which it is cited in Tudor. The next authority relied on by Tudor is *Attorney-General* v. *Sidney Sussex College* (7). In that case a testator by his will, made in the year 1641, had devised certain lands to Sidney Sussex College, Cambridge, and Trinity College, Oxford, equally:

> . . . for the only use, education in pietie and learninge of foure of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife, or, in default of such, to their next poor kindred . . .

Each of the colleges had, ever since the death of the testator, required that a person claiming the benefit of these educational trusts should become a member of the college. Sidney Sussex College had always applied its share of the rents, in so far as they were not used for the education of persons referred to in the will, as part of the general funds of the college. Trinity College had in effect done the same thing down to the year 1826, since when its share of the rents had been used to provide exhibitions in the college. The proceedings were by way of information filed at the instance of a descendant of a brother of the testator's second wife, praying a declaration that the educational gift and the gift to the poor kindred were good charitable gifts. The case, upon the relevant point, came first before Sir John Romilly, M.R., who was of opinion that the trust was a good charitable trust in favour of certain poor persons and that subject to the rights of such persons, if any could be found, the property was given beneficially between the two colleges. The colleges, be it observed, had disregarded the possible claims of persons interested under the second branch of the trust, namely, that in favour of the poor relations, and the effect of the decision of Sir John Romilly, M.R., was that they were not entitled to do so. The actual declaration was to the effect that the lands were held in trust to educate the descendants mentioned in the will and that in default of such persons the poor kindred of the testator's wives were absolutely entitled. On appeal to Lord Hatherly, L.C., Sidney Sussex College claimed that in default of descendants willing to become members of the college the college was entitled to the whole of the rents while Trinity College argued that the only trusts were for education. The principal point which arose appears to have related to the claim of the colleges to require claimants to become members of the college, a claim which had been in effect negatived by the declaration made by Sir John Romilly, M.R. The order made by Lord Hatherley, L.C., declared that the trust was to educate the descendants according to the course and usage of instruction in the colleges (thus confirming the construction put forward by the colleges) with such limitations over as appeared in the will in default of such descendants. Two points deserve mention. First, the gift was construed as a gift to the colleges upon trust to educate the descendants at the colleges. Secondly, no one appears to have questioned the validity of the trust; the only controversy was as to its true meaning. When the facts of this case are examined it is, I think, clear that it does not support the general proposition laid down in Tudor. It was a very special case and resembles in some respects the "founder's kin" cases. The third case is the Irish case of *Concannon* v. *Attorney-General* (8), a decision of O'Connor, M.R., in Ireland. There the bequest was to an educational body (called a college) the income to go to the education of the relations of the testator in that college. In this respect the case resembled the *Sidney Sussex* case (7). The only passage in the judgment which deals with the question is at p. 197 where O'Connor, M.R., says:

> Gifts for the advancement of education are undoubtedly charitable and it has been decided that bequests for the education of the donor's descendants and kinsmen are charitable.

He then refers to the *All Souls* case (6), and the *Sidney Sussex* case (7). It is clear that O'Connor, M.R., was merely accepting the statement in Tudor and I do not think that this case carries the matter any further.

One further case was cited to us by counsel for the respondent, that of *Re Rayner* (9), a decision of Eve, J. There were two bequests the validity of which A
was in question. That relevant for present purposes was a bequest to the governors of a commercial company of shares in the company with a direction to apply the income to the education of children of persons who for five years and upwards had been in the employment of the company. If the bequest should be held to be invalid the testatrix gave the shares to her executor absolutely. Eve, J., did not have the advantage of any argument since the only person interested in disputing the validity of the gift was the executor B
who supported the view that it was a valid charitable gift. In a very short judgment Eve, J., said that there was present an element which was wanting in his earlier decision, already quoted, in *Re Drummond* (5), in that the object of the gift was to promote education. He distinguished *Re Drummond* (5) on the ground that in that case the gift was not restricted to the relief of poor people within the meaning of the statute and said that in the case before him the gift was for an object within the statute and was accordingly a charitable gift. C
He was of opinion (at p. 370) that the gift was :

> . . . it is true limited to a section of the public but the section intended to be benefited was sufficiently defined.

I do not regard this as a satisfactory decision. There was no argument : the judge without giving any reasons treated the gift as one in favour of a section of the public : and in distinguishing *Re Drummond* (5) he apparently over- D
looked the fact that in that case the absence of the element of poverty was only one of the grounds of the decision ; as I have already pointed out, the argument that the case fell within the fourth of Lord Macnaghten's classes was negatived on the ground that the trust in favour of the employees of the company was a trust not for public purposes but for private individuals. The decision was, in my opinion, wrong so far as it dealt with the educational trust.

I must now refer to two more Irish decisions. The first is *Laverty* v. *Laverty* E
(10). There the testator gave his estate upon trust for the support and education of boys and men "of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty." It was held that this was not a charitable gift. Barton, J., said, at p. 13 :

> In my opinion, a valid charitable trust might be created for the advancement of education, with a preference for persons of a particular surname either by the endow- F
> ment of or gift to a school or college [this would resemble the "founder's kin" provisions] or by a gift, as in the present case, to trustees, if sufficiently definite.

He then proceeded to hold that the gift was not of that character since it might have been intended to work as a matter of private bounty—for example, by employing a governess or tutor for some wealthy young Laverty. So in the present case the income in certain events might be applied in paying for a tutor for the Earl of Sandwich of the day, irrespective of his means. The G
other case, with the reasoning in which Cohen, J., was clearly much impressed, is *Re McEnery* (11). There the testator made a bequest :

> . . . for enabling the sons and daughters and male descendants [of his brothers] to obtain professions, each suitable student to receive £100 yearly, for a reasonable time . . .

Gavan Duffy, J., began by pointing out the public character of a legal charity, H
saying at p. 526 :

> Courts of equity have been consistently insistent on the public character of a legal charity, importing a benefit to the community or a section of the community . . .

He then pointed out the difference between an endowment to maintain two scholars in Oxford and Cambridge and a trust for the personal educational benefit of the heir for the time being of a testator for ever : and he went on to say that there was nothing public about the latter purpose and that the prospective heirs would not constitute a section of the community for whom a charitable trust could be established. He explained the *All Souls* case (6), the *Sidney Sussex* case (7) and *Re Lavelle* (8) as showing no more than that the founder of a charity or a benefactor may lawfully associate his descendants with his bequest to a charitable institution and thus enable them to participate in his liberality. He then expressed the opinion that the trust before him was too narrow to be charitable : the motive, he said, may have been charitable but the intention was to benefit specific individuals.

If I may respectfully say so, this reasoning appears to me to be unassailable. Even if my view that the necessity of founding a claim upon the fact of kinship to an individual precludes the possibility of regarding a gift as charitable is too widely stated, I am of opinion that a gift for the education of descendants of named persons must be regarded as a family trust and not as one for the benefit of a section of the community on any fair view of what that phrase may mean. Such a purpose appears to me to be no more a public educational purpose than the purpose of enabling a body of individuals to perfect themselves by prayer and meditation is a public religious purpose (see *Cocks* v. *Manners* (12)). Moreover, as MORTON, L.J., has reminded me, if such a trust is held to be charitable a testator will be able to provide in perpetuity for the education of his kinsmen in a way which will avoid the payment of income tax on the trust income.

But it is suggested that even if this be true, the present case presents a feature which is sufficient to make the gift a charitable one, namely, the direction as to the kind of education to be provided. It is said that it is beneficial to the community to have individuals so educated as to become God-fearing men and women and good citizens and that a trust designed to increase the number of persons of that description, even if they are confined to the narrow limits of a particular family or particular families, must for that reason be regarded as charitable. I venture to suggest that in this sense education by itself, without reference to any particular kind of education, is in the same way beneficial to the community ; and that it is to the benefit of the community to have as many educated persons among its members as possible. Again, there are many particular kinds of education which may be considered specially beneficial—for example, it is clearly to the advantage of the community to have a large number of trained scientists and from the argument it would appear to follow that a trust to give a scientific education to the descendants of a testator's three brothers would be a valid charitable trust. The argument, moreover, would appear to lead to the conclusion that a gift to educate, for example, a number of named nephews and nieces of a testator so as "to fit them to be servants of God serving the nation" would be charitable by reason of that direction. In such a case there would, of course, be no question of perpetuity so that it would not be necessary to regard the trust as charitable in order to support it in that regard. But if the property devised or bequeathed consisted of real estate or impure personalty the effect of holding the gift to be charitable would in past days have been to invalidate it under the Statute of Mortmain and I cannot think that any court would have so regarded the gift as to produce that result. Moreover, if the argument is right, it would mean that a testator could provide for the education of his family in perpetuity, thus, incidentally obtaining relief from income tax, merely by adding to his bequest a direction that the kind of education to be provided is to be such as will be calculated to make them God-fearing men and public-spirited subjects of the King, a direction which, as I have already pointed out, would cover the ordinary public school education.

I must now turn to the "poor relations" cases on the analogy of which COHEN, J., felt himself constrained against his own view to decide against the appellants. The authorities relied on by the respondents are as follows. In *Isaac* v. *Defriez* (13) the gifts were (i) a gift of two annuities to the poorest relations of the testator and of his wife ; (ii) a gift of income to one poor relation of the testator "for a portion in the way of marriage and putting him or her out in the world"; and (iii) a similar gift of income to one poor relation of his wife. These gifts were upheld as good charitable gifts but no reasons for the decision appear in the report. This case was followed in *Attorney-General* v. *Price* (14), where the gift was in favour of the testator's "poor kinsmen and kinswomen and their offspring and issue which shall dwell in the county of Brecon." SIR WILLIAM GRANT, M.R., followed *Isaac* v. *Defriez* (13), saying, at p. 374:

> This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations.

In an earlier case *White* v. *White* (15), Sir William Grant had supported as charitable a gift by a testatrix for the purpose of putting out "our poor relations" apprentices. By a codicil this gift was confined to two families. Sir William Grant, M.R., appears to have thought that the case was similar to an earlier case of his own where "a great number of Jews were the objects"; such a gift would no doubt be regarded today as satisfying the well-established rule that a good charitable gift must be for the benefit of the public or a section of the public, a test which Sir William Grant does not appear to have taken into consideration in *White* v. *White* (15), or in *Attorney-General* v. *Price* (14). *Bernal* v. *Bernal* (16) was a case in which the only matter decided arose on the construction of a will providing for poor relations who were in fact (as the will was construed) the male descendants of certain named relatives of the testator. It appears from the petition that the gift was established as a charity under a decree of Dec. 9, 1728. What the reasons were for the decision in that behalf does not appear and when the question of construction was raised in 1838 before Lord Cottenham, L.C., there was no issue as to the charitable nature of the bequest. In *Brown* v. *Whalley* (17), where the gift was for the relations of the testator "who might happen to be in want or fall to decay" the charity had similarly been established by a decree of the year 1763. In *Gillam* v. *Taylor* (18) the gift was in favour of such of the lineal descendants of the testator's maternal uncle as they might severally need. This was held to be a good charitable gift on the authority of *Isaac* v. *Defriez* (13) and *Attorney-General* v. *Price* (14). In *Attorney-General* v. *Duke of Northumberland* (19) the will as construed by Sir George Jessel, M.R., was in favour of poor persons generally with a preference for poor persons who were kindred of the testator and in that respect the case was similar to the "founder's kin" cases. But Sir George Jessel in his judgment referred to *Isaac* v. *Defriez* (13) and *Attorney-General* v. *Price* (14) and did not cast any doubt upon the correctness of those decisions.

From this review of the authorities it will be seen that they are really all derived from *Isaac v. Defriez* (13) and *Attorney-General* v. *Price* (14). We are invited to overrule them. I agree that they are far from satisfactory and the original decisions were given at a time when the public character of a charitable gift had not been as clearly laid down as it has been in more modern authorities. If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently since I should have thought that their purpose was a private family purpose lacking the necessary public character. But it is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations upon the faith that they were charitable and many testators have no doubt been guided by these decisions. The cases must at this date be regarded as good law although they are, perhaps, anomalous. In these circumstances the question arises whether we ought to extend the analogy of these decisions so as to cover a trust of the kind now in controversy. Taking the view which I do, as already expressed, I do not think that we are bound or ought to do so. There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded: whereas in the case of an educational trust where there is no poverty qualification the funds may at any time be applied for the purpose of educating a member of the family for whose education ample means are already available, thus providing a purely personal benefit and one freed, incidentally, from the burden of income tax. Failing such a ground of distinction, I can only regard the poor relations cases as anomalous and I prefer to let them remain as such rather than to extend the anomaly to a different class of case.

I would allow the appeal.

Finlay, L.J.: I agree.

MORTON, L.J.: I agree.

Appeal allowed, declaration accordingly; costs of all parties as between solicitor and client to be paid out of the property comprised in the trust referred to in the declaration. Leave to appeal to the House of Lords.

Solicitors: *Farrer & Co.* (for the appellant next of kin, defendants in the court below); *Treasury Solicitor* (for the Attorney-General); *Royds, Rawstorne & Co.* (for one of the children, an infant); *Lovell, Son & Pitfield*, agents for *Nantes, Maunsell & Howard*, Bridport (for the respondent trustee, plaintiff in the court below).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re MOSS'S TRUSTS, MOSS *v.* ALLEN AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), **December 15, 1944.**]

Wills—Conditions—Forfeiture—Uncertainty—"Intermarry with any person not a member of the Jewish faith."

By his will the testator bequeathed a certain sum of money to the children of his daughter, K.L., subject to K.L.'s life interest therein. The testator inserted a condition in the will that, "if any child or grandchild of mine shall intermarry with any person not a member of the Jewish faith," such child or grandchild should forfeit any interest under the will not "absolutely vested in possession." During his mother's life-time, J.L., a son of K.L., had married a person not of the Jewish faith. The trustees took out a summons to determine whether the forfeiture clause was void for uncertainty:—

HELD: the expression "member of the Jewish faith" was one of complete uncertainty, and the condition could not, therefore, take effect. *Clayton* v. *Ramsden* (1) and *Re Donn's Will Trusts* (2) *followed.*

[**EDITORIAL NOTE.** It is attempted here to distinguish *Clayton* v. *Ramsden* (1) and *Re Donn* (2) on the ground that the expression here used is "member of the Jewish faith." It is said that this indicates membership of the totality of the Jewish religious community but this is held to be as equally vague as "of the Jewish faith" and falling short of that certainty of expression necessary in order to make the condition valid.

AS TO UNCERTAIN CONDITIONS, see HALSBURY, Hailsham Edn., Vol. 34, p. 109 para. 143; and FOR CASES, see DIGEST, Vol. 44, pp. 440, 441, Nos. 2667, 2668, and see also DIGEST SUPPLEMENT, Wills.

Cases referred to:

*(1) *Clayton* v. *Ramsden*, [1943] A.C. 320; [1943] 1 All E.R. 16; 112 L.J.Ch. 22; 168 L.T. 113.

*(2) *Re Donn's Will Trusts, Donn* v. *Moses*, [1944] Ch. 8; [1943] 2 All E.R. 564; 113 L.J.Ch. 61.

(3) *Walton* v. *Edge* (1884), 10 App. Cas. 33; 7 Digest 514, *365*; 54 L.J.Ch. 362; 52 L.T. 666; *affg. S.C. sub nom. Re Blackburn & District Benefit Building Soc.* (1883), 24 Ch.D. 421.

(4) *Sibun* v. *Pearce* (1890), 44 Ch.D. 354; 7 Digest 502, *289*; 63 L.T. 123.

*(5) *Sifton* v. *Sifton*, [1938] A.C. 656; [1938] 3 All E.R. 435; Digest Supp.; 107 L.J.P.C. 97; 159 L.T. 289.

*(6) *Re Exmouth (Viscount), Exmouth (Viscount)* v. *Praed* (1883), 23 Ch.D. 158; 44 Digest 441, *2668*; 52 L.J.Ch. 420; 48 L.T. 422.

(7) *Clavering* v. *Ellison* (1859), 7 H.L. Cas. 707; 44 Digest 440, *2667*; 29 L.J.Ch. 761; *affg.* (1857), 8 De G.M. & G. 662; *affg.* (1856) 3 Drew. 451.

(8) *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval (Marquise)*, [1940] Ch. 385; [1940] 1 All E.R. 632; Digest Supp.; 109 L.J.Ch. 166; 162 L.T. 418.

(9) *Re Evans, Hewitt* v. *Edwards*, [1940] Ch. 629; 109 L.J.Ch. 216; 162 L.T. 420.

ADJOURNED SUMMONS to determine, *inter alia*, whether a forfeiture clause contained in a will is valid, or whether it is void for uncertainty. The facts and the relevant portions of the will are fully set out in the judgment.

E. M. Winterbotham for the plaintiffs, the trustees of the will.

Harold Christie, K.C., and *J. G. Strangman* for the first defendant, a personal representative of the testator's daughter, K.L.

J. Norman Daynes, K.C., and *A. C. Nesbitt* for the second defendant, the Public Trustee, the administrator of the estate of the testator's grandchild, J.L.

VAISEY, J.: The testator, Edward Moss, made his will on Feb. 19, 1874. The document is a lengthy one, and I will refer only to those portions of it which may have a bearing on the questions which I am about to decide. After appointing executors and giving some directions about his funeral, the testator expressed his desire "that prayers should be said for my departed soul according to the Jewish faith." There are many legacies of various kinds, including one to "the synagogue in Sydney, New South Wales, to which" (meaning, presumably, "of which") his brother "Morris was then a member." He then gave certain freehold and leasehold estates and the residue of his personal estate to his executors upon trust for sale and conversion, and directed them, out of the resulting funds, to set aside a sum of £6,000 for each of his children therein named, including his daughter Katherine Lederer, subject to her bringing a sum of £4,000 into hotchpot. He then, in effect, settled the sum directed to be set aside for each daughter of his by giving such daughter and her husband successive life interests therein. After the death of the survivor of such daughter and her husband, if any, the fund was to be held for the children of such daughter who should attain the age of 21 years, or, being daughters, should marry. The testator then declared that the ultimate residue of his estate should be held:

> . . . upon the same or the like trusts and with the same or the like powers and provisos as are hereinbefore contained with reference to the said legacies of £6,000 . . .

so that each share of residue should correspond with one of the said legacies so far as might be.

There then follows the provision upon which the present question turns:

> I hereby declare that if any child or grandchild of mine shall intermarry with any person not a member of the Jewish faith any legacies, bequests and interests not absolutely vested in possession hereinbefore made to such child or grandchild or to his or her children, shall, from the time of such marriage, cease, and be absolutely void, and shall immediately vest in the person or persons who would be entitled to the subject matter of such legacies, bequests or interests, if the child or grandchild so marrying were simply dead or dead without leaving a wife, husband or child who would, but for this clause, take a vested interest in such subject matter as the case may be.

Katherine Lederer, the testator's daughter, had three children and no more, namely, Joseph Howard Lederer, Felix Lederer and Richard Lederer—I will call them Joseph, Felix and Richard. They all attained the age of 21 years. She died on May 12, 1942, a widow, her husband having predeceased her by more than 40 years. The reversion of the shares or interests under the testator's will of two of the three sons, Felix and Richard, had, at her death, become absolutely vested in her. The plaintiff Eric Arncliffe Moss and the defendant Robert Henry Allen are her legal personal representatives. The two plaintiffs are the present trustees of the testator's will.

Joseph, the eldest of the three sons of Katherine Lederer, married on Mar. 19, 1904, a lady of French extraction, who appears to have had no sort of connection with Jewry, apart from her marriage to Joseph. In no possible sense of the words could this lady, at the time of her marriage, or at any time, have been described as "a member of the Jewish faith." Joseph died intestate on Sept. 14, 1942, in France, and on Apr. 24, 1944, letters of administration of his estate were granted to the other defendant, the Public Trustee.

Having regard to the words which I have quoted from the will, what would have been the effect of Joseph's marriage? Let me consider the relevant expression "a member of the Jewish faith," which is certainly a very strange one. I think I am bound, and I certainly intend, to pay the same regard to the *dicta* of the House of Lords in *Clayton* v. *Ramsden* (1), with regard to the words "of the Jewish faith," as was paid to them by UTHWATT, J., in *Re Donn's Will Trusts* (2). It is urged that these words in this testator's will are used in a different sense from that in which they were used in those two cases. It is said that they must indicate some body or association of which membership may be predicated, and are to be understood here as equivalent to the totality of the Jewish religious community. Even if I read them in some such sense as that, my difficulty is that membership of such a totality, or, indeed, of any particular part of it, is a conception of far too loose and indeterminate a character for me to apprehend with any clearness. There are many associations consisting of members whose identity can be ascertained with absolute or reasonable certainty, such as the House of Commons, a club, an inn of court, a college, or, as we may gather from the testator's will, a synagogue. But there are other associations of which membership may be predicated only in a general sort of way, such as a political party, or, in most cases, a religious body. Even membership of a building society is an uncertain conception: see *Re Blackburn and District Benefit Building Society* (3) and *Sibun* v. *Pearce* (4). I think it is possible for a man to be, and properly to call himself, a member of, say, the socialist party, at election time, although he has never been a member of that party in the sense that its chiefs would recognise him as such, or that he has subscribed to the party funds, or has supported it in some other way. I am sure that, for some purposes, a man may well be a member of the Church of England and for other purposes not a member. If a Jew were to be asked whether he was a member of the Jewish faith or a member of the Jewish community, he might well be puzzled as to how to give a truthful answer, and would be almost certain, if he were wise, to counter the question by asking in what sense it was being put to him. As in *Clayton* v. *Ramsden* (1), so also in the present case, the general intentions of the testator are not in doubt. The trouble is that he has not, in my judgment, framed this condition subsequent, or condition of defeasance—for such, undoubtedly, it is—with that measure of clarity and certainty which is necessary to make it valid according to the standard laid down in *Sifton* v. *Sifton* (5). In that case, LORD ROMER, delivering the judgment of the Board, quoted with approval the words of FRY, J., in *Re Viscount Exmouth* (6), where he said, at p. 164:

> . . . the condition must be clear and certain. That, in my opinion, includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect.

Later in *Sifton* v. *Sifton* (5), LORD ROMER, referring to *Clavering* v. *Ellison* (7), said, at p. 675 ([1938] 3 All E.R., at p. 445):

> If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of LORD CRANWORTH, the court and, their Lordships venture to add, the parties concerned, can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease.

It seems to me that "the Jewish faith," whatever be the sense in which the words are used, is an expression of complete uncertainty, and in the expression "a member of the Jewish faith" I find a double or perhaps a multiple uncertainty which entirely precludes me from holding that the condition is one which possesses that measure of certitude and clarity which, upon the principles to which I have been referring, would enable it to take effect.

I have been referred to, and I have given attention to, *Re Blaiberg* (8) and *Re Evans* (9), but I think it is not necessary for me to deal with those cases in any detail.

I declare that the defeasance condition in question is void for uncertainty, inoperative and incapable of taking effect. The result of that is that the trusts of the will must be executed as though that provision had never been inserted in it.

Declaration accordingly.

Solicitors: *Soloman, Staddon & Barnes* (for all parties).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

KING-EMPEROR *v.* BENOARI LAL SARMA AND OTHERS.

[Privy Council (Viscount Simon, L.C , Lord Roche, Lord Porter, Lord Goddard and Sir Madhavan Nair), **November 6, 1944.**]

Privy Council—India—State of emergency—Governor-General sole judge as to state of emergency—Ordinance setting up special criminal courts—Applicability to province left to discretion of Provincial Government—Validity of Ordinance—Ordinance intra vires the Governor-General—Government of India Act, 1935 (*c.* 42), *ss.* 102, 223, 317, *Sched.* 9, *para.* 72—*India and Burma* (*Emergency Provisions*) *Act,* 1940 (*c.* 33), *s.* 1 (3)—*Ordinance No. II,* 1942.

Acting under the Government of India Act, 1935, the Governor-General proclaimed in Sept., 1939, a state of emergency in India, acquiring thereby powers to make laws for a province with respect to any of the matters enumerated in the " Provincial Legislative List." In 1942 the Governor-General promulgated an Ordinance providing for the setting up of special criminal courts consisting of special judges, special magistrates and summary courts. The Ordinance recited that " an emergency had arisen " necessitating the setting up of such courts, and contained the necessary framework, such as limits of jurisdiction, procedure and restrictions on appeal. It was then provided by the Ordinance that it should " come into force in any province only if the Provincial Government being satisfied of the existence of any emergency . . . declared it to be in force in the province." The respondents were convicted and sentenced to terms of imprisonment by a special magistrate acting under this Ordinance. The respondents took the preliminary point that the Ordinance was invalid, contending that (i) the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the Governor-General without legal authority sought to pass the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself ; (ii) the exclusion of the revisional and appellate powers of the High Court in cases dealt with by the special courts was ineffective and *ultra vires* as being in conflict with the Government of India Act, 1935, s. 223 ; (iii) the Ordinance made it possible to discriminate between one accused and another or between one class of offence and another so that cases might be tried either in special courts or under the established criminal procedure according to the direction and decision of the Provincial authorities :—

Held : (i) an emergency might well exist " which made it necessary to provide for the setting up of special criminal courts " without requiring such courts to be actully set up forthwith all over India. Since the Ordinance contained within itself the whole legislation on the matters dealt with, the provision that its local application was to be determined by the judgment of the Provincial Government concerned did not amount to delegated legislation.

Russell v. *R.* (3) *applied on the latter point.*

(ii) assuming that the condition as to emergency was fulfilled, the Governor-General acting under the Government of India Act, 1935, Sched. 9, para. 72, could repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do.

(iii) the provisions of the Ordinance were within the limits of the legislative authority conferred on the Governor-General, and the Constitution of India did not debar an executive authority, if authorised to do so by an Ordinance, from giving directions as to the choice of court after the accused had been arrested and charged with a crime.

[**EDITORIAL NOTE.** The court holds that however unsatisfactory it may be from the point of view of either sound policy or sound jurisprudence that it should lie in the hands of the executive to select the appropriate court of trial for a particular offender or a particular offence, the provision of such powers by the Ordinance here considered is *intra vires.* It is not a new feature in Indian legislation and to hold otherwise would throw doubt upon many earlier enactments containing this provision.

It is also held that a state of emergency may exist sufficient to give the Governor-General power to make Ordinances under the Government of India Act, 1935, although it is left to the Provincial legislature to decide whether the emergency is such as to warrant the bringing into operation of the Ordinance in a particular Province. This is not a delegation by the Governor-General of his legislative authority but is analogous to the introduction of a Dominion Temperance Act by a species of local option, considered in *Russell* v. *R.* (3), and held to be *intra vires.*

As to Appeals from India, see HALSBURY, Hailsham Edn., Vol. 11, pp. 221, 222, paras. 425-428; and for Cases, see DIGEST, Vol. 17, pp. 429-430, 450, Nos. 101-106, 197.]

Cases referred to:

(1) *Bhagat Singh* v. *King-Emperor* (1931), 58 L.R. Ind. App. 169; Digest Supp.
(2) *Shreekant Pandurang Ketkar and Others* v. *Emperor*, [1943] I.L.R. Bom. 331.
*(3) *Russell* v. *R.* (1882), 7 App. Cas. 829; 17 Digest 429, *101*; 51 L.J.P.C. 77; 46 L.T. 889.
(4) *R.* v. *Burah* (1878), 3 App. Cas. 889; 17 Digest 450, *197*.

Appeal by the Government of India from a judgment of the Federal Court (Varadachariar, C.J., and Zafrulla Khan, J., Rowland, J., dissenting) dated Jan. 4, 1943, dismissing an appeal from a judgment of the High Court at Calcutta (Sir Harold Derbyshire, C.J., Khundkar and Sen, JJ.) setting aside the conviction of 15 individuals by a special magistrate purporting to act under the Special Criminal Ordinance (No. II), 1942, promulgated by the Governor-General on Jan. 2, 1942. The ground upon which the conviction was set aside was that the Ordinance was *ultra vires* the Governor-General inasmuch as the Ordinance entrusted the executive, in respect of each case, or group or class of cases, to divest by its order the regular courts of their jurisdiction and to invest the special courts with jurisdiction to try any particular class or groups or class of such cases. Such entrustment was not valid or permissible. The Federal Court based their view on the conception that there was something underlying the written Constitution of India which debarred the executive authority, though specially authorised by statute or Ordinance to do so, from giving directions after the accused had been arrested and charged with a crime as to the choice of court which was to try him. The facts are sufficiently set out in the reasons for the report of their Lordships delivered by Viscount Simon, L.C.

N. L. Macaskie, K.C., Sir Walter Monckton, K.C., Sir Thomas J. Strangman, K.C., W. Wallach and *R. K. Handoo* for the appellant.

Comyns Carr, K.C., J. M. Parikh and *R. A. Parikh* as *amici curiae* for the respondents.

Viscount Simon, L.C.: This is an appeal by the Government of India from a judgment of the Federal Court (Varadachariar, C.J., and Zafrulla Khan, J., Rowland, J., dissenting) dated Jan. 4, 1943, dismissing an appeal from a judgment of the High Court at Calcutta (Sir Harold Derbyshire, C.J., Khundkar, J., and Sen, J.) setting aside a conviction of 15 individuals by a special magistrate purporting to act under Ordinance No. 11 of 1942, promulgated by the Governor-General on Jan. 2, 1942. The ground upon which the conviction was set aside was that the Ordinance was *ultra vires.* The question is largely academic, for upon Ordinance No. II being declared by the Federal Court to be *ultra vires,* Ordinance XIX of 1943 was promulgated to replace it. But in view of the elaborate argument that has taken place and the way in which the topic has been dealt with in the judgments in India, their Lordships think that the better course is to decide the question whether Ordinance II is invalid, especially as this may be of assistance in deciding other questions which may arise hereafter as to the validity of Ordinances made, in cases of emergency, by the Governor-General under the authority of the Government of India Act, 1935, Sched. 9, s. 317 and para. 72.

Their Lordships must, however, make a preliminary observation on the way in which the issue of the validity of the Ordinance has been dealt with by the Indian courts. The appeal from the special magistrate who convicted the accused was brought to the High Court under its criminal revisionary jurisdiction by a petition for revision under the Code of Criminal Procedure, ss. 435, 439. This assumes that the court below was a valid inferior court whose decision calls, in the view of the appellants who were convicted and sentenced by it, for revision. But if the special magistrate who tried the case was a valid court, duly authorised by the Ordinance, then by the very terms of the Ordinance there is no appeal to the High Court. Sen, J., at the beginning of his judgment in the High Court, points this out very clearly. If, on the other hand, the

Ordinance had no validity, the special magistrate was in the same position as a private person who took upon himself to conduct a trial of the appellants and to sentence them to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of *habeas corpus* (Cr.P.C., s. 491) would be the appropriate remedy. Their Lordships content themselves with pointing this out, without seeking to dispose of the litigation on this ground, as in their opinion the matter can be satisfactorily dealt with by considering whether the objections taken to the Ordinance have any validity.

The Governor-General purported to make and promulgate the Ordinance under a power conferred on him by the Government of India Act, 1935, Sched 9., para. 72. That paragraph -which must, of course, be read in the light of the India and Burma (Emergency Provisions) Act, 1940 (whereunder the operation of the words "for the space of not more than six months from its promulgation" was suspended during the period therein specified)—provides as follows :

> 72. The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature ; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws ; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act.

It is to be observed that the paragraph does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all, and assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that the emergency exists. In the present instance, such questions are immaterial, for at the date of the Ordinance (Jan. 2, 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared war on the previous Dec. 7 : Rangoon had been bombed by the enemy on Dec. 23, and again on Dec. 25 : earlier Ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises, and so forth. Their Lordships entirely agree with the view of Rowland, J., that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen ; but, as that judge goes on to point out, and, as had already been emphasised in the High Court, the question whether an emergency existed at the time when an Ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Board in *Bhagat Singh* v. *The King Emperor* (1), and is plainly right. On Sept. 3, 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor-General, acting under the Government of India Act, 1935, s. 102, had proclaimed that "a grave emergency exists whereby the security of India is threatened by war," and thereupon the Indian legislature acquired power to make laws for a province with respect to any of the matters enumerated in the "Provincial Legislative List," with the result that the Governor-General, acting under para. 72 of Sched. 9, had in case of emergency the same width of legislative power.

Two objections, however, were raised to the validity of the Ordinance in connection with the question of "emergency." The Ordinance recited that "an emergency has arisen which makes it necessary to provide for the setting up of special criminal courts," and the body of the Ordinance contained the necessary framework for courts of criminal jurisdiction consisting of special judges, special magistrates, and summary courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal (which fall to be separately considered in this judgment), but the Ordinance did not itself set up any of these courts, but provided by sect. 1 (3) that the Ordinance :

> . . . shall come into force in any province only if the Provincial Government being satisfied of the existence of an emergency arising from any disorder within the province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the province, and shall cease to be in force when such notification is rescinded.

In view of this last provision, it was contended that the Ordinance was invalid either because the language of the section showed that the Governor-General notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the section amounted to what was called "delegated legislation," by which the Governor-General without legal authority sought to pass the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself.

There is, in their Lordships' opinion, no valid ground for either of these contentions. As regards the first one, it is enough to say that an emergency may well exist which "makes it necessary to provide for the setting up of special criminal courts" without requiring such courts to be actually set up forthwith all over India. Any other view would appear to deny to the Governor-General the possibility, when faced with an emergency, of making provisions which could be instantly applied if the danger increased and became even more critical to the part of India where it was necessary to apply them. It would in fact (as BEAUMONT, C.J., observed in reference to a similar objection in the Bombay High Court, in *Shreekant Pandurang* v. *Emperor* (2)), deny to the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the State. He may well have considered that, in view of the existing emergency, it was necessary to have a scheme for special courts drawn up and all ready for application if the existing emergency was further aggravated. A very similar situation arose in this country when, under the Emergency Powers Act, the Government devised and prepared for instant application a system of zone courts which were to be put into force only if, owing to invasion by the enemy or the like, the ordinary courts in some part of the country were judged unable to function satisfactorily. SEN, J., in the High Court expressed the opinion that :

> . . . the provisions of this Ordinance proclaim unmistakably that the Governor-General did not think that an emergency which necessitates the Ordinance actually existed. He may have thought that such an emergency may arise at some future time. That, however, is not enough. The Governor-General had no power to promulgate this Ordinance unless he was of opinion that the emergency requiring it actually existed ; it is therefore *ultra vires* of the Governor-General.

With all respect to the judge, their Lordships are quite unable to accept this reasoning : it is perfectly possible, and indeed it is quite obvious, that the Governor-General regarded the situation on Jan. 2, 1942, as constituting an emergency—in view of what was happening it would be remarkable if he did not—and this justified and authorised the Ordinance providing in advance for special courts. It does not in the least follow that the bringing of special courts into actual existence and operation all over India must take place at the same time.

The second objection has attracted more support, but is, in their Lordships' opinion, equally unfounded. It is undoubtedly true that the Governor-General, acting under para. 72 of Sched. 9, must himself discharge the duty of legislation there cast upon him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian legislature which, as already pointed out, in view of the proclamation under sect. 102, had power to make laws for a province even in respect of matters which would otherwise be reserved to the provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a special court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of KHUNDKAR, J., on this part of the case. The latter judge appositely quotes a passage from the judgment of the Privy Council in the well-known decision in *Russell* v. *The Queen* (3). In that case the Canadian Temperance Act, 1878, was challenged on the ground that it was *ultra vires* of the powers of the Parliament Act of

Canada. The Temperance Act was to be brought into force in any county or city, if upon a vote of a majority of the electors of that county or city favouring such course, the Governor-General by Order in Council declared the relative part of this Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or county. Their Lordships said at. p. 835:

> The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency . . . If authority on the point were necessary, it will be found in the case of *Queen* v. *Burah* (4) lately before this Board.

The next objection to be considered is the contention that sect. 26 of the Ordinance, which is framed to exclude the revisional and appellate powers of the High Court in cases dealt with by the special courts constituted under the Ordinance, was ineffective and *ultra vires* as being in conflict with the Government of India Act, 1935, s. 223, which provides :

> Subject to the provisions of this part of this Act, to the provisions of any Order in Council made under this or any other Act, and to the provisions of any Act of the appropriate legislature enacted by virtue of powers conferred upon that legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court . . . shall be the same as immediately before the commencement of Part III of this Act.

Previous to 1935 the High Court had revisional jurisdiction over the magistrates' courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an Ordinance made by the Governor-General under para. 72, as the Governor-General's Ordinance was not an " Act of the appropriate legislature." " Legislature," it was said, only means the Central Legislature consisting of the two Houses and the Governor-General, or the Provincial Legislature consisting of the two Houses and the Governor, and the Governor-General when making an Ordinance in cases of emergency under para. 72 was not either of these legislatures. The argument, as SIR HAROLD DERBYSHIRE, C.J., pointed out in his judgment, overlooked the provision in sect. 311 (6) of the Act, which says :

> Any reference in this Act to . . . Acts or laws of the Federal or a Provincial legislature, shall be construed as including a reference to an Ordinance made by the Governor-General, . . .

There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled, the Governor-General acting under para. 72 may repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do.

There remains to be considered another objection to the validity of the Ordinance which is, as their Lordships understand, the main ground upon which it has been held to be *ultra vires*. The objection may perhaps be stated in more ways than one, but the substance of it, as appears both from the judgment of SIR HAROLD DERBYSHIRE, C.J., in the High Court and of the Chief Justice in the Federal Court, is that the Ordinance makes it possible to discriminate between one accused and another, or between one class of offence and another, so that cases may be tried either in the special courts or under the ordinary and well-established criminal procedure according to the direction and decision of provincial authorities. It is evident that this is an aspect of the matter which has greatly troubled the majority of the judges in India who have had this case before them, and in view of the well-established practice in India by which decisions in criminal cases are open to review by a higher court, it is natural that those who are versed in applying this system should feel disturbed by the totally different arrangement contained in the Ordinance.

The following are the sections of the Ordinance which appear to have given the judges in India most concern :

> 5. A special judge shall try such offences or classes of offences, or such cases or classes of cases as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf may, by general or special order in writing direct . . .

> 10. A special magistrate shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death, as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct . . .
>
> 14. If any question arises whether, under any order made under sect. 5 or sect. 10, an offence is triable by a special judge or a special magistrate, the question shall be referred for decision to the authority which made the order and the decision of that authority shall be final.
>
> 16.—(1) A summary court shall have power to try such offences or classes of offences, or such cases or classes of cases as the district magistrate, or in a Presidency-town the chief presidency magistrate, or a servant of the Crown authorised in this behalf by the district magistrate or chief presidency magistrate, may by general or special order direct:
>
> Provided that no person shall be tried by a summary court for an offence which is punishable with imprisonment for a term exceeding two years, unless it is an offence specified in sect. 260 (1) of the Code.
>
> (2) The district magistrate or chief presidency magistrate may by general or special order give directions as to the distribution among the summary courts within his jurisdiction of cases triable by them under subsect. (1).

Sir Harold Derbyshire, C.J., found that the sections above quoted were invalid. He pointed out, with justice, that the Ordinance left it to the local Government, or to some officer of the local Government empowered by it in that behalf, to direct what offences or classes of offences, and moreover what cases or classes of cases, should be tried by the special courts. He thought that this amounted to repealing the Code of Criminal Procedure in part, for under the Ordinance there would be no trial by jury and no right of appeal and no right of revision by superior courts, including the High Courts, such as are enacted by the Code. He said:

> In effect it is the Provincial Government or the district magistrate acting not in a judicial capacity but in an administrative capacity that deprives the subject of his right under the Code and repeals its valid provisions as far as he is concerned. That, in my view, is repealing the Code of Criminal Procedure in part—in that instance legislation *ad hoc* for the man's case.

He added that he did not find authority in sect. 72 to justify this result; and in his view the above-quoted sections, which he declared invalid, purported to authorise persons other than the duly authorised legislature constituted under the Government of India Act, 1935, to repeal *ad hoc* certain provisions of the Criminal Procedure Code and of the Letters Patent of the High Court. Khundkar, J., agreed with the Chief Justice on this point and stated his objection to the above-quoted sections of the Ordinance thus:

> The result is that no man accused of an offence may know whether he is to be tried by a court under the Code, subject to all the safeguards provided by the Code, including a right of appeal or revision under the Code, or to be tried on the mere motion of the Provincial Government or of an officer of the Crown empowered by the Provincial Government, by some one or other of the special courts under the Ordinance. The Provincial Government or an officer of the Crown empowered by the Provincial Government is endowed with a power that is far-reaching, unfettered by rule, unconditional and subject to no supervision by the High Court or by any court under the Code. It is a power to direct any person accused of any criminal offence to be tried by one or other of the courts constituted under the Ordinance.

The judge goes on to point out what he regards as "the possible mischief which may flow from the unwise or injudicious exercise of such a power," fortifying his criticism by quotations from well-known writers on jurisprudence such as Anson and Salmond; and he concludes that the above-quoted sections are *ultra vires* on the ground that the Ordinance gives to the Provincial Governments:

> . . . a power to effectuate jurisdiction of special criminal courts by making orders in individual cases or groups of cases.

Sen, J., as their Lordships understand, did not differ from the Chief Justice and Khundkar, J., in this view, though he rested his decision that the Ordinance was *ultra vires* on other grounds which their Lordships have already indicated.

In the Federal Court the Chief Justice dwelt on the value of the revisionary jurisdiction, but considered that the most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused and another by directing trial in different courts. He developed his objections on this point by elaborate references to the constitutional principles involved in certain decisions of the Supreme Court of the United States and of the High Court of Australia, and quoted passages from the writings of Sir Courtenay Ilbert and of Sir Cecil Carr to illustrate the relation between executive and legislative powers in the British Constitution. He concluded that sects. 5, 10, and 16 of the Ordinance are

> . . . open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute and unrestricted discretion, without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised.

This was the ground upon which the Chief Justice and Zafrulla Khan, J., based their decision that the appeal of the Crown should be dismissed.

With the greatest respect to these eminent judges, their Lordships feel bound to point out that the question whether the Ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle. Rowland, J., at the beginning of his dissenting judgment, collects a number of striking quotations from previous judgments delivered in the Privy Council as to the proper rule of construction. Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. The judges who were in the majority in the Federal Court would presumably not contest this proposition, and their Lordships rather understand their view to be based on the conception that there is something underlying the written Constitution of India which debars the Executive Authority, though specially authorised by the statute or Ordinance to do so, from giving directions after the accused has been arrested and charged with crime as to the choice of court which is to try him. Their Lordships are unable to find that any such constitutional limitation is imposed. Indeed, Rowland, J., points out that, if it were held that where two sets of courts exist side by side power cannot be delegated to pass an order directing that a case shall come before the special court and not before the court under the Code, this would throw doubt on a long course of legislation in India where this very thing is enacted. The judge cites 13 instances, and, in addition to these, refers to the discretion conferred by the Indian Army Act and by the Indian Air Force Act upon the prescribed authority to decide in a particular case, where a criminal court and a court martial would both have jurisdiction, before which court the accused shall be brought for trial. There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of courts should rest with an executive authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India.

Their Lordships will humbly advise His Majesty that the appeal should be allowed. The judgment of the Federal Court must be set aside and the Ordinance II of 1942 declared not to be *ultra vires*.

Appeal allowed. Judgment of the Federal Court set aside and Ordinance No. II of 1942 *declared not to be ultra vires.*

Solicitor : *India Office Solicitor* (for the appellant).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

WATSON *v.* COUPLAND.

[KING'S BENCH DIVISION (Humphreys, Singleton and Croom-Johnson, JJ.), **January 18, 1945.**]

Food and Drugs—Milk—Standard agreement with Milk Marketing Board—Milk left at roadside by producer for collection by Board's carrier—Property and risk in milk passing to Board at place of delivery—Milk tested after delivery by carrier—Whether sale effected at time of collection or at place of delivery—Sale—Sale of Goods Act, 1893 (*c.* 71), *s.* 1—*Agricultural Marketing Act,* 1933 (*c.* 31)—*Food and Drugs Act,* 1938 (*c.* 56), *ss.* 24, 68.

The respondent entered into an agreement with the Milk Marketing Board to sell to the Board all the milk produced at his farm. Churns were provided for this purpose by the Board and the respondent was to deposit the churns at an appointed place on or near his farm where they were collected by an agent of the Board, a carrier, to be ultimately delivered at the premises of the Nottingham Co-operative Society in Nottingham. By the terms of the agreement the respondent was to be responsible for the condition of the milk not only while it was under his control but after it had left his control and had passed under the control of the carrier. It was provided that the property and risk in the milk should pass to the Board at the place of delivery when the milk was unloaded from the vehicle by which it was transported. The appellant, an inspector, sampled some of the milk when it arrived at the place of delivery in Nottingham and found that water had been added. The respondent was charged under the Food and Drugs Act, 1938, s. 24 (1) (*c*) with unlawfully selling for human consumption milk to which an addition had been made. The magistrates found that the milk was delivered by the respondent to the Board at the roadside where it was collected by the carrier and held that the property in the milk passed from the respondent to the Board when it was so collected. They, therefore, dismissed the case. The question for the determination of the court was whether the sale of milk took place at the time the churns were collected by the Board's carrier or at the time when the milk was delivered at the premises of the Nottingham Co-operative Society:—

HELD: the sale depended upon the transfer of property and the property in the milk passed to the Board according to the express terms of the contract only on delivery at Nottingham.

[**EDITORIAL NOTE.** The standard form of contract with the Milk Marketing Board provides that the property in the milk shall pass to the Board at the place of delivery, when the milk is unloaded from the vehicle by which it is transported. It is, accordingly, held that the sale of the milk for the purposes of the Food and Drugs Act, 1938, s. 24, took place at the place where the milk was unloaded. The place of delivery for the purposes of testing under s. 68 of the Act is not necessarily the place of delivery for the purpose of the passing of the property.

The case may be compared with *Oliver* v. *Goodger* ([1944] 2 All E.R. 481), but it must be pointed out that in that case the prosecution was for unlawful possession, not unlawful sale, and, accordingly, the question of the passing of the property did not arise.

AS TO ADULTERATION OF MILK, see HALSBURY, Hailsham Edn., Vol. 15, pp. 208-213, paras. 383-394; and FOR CASES, see DIGEST, Vol. 25, pp. 126-131, Nos. 474-509].

Case referred to:

(1) *Paterson* v. *Aird,* [1937] S.C. (J.) 128; Digest Supp.

APPEAL by way of case stated from a decision of the magistrates for the city of Nottingham, dismissing three informations charging the respondent, a dairy farmer, with unlawfully selling milk to which an addition had been made in contravention of the Food and Drugs Act, 1938, s. 24. The facts are fully set out in the judgment of HUMPHREYS, J.

Vernon Gattie for the appellant.

D. A. Scott Cairns for the respondent.

HUMPHREYS, J.: This is a case stated by justices of the peace for the city of Nottingham, who dismissed three informations charging the respondent, who is a dairy farmer with, in each case, the same offence, which is one of the offences created by the Sale of Food and Drugs Act, 1938, s. 24, the offence being stated as follows :

> No person shall (c) sell . . . for human consumption any milk to which any addition has been made in contravention of the provisions of this subsection.

In my opinion, this case is not well stated ; it exhibits the vice of a case which purports to find facts and then asks this court for assistance upon points of law arising out of those facts, but which in point of fact does not find the facts at all. The so-called finding of facts, headed " Upon the hearing of the said information, the following facts were proved or admitted before us," is in truth nothing but a jumble of facts, what are called admissions in cross-examination and theories as to what may have happened. The result is that we are not able to do what we ought to be able to do if the case were properly stated, and that is to decide the question whether, upon the facts in this case, the respondent was or was not properly acquitted of the offences or whether he ought to have been convicted, that is to say, whether the offence ought to have been found to be proved. Therefore, in any event, the case must go back to the justices, because there are various defences which are vaguely suggested in the case to have been raised by the defendant, perfectly good defences if they are effective, as to which the justices do not say whether they accepted them or not, and do not say what the facts are in regard to them. All those matters remain for the justices to consider and decide. There is, however, in my opinion, one point of law upon which it is possible for this court to express its opinion, because I think there are sufficient facts in the case, or which emerge from this jumble, to enable us to say we know what the facts are ; firstly, because the answer to the question of law depends almost entirely upon a document which we have, and, secondly, because the court is familiar with the class of case of which this forms one. That question of law is to be found in para. 8 of the case, and the justices say that it was upon their view of the law relating to that matter that they dismissed the summons. What they say there is this :

> We, being of the opinion that the milk was delivered by the respondent to the Milk Marketing Board at the roadside, where it was collected by the Board's vehicle, held that the property in the milk passed from the respondent to the Milk Marketing Board when it was collected by the lorry, and therefore dismissed the case.

It is necessary to state what the procedure is in this matter. Every dairy farmer who desires to carry on his business of selling milk is forced to sign a contract in a form as to which he has no option. He has no power to alter the form. His approval is not asked to the form of the contract. He is forced, if he is to carry on the business of the sale of milk at all, to sign the contract in the form in which it is presented to him, and the procedure which follows afterwards is this : As appears from that contract, what he has to do is to take or send his churns of milk not to the Milk Marketing Board, with whom he has contracted to sell the whole of his milk, as he is required to do, but he is to take his milk to a place which may be on his farm, or may be the nearest part of the main road to his farm, where it will be collected by the agent of the Board, a carrier. He is bound to hand over his milk to that carrier at that place, and from that moment in fact the dairy farmer ceases to have any control whatever over that milk. That milk is then taken by that other person, over whom he has no control, to a place indicated by the Milk Marketing Board. In this particular case that place was the premises of the Nottingham Co-operative Society in Nottingham, and that is some miles at all events away from the premises of the respondent, the dairy farmer.

By the terms of the contract he is made responsible for the condition of that milk not only while it is under his control but after it has left his control and has passed under the control of the carrier to whom I have referred, regardless of the fact that that carrier may have the opportunity and may have exercised the opportunity of watering the milk. The object of the contract is that the dairy farmer shall be made responsible for any watering of the milk whether it has taken place on his farm or while in the possession of the carrier, unless he can show that in point of fact the watering of the milk has been done by the carrier, and show it in a particular way, one of the things he has to do being to show that the churns when they left his premises were efficiently sealed. The churns are the churns of the Milk Marketing Board ; they are provided by them. We have no information in this case as to whether it is possible to seal those churns effectively or not. We do know that the churns cannot be locked.

It is said in this case and, in my opinion, it is true, that that is a great hardship upon the dairy farmer, the position being that he is obliged to enter into a contract whether he agrees or not with the terms of it. He may be made responsible in law for the watering of milk although in point of fact he may be perfectly innocent morally of any such offence at all.

In this case, the question which we have to decide is whether that unfortunate state of facts has arisen or not, and that depends entirely upon the answer to this question: Was he rightly charged with having sold this milk to the Milk Marketing Board as each of these informations alleges at the premises of the Nottingham Co-operative Society's dairy in Meadow Lane, Nottingham? What happened was that when the churns in question arrived—the justices in point of fact have not found in terms that it was the milk of this farmer which was sampled, but I am assuming they have so found for the purposes of this decision—when the milk which I assume was in the churns of the respondent arrived at those premises in Nottingham, it was sampled by the inspector, who is the appellant in this case, and the contents of those churns were found to be deficient in the constituents which ought to have been there, in other words, the milk had been watered by somebody at some time; there is no doubt about that. If the sale took place, as the informations allege that it did, at that place, then the respondent was *prima facie* guilty of the offence, because he had sold milk which in fact was watered, and that was the charge that was made. If, however, the sale took place at some time prior, for instance, at the time when he parted with the control of the milk and handed it to the Board's carrier somewhere near his own premises miles away, then it would be wrong that he should be convicted, for in point of fact there was no sale at the place at which it was alleged to have taken place and, further, when the sale took place, if it did take place at the point where he parted with the control of the milk and handed it over to the carrier, there was no evidence upon which the justices could find that at that time it was watered milk at all inasmuch as the facts were equally consistent with it having been watered after the sale. That was the contention, as I understand it, in this case, and I think the justices appreciated at all events that that was the question with which they had to deal.

It is elementary law that where you have a contract of sale which by common consent has become a sale, the point at which the contract of sale becomes a completed sale is the point at which the property in the goods passes from the vendor to the purchaser. Those in fact are the terms of the Sale of Goods Act itself. It is only necessary to read the first section of that Act to see that that is abundantly clear, and, of course, it was not disputed. Sect. 1 says:

> A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

Subsect. (3) is:

> Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

Subsect. (4) is:

> An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

The question, therefore, on this part of the case, which the justices had to decide was simply this: Where in the course of this transaction, which *ex concessis* resulted in a sale by the respondent to the Milk Marketing Board of his milk, which milk was ultimately found to have been watered, did the transfer of the property take place? It is again elementary and is again to be found in the codification of the law which is called the Sale of Goods Act, that in order to find where the property in goods in the case of a sale does pass from the vendor to the purchaser, what has to be found is where the parties intended it should so pass, and the best evidence of that is the contract, where the parties have entered into a written contract, stating that fact. In this case, the parties have entered into a written contract, and I turn to cl. 5 of the contract in order to see whether they have or have not answered that question for themselves.

Cl. 5 of this contract provides as follows:

> Subject to the provisions of cl. 9 hereof [which do not affect this case] the property

> and risk in the milk will pass to the Board at the place of delivery when the milk is unloaded from the vehicle by which it is transported . . .

and that is all that it is necessary to read. That seems to me as plain a statement as one can hope to have, that in this case the sale is deemed to take place, and does in law take place, at the place of delivery when the milk is unloaded from the vehicle by which it is transported. It is obvious that there is only one place which corresponds to that description, and that is the premises of the Nottingham Co-operative Society as charged in the informations. How can the justices come to any other conclusion than that ? I look again at para. 8 of the case to find that this is what they have done : They have started by considering where the milk was delivered by the respondent to the Milk Marketing Board. I do not say that the question where the delivery took place is immaterial. It may be from certain points of view material, but for the purposes of this case it is absolutely immaterial because what has to be considered is not where the milk was delivered from A to B, but where the sale took place. The sale depends upon the transfer of property, and the contract declares that that shall be deemed to have taken place at the place mentioned. But the justices say :

> We, being of the opinion that the milk was delivered by the respondent to the Milk Marketing Board at the roadside, where it was collected by the Board's vehicle.

I pause to say that I quite appreciate, at least I think I rightly understand, that the justices there were merely saying that the milk was in fact delivered, handed over, by the respondent to the Milk Marketing Board, and, of course, they are quite right. I daresay what affected their minds was that to which I have already alluded, namely, that that was the place where the dairy farmer, the defendant in the case, had parted with all control over the milk, which is perfectly true. Then they go on to say, that being the place where the milk was handed over :

> We held that the property in the milk passed from the respondent to the Milk Marketing Board when it was collected by the lorry, and therefore dismissed the case.

If they were right in that opinion of law, they were right in dismissing the case, as I have already observed, but, in my opinion, they were quite clearly wrong in that decision, and they, having asked us this question :

> The question upon which the opinion of the court is desired is whether, upon the above statement of facts, we came to a correct determination and decision in point of law . . .

that meaning, as I understand, "whether we were right in holding that the property in the milk passed at the place where it was collected by the lorry," in my opinion, the answer to that question is : "No, you did not come to a correct determination ; you came to a wrong determination of law upon that matter."

I think the case ought to go back to the justices with that intimation of our opinion upon the question asked, but I add that that by no means disposes of this case, for the justices have never heard the evidence for the defence. They must now hear any evidence which the defendant desires to call. They must, I think, also consider any other matters raised by way of defence on behalf of the defendant and, having done those things, then and only then will they be in a position to decide the question whether the case is or is not proved against the defendant having regard to the nature of the charge which is made.

There is one other observation I think perhaps I ought to make. I have alluded to the hardship, but I think I ought to add that that hardship may be mitigated to some extent, and by a court of law. If the justices—and I am not now speaking of the facts of this case, because I do not know what they are—in any case come to the conclusion that they are bound to find the offence proved of some dairy farmer selling milk which has been improperly tampered with, but that, upon the whole of the evidence, he is morally guiltless in the matter and is only in law held to be responsible for that wrongful act, they can always give effect to their finding in the penalty necessary to impose in the particular case, which is entirely for them to decide.

SINGLETON, J. : I agree that this case must go back. I think the expression of opinion of the justices in para. 8 of the case is wrong. However, we have not the full facts before us. It has been pointed out again and again that the facts must be found and stated. In the present case they are not. The result of this is that additional expense is thrown upon someone. That is not the fault of this court. I refrain from saying anything more upon the case.

CROOM-JOHNSON, J.: The case stated here arises upon three summonses which were issued against the respondent Coupland, who is a milk producer and, as such, is subject to the rules and regulations contained in the Milk Market-
A ing Scheme set up under the Agricultural Marketing Act, 1933. The Board itself was established at least over ten years ago, and under that scheme there are special provisions protecting the milk producer with regard to the form in which the contracts are to be drawn up by the Board established under that scheme. The summonses charged the respondent with selling milk to which an addition of water had been made; the amounts vary in the different sum-
B monses and are immaterial to state. The milk had been supplied under the terms of an agreement of sale in the Milk Marketing Board's form, and an agreement for sale becomes a sale under the Sale of Goods Act, 1893, s. 1 (4), that is to be looked at for the purposes of the Food and Drugs Act of 1938, as to which I say nothing because the point has not been argued, and that says this:

> An agreement to sell becomes a sale when the time elapses or the conditions are
> C fulfilled subject to which the property in the goods is to be transferred.

That seems to me the test, for the purposes of that statute at least, and the first thing that the justices had to determine was whether there was a sale, and whether there was a sale at the place specified in the different summonses, which was the same place, the same Co-operative Society, at Nottingham. The justices have not determined that question. Supposing they had deter-
D mined that question, the next question which they would have had to determine would have been whether the milk had had an addition of water within the terms of the summonses, in other words, whether there was a deficiency, which is familiarly proved in these cases by the production of the samples which are taken pursuant to the Food and Drugs Act, 1938, s. 68.

The justices, although met with a number of contentions on the part of the respondent, who was not called upon to give evidence in his own defence in
E view of the way in which the case went but contended many things with regard to the proof of the offences, have not dealt with any of those matters. For the purposes of sect. 68, it becomes material to look at the place of delivery and, without saying anything more about that conundrum because it is not before us, some very nice questions obviously might arise and possibly do arise in this case, as to what was the place of delivery for the purposes of sect. 68. But the justices at the conclusion of the case for the prosecution were invited to stop
F the case upon a number of submissions that were made. I am not sure that there was a submission at all made that there was no sale, but the justices appear, as far as I understand this case, to have confused two questions. They appear to have confused the question as to whether there was a sale at the place indicated in the summonses and the other question whether there was a sample taken at the place of delivery which, as I have said, may not be by any means the place
G where the property passed. I am very anxious to express no opinion about it, because the point does not arise upon this case, and I only mention it because I think that this confusion which has arisen is probably the cause of this case being stated in the way in which it is stated and, in particular, in para. 8 in which the point decided is indicated. What the justices have held is that for some purpose, not indicating what it was, they came to the conclusion that the place of delivery was the place where the producer, the respondent here, put his
H milk out by the roadside for the lorries employed by the Milk Marketing Board to pick it up and take it away. It does not seem to me to follow that the place of delivery is the same for the purposes of delivery under the contract of sale as for the purposes of sect. 68, and, in view of *Paterson* v. *Aird* (1), I can well see that a good deal of controversy may arise having regard to earlier cases decided in this country under the previous statute. But, having decided that that is the place of delivery, the justices then seem to have gone on to take the view that that is the place at which the property passed, and I agree with my Lord that that is quite wrong. The question as to whether there was a delivery

at one place or the other does not turn this contract of sale into a sale, and, if the situation simply is that delivery takes place by the roadside, it seems to me that the justices cannot, for the purpose of looking to see where the property passed, shut their eyes to the terms of the precise contract under which the sale has become established. Looking to see what it is they have held and submitted to us, the one thing which it seems to me upon this case they have submitted to us is their determination, that the property in the milk passed from the respondent to the Milk Marketing Board when it was collected by the lorry, and thereupon they dismissed the case. They do not say whether they thought that that meant that the sale was at the Co-operative Society's place or not, or whether they were merely running their heads into the question as to whether the samples had been taken at the right place of delivery or not.

The result is that I agree with HUMPHREYS, J., that this finding that the property passed when it was collected by the lorry seems to ignore what is said in the Sale of Goods Act, 1893, ss. 17, 18. When one looks at the terms of the contract under which this agreement for sale ultimately became a sale, the contract is perfectly clear and precise.

> . . . the property and risk in the milk will pass to the Board at the place of delivery when the milk is unloaded from the vehicle by which it is transported.

Apparently the argument for the respondent was that that meant the farmer's cart taking the milk from the farm to the place on the roadside. I do not think that is the right construction of this at all, because the contract goes on to deal with the question of transport. It goes on to provide for the cost of the transport being charged upon some flat rate or scheme by the Milk Marketing Board as against the producer. In these circumstances I agree with HUMPHREYS, J., and SINGLETON, J., that that part of the determination, which is the only point as I read this case submitted to us, which says that the property in the milk passed when it was collected by the Milk Marketing Board's lorry, is a wrong determination in point of law. What, upon a full consideration of all the facts, including the position under sect. 68, will eventually result is not for us to determine to-day. I agree with the order which is proposed.

Appeal allowed. Case remitted to justices. No order as to costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. E. Richards*, Town Clerk, Nottingham (for the appellant); *Ellis & Fairbairn* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law*.]

PARK *v.* J. JOBSON & SON.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Finlay, L.JJ.), **January 12, 1945.**]

Animals—Trespass—Allotments—Damaged fence—Leave and licence—Obligation of allotment-holder to fence—Liability of owners of animals.

The respondents were dairy-farmers who took a tenancy in 1938 of field 55 belonging to a colliery company. They placed in the field a number of sheep and cows which entered upon the adjoining allotments and destroyed a large quantity of growing produce. The appellant was one of the allotment-holders whose produce was so destroyed. These allotments originally formed part of field 55 and in 1916 a fence was put up separating the allotments from the rest of field 55. The colliery company supplied the material with which the allotment-holders erected the fence. Each allotment-holder was under a duty to the company to maintain that portion of the fence which ran by his allotment. It was found as a fact that a number of allotment-holders, including the appellant, had damaged their portions of the fence with the result that the respondents' cattle managed to get through the fence to the appellant's allotment, although there was no evidence as to the precise portion of fence through which the cattle entered. The appellant contended that as it was the duty of the respondents to keep their cattle in by means of a fence, the respondents were liable for the damage done by the cattle. For the respondents it was contended that (i) there was an obligation, express or implied, on the appellant to fence his allotment for the protection of his crops and any damage suffered by the appellant was due solely to his own neglect to fulfil such obligation; (ii) there was evidence that the appellant by his own acts gave leave and licence:—

HELD: (i) as between the appellant and the respondents, there was no obligation on the appellant to fence the allotment.

(ii) the appellant was not responsible for the acts of damage by the other allotment-holders. There was no evidence of the cattle entering through a particular portion of the fence damaged by the appellant and, therefore, no leave and licence of the appellant could be inferred.

[**EDITORIAL NOTE.** The defence of leave and licence fails here because there is no evidence that the act from which leave and licence could be inferred was the act of the plaintiff. It is not enough to prove that the act was committed by some one of a number of persons of whom the plaintiff was one.

AS TO TRESPASS BY ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 544-546, paras. 935, 936; and FOR CASES, see DIGEST, Vol. 2, pp. 223-229, Nos. 154-197.]

APPEAL by the plaintiff from an order of His Honour JUDGE RICHARDSON, made at the Morpeth County Court and dated Aug. 14, 1944. The facts are fully set out in the judgment of LORD GREENE, M.R.

Geoffrey Howard for the appellant.

L. F. Sturge for the respondents.

LORD GREENE, M.R.: In Nov., 1943, the defendants had, upon a field known as field 55, of which they were tenants, a number of sheep and cows, and those sheep and cows entered upon the adjoining allotments and consumed a very large quantity of growing produce. The plaintiff is one of the allotment-holders whose produce was so destroyed. There were others whose cabbages and other vegetables suffered from the depredations of these animals. The case has been described quite inaccurately as a test case. The judge began his judgment by saying and rightly, that he would dispose of the case "on its own facts." The facts in other cases may be quite different. Evidence might be available in the other cases which would lead to their being differently decided. What we have to consider is whether or not the plaintiff has established liability on the defendants in respect of the particular wrong of which he complained, having regard to the evidence and the findings of fact of the judge and the law applicable to the case.

These allotments originally formed part of field 55, which is owned by a colliery company. Some of the allotment-holders, including the plaintiff, are miners in the employment of the company. The allotments were originally started during the last war and they have remained in cultivation ever since. In the present war they have been exploited obviously very fully by the allotment-holders. In 1916 a fence was put up separating the allotments from the rest of field 55. The company supplied the material and the allotment-holders put up the fence. In some cases one holder holds more than one allotment; the plaintiff, for instance, at the relevant time, held three. The position of the allotment-holders was that of tenants of the colliery company under oral agreements. The judge has found that the duty of maintaining the fence was put upon the allotment-holders, the allotment-holder being responsible, as between himself and the landlord (the company) to maintain his own part of the fence. As it seems to me that is the clear meaning of the various findings of fact in the judgment of the judge. Further, the fences, as I infer from the judgment, were actually upon the allotment-holder's land.

The defendants are dairy farmers who took a tenancy in 1938 of various fields belonging to the colliery company, including field 55. A previous tenant put up on field 55 a barbed wire fence across his own boundary some little distance from the original fence put up by the allotment-holders with the materials supplied by the company. That barbed wire fence was in a state of disrepair at the date of the particular occurrence now complained of.

The actual length of this group of allotments, and, accordingly, the length of the fence separating them from field 55 was, we are told, something in the nature of 300 yards. There were something like 20 different allotments there. The position, therefore, was that, although physically this fence might be regarded as one fence, in relation to the legal situation as between the allotment-holders and the colliery company it was a series of fences in respect of which each allotment-holder was under a contractual obligation to his landlord in respect of his part of the fence. It was, therefore, in that regard right to consider it as a number of fences. Each allotment-holder has no concern at all with the fence other than the piece opposite his allotment. He is under no contractual obligation in respect of its maintenance, and it has nothing to do with him. I think that is the perfectly clear result of the findings of fact of the judge. The allotments, I should infer, although it is not expressly stated, were not separated from one another by fences, but lay in the ordinary way that allotments do lie, namely, all open to one another but separated by baulks or paths, to mark out the holding of each allotment-holder. Cattle, sheep and cows, on this occasion wandered over several allotments and ate some of the produce of a number of allotment-holders. There is no particle of evidence as to the precise bit of fence through which they made their way to get into the allotment area. Not only is there no evidence to show where the cattle got in, but, as one might expect, there is no finding by the judge on that matter. They may have got in through that bit of the fence for which the plaintiff was responsible as between himself and his landlord. On the other hand, they may have got in through a bit of the fence in respect of which some other allotment-holder was responsible for maintenance. The evidence is consistent with either view, and the fact as to where they got in was not established. There are certain other matters of fact which must be borne in mind. It appears that a number of allotment-holders neglected the duty to maintain their parts of the fence in question, with the result that those parts fell into disrepair. It was further established—and the judge so found—that a number of allotment-holders had been in the habit of getting through the fence for the purpose of drawing water from some practice trenches which had been dug by the military in field 55 and had become full of water. In addition, certain miners, including certain allotment-holders, were in the habit of taking a short cut to or from the mine across field 55 and then leaving field 55 by climbing through or over the fence. The plaintiff was one of the allotment-holders who, on occasions, climbed through the fence, damaging it in so doing, in order to get water. The judge has found that the fence was in a damaged condition, and that that damage was caused in whole or in part not by natural decay or lack of repair, but by the acts of these allotment-holders and miners who climbed through it, including, among them, the plaintiff. So far as this plaintiff was concerned, there was no evidence as to what part of the fence he himself climbed through, or to what extent he did damage to it. That being the position, the plaintiff brings this action upon a perfectly well-known and familiar rule of law, that the obligation of keeping his cattle in lies in general upon the owner of the cattle. I need not go into the law on this subject because, for the present purpose, I think I have stated it with sufficient accuracy. Here the plaintiff says: The defendants did not fence in their cattle. If they had performed their duty of fencing in their cattle, the cattle would not have got on to my allotment and eaten my cabbages.

The defence that is put in was this: The defendants dispute the plaintiff's claim because there is an obligation express or implied upon him to fence his allotment for the protection of his crops and that any damage that he has suffered is solely due to his own neglect to fulfil such obligation. At the trial the judge allowed the defendants to raise another defence, namely, that of leave and licence, and he held that that defence was established. I do not think the proposition is likely to be disputed that a person who gives leave, expressly or impliedly, to his neighbours' cattle to trespass on his land cannot complain, and that such leave and licence can be inferred from the circumstances of a particular case. The simplest case that occurs to one is where a cattle-owner has himself put up on his own land a fence which the neighbouring owner destroys. That owner could not thereafter complain of the cattle trespassing. That may be put on one of two grounds—either leave or licence or that the trespass by the cattle was the direct result of his own wrong in pulling down his neighbour's fence. In the present case the fence was not on the land of the present defendants but was on the land of the allotment-holders. As between them and the present defendants, I cannot see how any obligation to maintain that fence lay upon the allotment-holders. I will deal with that aspect of the matter a little later, but, generally speaking, if an owner of land has on his land a fence of his own, which in fact serves to keep out his neighbour's cattle, it is manifest that his neighbour has no right to call upon him to maintain that fence and thus absolve the neighbour from the duty that is laid upon him to keep his own cattle in. I agree that the owner of a fence may deal with his fence in such a way as to lead to an inference of leave and licence. If he suddenly pulled it down, for instance, in the night time, giving his neighbour no opportunity of running up a fence to keep the cattle in, it might very well be that in that state of facts the inference of leave and licence for trespass by cattle could be drawn. A A great deal would depend on the question of time. If the owner of a fence pulls his fence down and leaves it down, and, six months afterwards, to take an extreme case, a neighbour puts cattle in the field, knowing that there is no fence there, I do not think leave and licence could be assumed. I say that for this reason. In the present case, the judge has not directed his mind to that question; but when the evidence is examined and his findings are examined, I should have B thought it was pretty clear that this fence had become in a damaged condition to the knowledge of these defendants a very long time before this particular incident. The defendants having no right to call upon the allotment holders to keep their fence up, the fact that it had fallen into disrepair a long time ago would not be a justification for drawing an inference of leave and licence. I merely mention that because it is an aspect of the case which the judge does not seem to have considered. I do not find it necessary to express any concluded C opinion about it, because, in my opinion, the defence of leave and licence fails for another reason. The judge treated the acts of the allotment-holders, as an aggregate of individuals in destroying at various places various sections of this fence, as amounting to leave and licence by this particular plaintiff, because he was one of the people that at some unspecified place and to some unspecified extent damaged some part of this fence. In my opinion, in so doing the judge has misdirected himself in law. He does not find—and there is no evidence D on which he could find—what particular part of the fence the cattle broke through or what particular part of the fence, and to what extent, was damaged by this plaintiff. What he says is this:

> I think that the plaintiff would be entitled to recover damages for trespass apart from the fact that he himself, with other allotment-holders, carelessly or deliberately broke down this fence, and is, therefore, with the others concerned, entirely the author of his own trouble. By these acts I think these allotment-holders, of which the plaintiff E is one, gave the defendants' cattle leave and licence to trespass as they did. A man cannot take advantage of his own wrong.

It will be observed that the judge makes no attempt to bring home to this plaintiff an injury to the fence which was part of the chain of causation which led these cattle on to his allotment. What he does is this. He treats the whole of the allotment-holders as composing a unit. The plaintiff being one of them, he F finds that that unit has, by its aggregated but not concerted actions, damaged the fence, and that, by reason of that damage, at some point the cattle got in, and that, therefore, this allotment-holder (and, by parity of reasoning, I imagine all the other allotment-holders) cannot complain. In other words, the fault of one is the fault of all, and the fault of all is the fault of one. In my opinion that is misdirection in point of law. If it had been established that the cattle had got on to the plaintiff's land by reason of some act of the plaintiff from G which leave and licence could be inferred, then I agree the plaintiff could not recover. But it is quite impossible, on this evidence, to infer leave and licence by the plaintiff when the act from which leave and licence would have to be inferred may well have been the act of somebody else altogether. It seems to me quite impossible to say that, if it had been established that the cattle had got through a gap made by some allotment-holder other than this particular allotment-holder, the plaintiff would have been deprived of his right to complain.

H There being no evidence of where the cattle got in, the only way by which the judge could reach his conclusion was by lumping together all the gaps made by all the allotment-holders and saying that the cattle got through one or other of those gaps, and as this plaintiff made a gap which may or may not have been the one through which the cattle got in, the plaintiff must be taken to have allowed the cattle to get on to his allotment. It seems to me, with respect to the judge, that it is only sufficient to analyse his finding in that way to show that it cannot be supported.

There is another argument which was addressed to us, which is supported by a case mentioned by the judge, which was a case of an alleged enclosure. The proper inference to be drawn from the history of the facts in that case was that, when the land was enclosed, the landlord imposed on the person for whose benefit it was enclosed an obligation to fence. It is a perfectly obvious inference to draw in a case of that kind, for the very simple reason that, if no such obligation were imposed, the position of the commoners, who have the right to pasture their cattle on the common, would have been quite an impossible one. The inference was drawn in that case, but it is nothing like this case, where the whole relationship between the allotment-holders and the colliery company is a contractual one, the terms of which are capable of ascertainment and have in fact, been found by the judge. They do impose an obligation to fence.

The argument then developed into a proposition, if I understand it rightly, of this nature. As between the colliery company and the allotment-holder, the allotment-holder was under an obligation to fence. If the colliery company had kept field 55 in hand and had put its own cattle there, and by reason of the default of an allotment-holder in keeping up his bit of fence, the cattle had gone on to his allotment and eaten his cabbages, that allotment-holder could not have complained. I am not concerned to dispute that proposition. It is then said that the present defendants, who are tenants of the colliery company, and to that extent their successors in title, have a similar right to say that, if the allotment-holder fails in his obligation towards the colliery company, the allotment-holder cannot complain against these defendants. That seems to me to be a very debatable proposition, but I do not propose to take up time in discussing it. If it were correct it would still be necessary to show that this particular cattle trespass was due to a breach of the allotment-holder's obligation to fence, and that could only be shown if it were established that the cattle got through a breach in his part of the fence. It would clearly not be a breach by this allotment-holder disentitling him from objecting to cattle trespass, if the trespass was due, not to his breach of his particular obligation to fence, but to a breach of the obligation of some other allotment-holder to repair a different part of the fence. The argument comes round to precisely the same point as that which I have already dealt with in the earlier part of my judgment, namely, that the evidence, having wholly failed to link up this particular misfortune with any act of the plaintiff, or any default of the plaintiff, it is impossible to draw an inference against him of leave and licence ; and it is equally impossible to say that this particular damage that he has suffered is to be traced to some breach by him of his obligation to fence.

In the result, therefore, the judgment cannot stand. There is only one possible judgment on the evidence, and that is judgment for the plaintiff for the sum of £10 agreed damages.

MacKinnon, L.J. : I agree. I have some sympathy with the defendants. It is rather a hard case in one aspect of it. I venture to think that it is rather a pity that the colliery company, as freeholder of both the plaintiff and the defendants, having put a specific obligation on the defendants to keep in order the fences round certain parts of their property, and having an arrangement with the allotment-holders under which they were to fence it, did not see that the fence round the allotment was kept in order. The defendants may very well, not having a specific obligation to fence, and not being versed in the law, have supposed that they need not bother about fencing up the allotments. But I think the law unfortunately does impose the obligation on them to keep their cattle in.

Finlay, L.J. : I entirely agree and I would only add this. The law being quite clear that there is a primary obligation thrown on the defendants to keep in their cattle, the action must succeed unless the defendants show leave and licence. For the reasons which Lord Greene, M.R., has so fully given, I think that the defendants fail altogether to establish that this individual plaintiff —and he alone was concerned in the case—gave any leave or licence to these cattle to come where they did. I agree with the judgment of Lord Greene, M.R.

Appeal allowed with costs.

Solicitors : *H. Lindley*, agent for *Frank Kirby & Co.*, Newcastle-on-Tyne (for the appellant) ; *Hyde, Mahon & Pascall* agents for *Nicholson, Martin & Smith*, Newcastle-on-Tyne (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

NETHERTON *v.* COLES.

[Court of Appeal (Scott, Finlay and Morton, L.JJ.), **December 6, 7, 20, 1944.**]

Workmen's Compensation—Painter employed by contractor on outlying work—Place of work eleven miles from workman's home—Travelling allowance paid in addition to remuneration—Workman fatally injured while riding home after finishing work—Journeys of workman not forming part of his service—Accident not arising out of and in the course of employment.

The workman was a painter employed by the appellant, a building contractor. By the contract of employment the employer had reserved the right to name the place of work. This place of work was a hospital, some eleven miles away from the workman's home. The contract contained provisions for travelling allowances and for free travelling facilities (by vouchers or otherwise) as between convenient centres at or near the job and the employer's office in Plymouth. The workman finished work at the hospital at 6 p.m., on May 21, 1943, and about five minutes later was killed when riding his motorcycle on the public road on his way to his home. It was found as a fact that it was not the practice of the workman to attend at the employer's office in Plymouth either before going to, or after returning from, his place of work. It was contended for the respondent, the widow of the workman, that the accident arose out of and in the course of the employment, since the workman was under orders to make the journey to the place of work and the journey from it must be treated on the same footing, with the consequence that the workman's employment was extended so as to cover such journeys :—

Held : the journeys of the workman did not form any part of his service since he was at liberty, outside working hours, to choose his own time and method of transport to and from his actual work and the accident happened after completion of his work.

[**EDITORIAL NOTE.** It is well-established that for purposes of workmen's compensation a man's employment does not in general begin until he has reached the place where he is to work and does not continue after he has left it. It is argued here that the rule is otherwise where a workman is working for a contractor, since the place of work is wherever the job happens to be and the workman is bound to go from his home to that place as he is directed and to return thence. It is held, however, that it makes no difference that the working place is to be named by the employer. The case may be compared with *Sparey's* case (3) where the workman, a road repairer, was injured while cycling from his place of work.

As to Course of Employment, see HALSBURY, Hailsham Edn., Vol. 34, pp. 825-827, para. 1164 ; and for Cases, see DIGEST, Vol. 34, pp. 276-282, Nos. 2336-2371. See also WILLIS'S WORKMAN'S COMPENSATION, 36th Edn., pp. 24-35.]

Cases referred to :

- *(1) *Upton* v. *Great Central Ry. Co.*, [1924] A.C. 302 ; 34 Digest 276, *2336* ; 93 L.J.K.B. 224 ; 130 L.T. 577 ; 16 B.W.C.C. 269.
- *(2) *St. Helen's Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59 ; 34 Digest 280, *2364* ; 93 L.J.K.B. 177 ; 130 L.T. 291 ; *sub nom. Hewitson* v. *St. Helen's Colliery Co., Ltd.*, 16 B.W.C.C. 230.
- *(3) *Sparey* v. *Bath Rural District Council* (1931), 146 L.T. 285 ; Digest Supp. ; 24 B.W.C.C. 414.
- (4) *Allen* v. *Siddons* (1932), 25 B.W.C.C. 350 ; Digest Supp.
- (5) *Weaver* v. *Tredegar Iron & Coal Co., Ltd.*, [1940] A.C. 955 ; [1940] 3 All E.R. 157 ; Digest Supp. ; 109 L.J.K.B. 621 ; 33 B.W.C.C. 227.

Appeal by the employer from an award of His Honour Judge Scobell-Armstrong, sitting at Plymouth County Court, dated July 22, 1944, who held that the accident arose out of and in the course of the employment of the workman. The facts and arguments are fully set out in the judgment of the court delivered by Finlay, L.J.

W. H. Duckworth for the appellant.

B. J. MacKenna for the respondent.

Finlay, L.J. [delivering the judgment of the court] : This is an appeal by the employer from a decision of Judge Scobell-Armstrong, sitting in the Plymouth county court, who held that the accident by which the husband of the present respondent lost his life arose out of and in the course of his employment. I will refer to the appellant as " the employer," and to the deceased man as " the workman." The facts are all agreed, and no evidence was called. The workman was a painter; the employer was a contractor. The place of work was the Lee Hill Isolation Hospital where the employer was carrying out a contract. The workman finished work at the hospital at 6 p.m., on May 21, 1943, and about five minutes later was killed when riding his motor-cycle on the public road on his way to his home at Crapstone, about eleven miles away. The employer's office was in Bath Street, Plymouth, also about eleven miles from the hospital, but some miles from the workman's home.

The contract of employment was partly oral and partly contained in a printed form of agreement, applicable in the building industry to "jobs" such as that where the workman had been working. Cl. 6 provided, *inter alia*:

> (*a*) Free daily travelling facilities (by vouchers or otherwise) shall be provided as between convenient centres at or near the job and convenient centres in the area between four and twenty-five miles of the job . . . (*d*) In respect of each day on which a man travels to the job he shall receive an allowance for travelling time in accordance with the following scale: From an agreed convenient centre over ten miles and up to and including fifteen miles from the job: Travelling allowance equivalent to half-hour's pay per day.

The "convenient centre" was said to be the employer's office in Bath Street. As a matter of fact it was not the practice for this workman to attend at that centre either before going to, or after returning from, his place of work.

The question we have to decide is one of law, and law only, as the facts were agreed in the court below, and there is no finding of fact beyond the judge's acceptance of those agreed facts. The question is whether the accident "occurred in the course of the employment." If it did it was conceded before us that it arose out of the employment, a concession rightly made having regard to *Upton* v. *Great Central Ry.* (1), decided by the House of Lords a month after they decided *St. Helen's Colliery Co., Ltd.* v. *Hewitson* (2); for the facts here would bring the case within the words of Viscount Haldane, at pp. 306, 307 respectively of the report of *Upton's* case (1):

> "arising out of" no doubt imports some kind of casual relation with the employment; but it does not logically necessitate direct or physical causation . . . That the accident should have arisen out of his fulfilment of these conditions [of employment] seems to be all that is required to establish the only kind of causation that is demanded . . . If, in the course of his employment, a workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed.

For the reasons there given the only question in the present appeal is whether the accident was "in the course of the employment." Travelling to and from work is *prima facie* not within the course of the employment: *Hewitson's* case (2); *Sparey* v. *Bath Rural District Council* (3), where the House of Lords affirmed the Court of Appeal, and *Allen* v. *Siddons* (4), where the Court of Appeal applied the rule laid down in *Hewitson's* case (2), and *Weaver* v. *Tredegar Coal & Iron Co., Ltd.* (5).

It was contended by counsel for the respondent that in the present case the workman was under orders to make the journey to the place of work; that the journey from it must be treated on the same footing, and that, as the employer was entitled under the contract to name the place of work, the workman was "directed" to go there. From this he asked us to draw the inference that the workman, during the journey either to or from the hospital, was under a duty which fell within the category of his contractual duties, or at least that there was evidence upon which the judge could so find. We think this argument fallacious, but in order to expose the fallacy it is desirable to analyse the contract. The duty of the workman was obviously to be at the place of work, wherever the job might be, at the correct hour for starting work, to work there during working hours (including overtime if required under the terms of the contract) and not to leave until the working time at the "job" was over. But at all times outside working hours the workman was obviously free to do what he liked, be where he liked, go where he liked, and in coming or going to choose his own method of travelling, provided always that he was present at the job by the appointed hour for starting and did not leave before the appointed hour for "knocking off." That is the general rule which defines in time and place the course of such employment as was this workman's, a rule which is, I think, correctly stated in WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., at p. 24:

> As a general rule a man's employment does not begin until he has reached the place where he has to work, or the ambit, scope or scene of his duty, and it does not continue after he has left it, and the periods of going and returning are generally excluded.

To substantiate a claim under the Act where the accident happens outside the limits of time and place so defined, it is necessary to bring the case within one of the recognised exceptions to the general rule, as is so clearly stated in the summaries of the relevant decisions cited in WILLIS, under the various heads of exceptions, on pp. 27-38. The fact, for instance that a workman is transported to and from the work by the employer free of charge makes no difference, it constitutes no exception: *St. Helen's Colliery Co., Ltd.* v. *Hewitson* (2). The distinction between *Hewitson's* case (2) and *Upton's case* (1) was that in the latter whilst it was common ground that the accident arose in the course of the employment, the employer contended that it did not arise out of it; what differentiated the case from *Hewitson's* (2) was that the workman was still at the place of employment and had not yet embarked on his journey from it at the moment when the accident happened.

If then the hospital in the present case was the workman's place of work in the same sense that a factory or mine or a particular part of a railway is the workman's place of work in those employments, it follows beyond all doubt that the course of employment of this workman had come to an end before he met with his accident. Counsel for the respondent sought to escape from this inevitable conclusion by one submission only, that is to say that in the case of a "contractor" the working place of his workmen being wherever the contractor's job happens to be, and his workmen being under their contract of employment in duty bound to go to the place where the "job" is, then (provided it is within the geographical limits of the contract) the employer must as a matter of law be regarded as ordering them to make their journeys from home to work and from work to home, with the consequence that the employment, for example, of a painter, will extend to cover his journeys to and from, whether by road or rail, whether long or short, whether his off-duty terminus is a hostel of the employer's, casual lodgings, or the workman's own home. This submission is in our opinion erroneous. Outside working hours, in order to bring an accident within the course of the employment, there must be a duty owed by the workman to the employer under the contract either to be where he is when he meets with his accident, or to be engaged in performing some task called for by the contract by means of the specified journey. Without such a limitation the contention of counsel for the respondent would bring every workman within his "employment" when going to or returning from work. The argument confuses a condition of the contract, *viz.*, that the workman shall be at the place of employment during the agreed hours of work there, with an undertaking by him to accept control by the employer outside the place and hours of work defined by the contract. The fact that the employer has not named the place of work before the contract of employment is made is irrelevant. If it were a contract by the workman to work at any such place as from time to time should be named by some third party—e.g., a multiple shop company or the Minister of Works—the legal effect would be the same as if each such place when so named had been stated in advance in the contract. It can make no difference that the employer reserves to himself instead of to a third party the right so from time to time to name the working place within the geographical limits of the contract of employment. In the present case there is no evidence that the journeys of the workman formed any part of the service of the workman. It is thus fundamentally different from those contracts where a duty is imposed to make journeys, as in the case of a messenger or a driver or conductor of an omnibus.

The appeal must be allowed with costs here and below.

Appeal allowed with costs.

Solicitors: *Church, Rendell*, agents for *David F. Nash*, Plymouth (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Pearce & Major*, Plymouth (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ENGVALL v. IDEAL FLATS, LTD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Finlay, L.JJ.), **January 16, 1945.**]

Landlord and Tenant—Rent restriction-
water, central heating and other s
over as statutory tenant—Whether st
terms of tenancy—" Attendance "—
(*Restrictions*) *Act*, 1920 (*c.* 17), *s*
Restrictions Act, 1923 (*c.* 32), *s.* 10.

Engvall v. Ideal Flats, Ltd. ([1945] 1 All E.R. 233; 172 L.T. 134). *Dictum of* Lord Greene, M.R., *approved.*
Palser v. Grinling. Property Holding Co., Ltd. v. Mischeff .. .. [1948] 1 All E.R. 1

By an agreement dated Dec. 1, 1940, the appellant landlords let to the respondent a flat on a quarterly tenancy at a weekly rent of 23*s.* The premises were controlled premises under the Rent Restriction Acts. By the agreement the landlords undertook to perform a number of services in and about the flat, such as to provide hot water and central heating, to provide for the services of a caretaker, to provide and maintain a gas cooker in the kitchenette of the flat, to provide and maintain a system of electric bells for the use of the tenant in the flat, and to provide and maintain at the rear of the house an adequate dustbin for the use of the tenant. The landlords gave to the tenant, on Aug. 30, 1943, three months' notice to quit announcing simultaneously their intention of discontinuing the central heating and the supplying of hot water. Subsequently, the appellants extended the period during which they would carry out these services until Dec. 31, 1943. On Jan. 15, 1944, the landlords offered a concession on the rent because they could no longer carry out these services. In an action by the respondent, who was holding over as a statutory tenant, for the recovery of damages for the breach of the landlords' obligation to provide hot water and central heating, the respondent was awarded damages amounting to £8 18*s.* 6*d.*, which sum represented about half the amount of the rent for the period covered by the claim. On appeal it was contended for the appellant landlords that (i) after the contractual tenancy had been terminated, their undertaking to provide hot water and central heating was not one of the obligations which were imported into the statutory tenancy under the Rent Restriction Act, 1920, s. 15; (ii) the undertaking to maintain a gas cooker, a system of electric bells and a dustbin ought to be classed as " attendance " within the meaning of the Rent Restriction Act, 1923, s. 10, and must be taken into account in assessing the part of the rent attributable to " attendance "; (iii) the damages awarded for not providing heating and hot water were excessive, alternatively, a substantial portion of the whole rent was paid for " attendance " thereby bringing the letting outside the scope of the Rent Restriction Acts. The respondent contended that a statutory tenant was entitled to all the services stipulated in the lease and that maintenance or repair of any part of the demise was not " attendance ":—

Held: (i) the statutory tenant was still entitled to the benefit of the original terms of the tenancy since those terms were not inconsistent with the Rent Restriction Act, 1920, s. 15.

(ii) the undertaking to maintain a system of electric bells, a gas cooker, and a dustbin could not be deemed " attendance " within the meaning of the Rent Restriction Act, 1923, s. 10.

(iii) the amount of damages to be awarded depended on questions of fact to be decided by the county court judge, and was, therefore, not appealable. The question whether or not the amount referable to items of " attendance " formed a substantial portion of the whole rent was also a question of fact and degree to be decided without appeal by the county court judge.

[**EDITORIAL NOTE.** It is held here that all terms and conditions of a purely contractual nature, such as the obligation of the landlord to supply hot water and central heating, are imported into the contractual tenancy under the Rent Restriction Acts, not being inconsistent with the original contract of tenancy. There is no justification for adopting a more limited construction of sect. 15.

The other point of interest is the construction of " attendance " in sect. 10. It is held that " maintenance " of a gas cooker, electric bells or a dustbin do not constitute "attendance." This makes a distinction between the removal of the refuse itself from a flat, which was held in *Nye* v. *Davis* ([1922] 2 K.B. 56) to amount to attendance. It may be observed that the maintenance of gas or electrical fittings is generally a matter for a contractor or the supply companies concerned and clearly distinguishable from such acts as the cleaning of windows or removal of refuse carried out by the staff of the flats.

As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401 ; and for Cases, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255.

As to Attendance, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370 ; and for Cases, see DIGEST, Vol. 31, pp. 559, 560, Nos. 7068-7077].

Appeal by the defendant landlords from a decision of His Honour Judge Hurst, sitting at the Cheltenham County Court, dated Sept. 26, 1944. The judge awarded to the plaintiff tenant damages amounting to £8 18*s.* 6*d.* for the breach of the undertaking by the landlords to provide central heating and hot water for the period covered by the claim. The judge held further that the services which consisted in the provision of hot water and central heating did not fall within the meaning of "attendance" in the Rent Restriction Act, 1923, s. 10. Of the other services to be provided by the landlords, the judge held that the cleaning of the exterior of the windows of the flat and the personal services of a caretaker constituted "attendance" within the meaning of the section, whereas the maintenance of a gas cooker, a system of electric bells for the use of the tenant, and a dustbin ought not to be taken into account for the purpose of applying sect. 10. Concerning the two items constituting "attendance" within the meaning of the section, the judge decided that, having regard to the value of those items to the tenant, the amount of rent which by sect. 10 was "fairly attributable to them" did not form a substantial part of the whole rent. The facts and arguments are fully set out in the judgment of Lord Greene, M.R.

Geoffrey Howard for the appellants.

H. J. Astell Burt for the respondent.

Lord Greene, M.R. : This appeal raises two questions as to the application of the Rent Restrictions Acts to the particular facts of the case. The premises in question are a flat let on a tenancy which began on Dec. 1, 1940, taking the place of an earlier tenancy. In the tenancy agreement the landlord entered into a number of undertakings in respect of services to be performed by them in and about the flat.

For the purposes of the first question, the only two items which need be mentioned are the undertakings by the landlords to provide constant hot water and heating, whether by radiators or central heating, in the flat, in the entrance hall, and in the corridors and landings. It so happened that the services which the landlords took upon themselves in that and other respects were performed under contract by a different company, which, at the relevant moment when the stage was being set for this dispute, found itself unable to carry on with that contract. The landlords assert that they were unable to obtain another firm or company to carry out these services and they were not prepared to carry them out themselves. In consequence they took the following steps. On Aug. 30 they gave to the tenant, the plaintiff in the action, three months' notice to quit. In the same letter they announced their intention of discontinuing the central heating and the supplying of constant hot water. By a later letter they extended the period during which they would carry out those services until Dec. 31. On Jan. 15, 1944, they offered a concession on the rent in view of the fact that they could no longer carry out these services.

The action was an action to recover damages for the breach, as it was alleged, of the landlords' obligation to provide the hot water and heating services. The judge awarded damages amounting to £8 18*s.* 6*d.* for the breach of that undertaking which he held to have been established over the period covered by the claim. A complaint was made as to the amount of those damages. It was pointed out that they represented about half of the rent of the flat after deduction was made for rates. It may be that the judge put the damages rather on the high side, but we cannot interfere with that. There is no error of law in his method of arriving at the damages, nor are they so extravagant as to be beyond the limit which a reasonable man could arrive at. No complaint of the *quantum* of damages awarded in this case can be entertained in this court.

The first and most important point which is raised on the appeal is of this nature. It was said that the undertaking by the landlord to provide hot water and heating was not one of the obligations which were imported into the statutory tenancy under the 1920 Act, s. 15. It was said that, when a contractual tenancy is brought to an end either by expiration of time or by notice, the section only keeps alive, as terms of the statutory tenancy, a limited class of the obligations which were found in the contractual tenancy, and that directly the contractual tenancy comes to an end, the obligations which fall outside that class, being contractual in their nature (and purely contractual), necessarily came to an end as well. So far as is relevant, the language of the section provides that the tenant who, by virtue of the provisions of the Act, retains possession shall, so long as he retains possession :

> . . . observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act,

That language is comprehensive and clear. Applying it in its clear *prima facie* meaning to the question in this case, the obligation of the landlord to provide hot water and central heating is one of the terms of the original contract of tenancy. It is a term which is not inconsistent with the provisions of the Act. Therefore, it would appear, reading the words in their natural sense, that the tenant is entitled to the benefit of those undertakings by the landlord. But it is said that a more restricted meaning must be put upon the section, and that when the legislature used the phrase " all the terms and conditions " it cannot possibly have meant what it said. Otherwise, so it was argued, it would mean that a landlord who had, in the tenancy agreement, entered into undertakings to provide services outside the ordinary covenants which you may expect to find in a lease, would find himself compelled, in a case where the Act applied, to continue those services so long as the house remained a controlled house, and that it would be, or might be, a great hardship to put such an obligation upon him, and, therefore, the section should be construed in some more limited way.

I can find nothing in the context, or in the other parts of the Act which would justify me in writing such a limitation into the clear language used by the legislature. This is a clear and comprehensive expression which, in my judgment, would require an equally clear context to cut it down. I cannot find it. Indeed, when one thinks of the practical position, there seems to be very good reason why the legislature should have refrained in view of the class of dwelling-house covered by the Act from drawing any such distinction. As counsel for the respondent pointed out, in the case of flats it is customary for a variety of services to be performed, and it is common to find that, without the performance of those services, the flats will be uninhabitable. One example that he gave which particularly struck me was the matter of heating. It is common knowledge that in a block of flats which is provided with central heating service, the architect who designs the flats makes no provision for fireplaces. One of the great attractions to some people in living in such a flat is not to have to bother with fireplaces. If the landlord lets a flat with an undertaking to keep the central heating system going, and then is at liberty, when the contractual tenancy comes to an end, to stop that particular service, the value of the statutory tenancy to the tenant would be largely, if not completely, destroyed.

It is to be observed that, if the argument of counsel for the appellant is right, every obligation of the class which he has in mind automatically comes to an end when the contractual tenancy comes to an end, for the simple reason that the section, on his construction, does not provide for the carrying over of such obligations into the statutory tenancy. It would mean that in every case where a controlled flat has been let and the tenancy includes an obligation to provide hot water and central heating, directly the notice which the landlord serves has expired, or the lease comes to an end by effluxion of time, the landlord could turn off the hot water and turn off the heating system. It seems to me that the legislature, if it directed its mind to this point at all, would not unreasonably have come to the conclusion that such a result was not what it intended. There is another difficulty in the way of counsel for the appellant, because quite clearly his argument must involve this. The cessation of the landlord's obligation must, in all fairness and justice, carry with it a right on the part of the tenant to obtain a reduction of rent. To construe the section so as to deprive the tenant of the services and leave him liable for the same rent as before would shock the conscience.

The method of counsel for the appellant of dealing with that difficulty is to say that the tenant in those circumstances could obtain the fixing of a standard rent which would be lower than the contractual rent, and would be the amount of rent properly attributable to what is left to the tenant, namely, the bare demise without the services. I can find nothing in the Act which makes provision for procedure of that kind. Indeed, it seems to me to suggest that such procedure if competent is in conflict with the provisions of the Act which lay down what the standard rent is to be. As I have said, I can find nothing which would justify the cutting down of these words in sect. 15 and there is no context which would entitle me to do so. In my judgment, therefore, that point fails.

The other question in the case is not of such general interest. It applies merely to the facts of this particular case and turns on the application of those provisions in the Acts which deal with houses where attendance or use of furniture is provided. As I have said, in the present case a variety of services, to use a general expression, was provided for. Certain of them admittedly fall within the meaning of the word "attendance" in the 1923 Act, s. 10. Others admittedly fall outside the meaning of that word. To take an example, it is not suggested that the services which consisted in the provision of hot water and heating fall within the meaning of the word "attendance." The judge held that in this string of undertakings only two fall within the meaning of the word "attendance." One of them is in sub-cl. 4 of cl. 4 of the tenancy agreement:

> . . . to clean at reasonable intervals the exterior of the windows of the said house and the said flat . . .

and sub-cl. 19:

> . . . to provide the personal services of a caretaker for the purpose of carrying to the flat wood, coal and fuel not exceeding two buckets per day and also for carrying therefrom refuse, ashes, etc., not exceeding one bucket per day.

Counsel for the appellant submitted that there were three other items, and only three, which also ought to be classed as "attendance." One is to be found in sub-cl. 10:

> . . . to provide and maintain in the kitchenette of the said flat a gas cooker sufficient for household purposes.

The second is in No. 11:

> . . . to provide and maintain a system of electric bells for the use of the tenant in the said flat.

It is only with regard to maintenance in those two cases that he can claim that those services constitute attendance. The third one was No. 13:

> . . . to provide and maintain at the rear of the said house an adequate dustbin of approved plan for the use of the tenant.

He said that those services ought to be taken into account for the purpose of applying sect. 10. On that the judge held against him, and, in my opinion, the judge was right. I do not think that an undertaking to maintain a system of electric bells, an undertaking to maintain a gas cooker, and an undertaking to maintain a dustbin at the rear of the house can properly be described as "attendance" within the meaning of the section. Therefore, those items must be ruled out.

The only question remaining is whether or not the judge applied proper principles in dealing with the value to the tenant to be attached to the other two items, Nos. 4 and 19. He held that, having regard to the value of those items to the tenant, the amount of rent (to quote the section) "which is fairly attributable to them" did not form a substantial part of the whole rent. The question whether or not the amount referable to items of attendance forms a substantial portion of the whole rent is eminently a question of fact and degree to be decided without appeal by the county court judge. The only way in which his decision could be attacked would be by saying that he had fallen into some error of law in applying his mind to the question. I cannot find that the judge in this case fell into any error of law. Certain points were taken. For instance, the judge, in estimating the value to the tenant of cleaning the exterior of the windows of the house and the flat, limited himself—and I do not think this was complained of—to the value to the tenant of the cleaning of the windows of the flat. Counsel for the respondent pointed out that it might very well be said that that was not "attendance" within the meaning of the section, having regard to the fact that it was the exterior of the windows to which the undertaking related. It is not necessary to decide that point. The point of criticism which is directed against the judge's finding is that, in arriving at it, he took into account the circumstance that the landlord himself was benefited by having the outside windows of his building kept clean. It was said that was contrary to the direction in the section that regard is to be had to the value of the attendance to the tenant. In my opinion, there is nothing in that point, because the first thing which has to be found, in applying the section, is that the rent includes payment in respect of attendance. It is those payments which have to be considered. When you find an undertaking to do something which is clearly in itself for the benefit of the landlord, the court, in deciding whether in the rent there is to be found an element of payment in respect of the doing of that thing, is perfectly entitled, as it seems to me, to say that the only element of payment which one is to have regard to here is payment for what the tenant, and the tenant alone, gets and pays for. What the tenant has paid for is that element in the advantage of the attendance which goes beyond the landlord's own advantage. I cannot agree that the judge misdirected himself in any way, therefore, in taking into account the element of benefit to the landlord.

With regard to No. 19—the provision of personal services of a caretaker for the purpose of carrying up wood, coals and so forth—the fact is that the tenant used electric fires and did not make use of those services, and had no need for them. The judge, accordingly, held (and I think he was fairly entitled to hold) that no value to the tenant must be attributed to that particular undertaking by the landlord.

Similarly, with regard to the bucket of refuse, the tenant was entitled to one bucket a day, but she in fact needed only one bucket a week. There, again, the judge was entitled to take the view he did that the proper method of valuing that service from the tenant's point of view was to have regard to her actual needs. No doubt in some cases it is not right to treat as being valueless to the tenant something which the tenant does not in fact use. The possibility of having use of it may be of value to him, but whether it is or whether it is not is a question for the county court judge to decide. In the present case the county court judge has held that the only value of this particular provision to the tenant was the value to be attached to the right to have one bucket of refuse a week carried down for her.

In the result, on neither branch of the appellants' argument can I find that the judge has fallen into any error of law. The appeal must be dismissed with costs.

MacKinnon, L.J.: I agree. This Act, in conceivable circumstances, may lead to very strange results, but that arises from the terms in which it is drafted. I think that the plaintiff was lucky in the amount of damages she was awarded, but there, again, that is a matter for the county court judge to decide, and we cannot interfere with his decision. I agree that the appeal fails.

Finlay, L.J.: I also agree. I only want to add one word on the construction of the 1920 Act, s. 15, which is, no doubt, the important point in this appeal. I agree with what Lord Greene, M.R., has said. For myself, I cannot see that the construction of the section admits of any doubt. You may think of reasons why the section might have been expressed differently, but it seems to me to bear only one construction. The words, so far as they are material, are:

> A tenant . . . shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, . . ,

Of course, if there was a term or condition inconsistent with the provisions of the Act, quite different considerations would come into play; but, unless that point arises, it seems to me that the section is perfectly plain in saying that, so long as the tenant retains possession, he is to observe, and he will be entitled to the benefits of, all the terms and conditions of the original tenancy. I have nothing further to add, as I entirely agree with the judgment of LORD GREENE, M.R.

Appeal dismissed with costs.

Solicitors: *Williamson, Hill & Co.*, agents for *Russell, Orme & Dykes*, Ledbury (for the appellants); *Barlow, Lyde & Gilbert*, agents for *Ivens, Thompson & Green*, Cheltenham (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DAVIDSON *v.* HANDLEY PAGE, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **December 19, 20, 1944.**]

Master and Servant—Duty of master—Provision of safe appliances—Slippery duck-board—Servant injured while washing teacup for her own use—Course of employment—Acts reasonably incidental to daily work.

The appellant was employed by the respondents to work in one of their workshops, in which there was a row of vats containing a liquid called suds and used for oiling the lathes. The liquid was frequently spilled while being carried to the lathes, thus rendering the floor slippery. In order to remedy this danger, labourers were employed to clean the floor from time to time, or to put sawdust on it. Above the row of vats was a water tap and beneath was a loose wooden board, called a duck-board, which was used for reaching the vats or the tap. While going to the tap in order to wash a teacup for her own use the appellant slipped on the duckboard and suffered personal injuries. At the time of the accident suds had been splashed over the duck-board and no sawdust had been put on it. The appellant brought an action claiming damages for personal injuries, but the county court judge held that, although the respondents had failed in their duty of providing a safe system of work, the appellant was not entitled to recover since, at the time of the accident, she was engaged in an activity not directly connected with her work. Before the Court of Appeal, the respondents also raised the defence of *volenti non fit injuria*, stating that two water taps were available and that, in selecting the one in a dangerous place, the appellant had voluntarily accepted the risk:—

HELD: (i) the obligation of the employer to provide safe appliances extends to cover all acts normally and reasonably incidental to the daily work, and, therefore, extended to the appellant's case.

(ii) the defence of *volenti non fit injuria* was not open to the respondents since it had not been put forward in the county court.

[**EDITORIAL NOTE**, This case considers the extent of an employer's duty to provide safe appliances for his workmen. It is held that this is not limited to the period during which a workman is performing the work which he is engaged to do, but extends to the time while he is there for that purpose but is actually performing the ordinary incidental acts of a day's work. This is consistent with the decisions under the Workmen's Compensation Acts, relating to accidents occuring during such incidental acts, of which *Fearnley* v. *Bates & Northcliffe, Ltd.* ((1917) 10 B.W.C.C. 308) may be taken as an example.

AS TO MASTER'S DUTY TO PROVIDE AND MAINTAIN PROPER PLANT AND APPLIANCES, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187, 188. para. 314, and pp. 189, 190, para. 317; and FOR CASES, see DIGEST, Vol. 34, pp. 196-198, Nos. 1602-1623.]

Case referred to:

*(1) *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.

APPEAL by the plaintiff from a decision of His Honour JUDGE ALCHIN, given at the Barnet County Court and dated Aug. 8, 1944. The plaintiff had brought an action claiming damages for personal injuries. The liability was put on three grounds, (i) at common law, (ii) under the Factories Act, 1937, s. 25, and

(iii) under the Factories Act, 1937, s. 26. The action was originally brought in the High Court but was remitted to the Barnet County Court. The facts are set out in the judgment of Lord Greene, M.R.

R. T. Monier-Williams for the appellant.

R. Marven Everett for the respondents.

Lord Greene, M.R. : In this case we have the advantage of an admirable note of the evidence by the county court judge and a very clear statement of the reasons for his decision. The liability which it is sought to fix upon the respondents is put on three grounds, two of them under two sections respectively of the Factories Act, 1937, and one at common law. Having regard to the view which I have formed of the third of those grounds, it is not necessary or desirable that I should express any opinion as to the application of those sections of the Factories Act.

The accident took place in a part of the shop where there were standing a number of vats or bins containing a liquid called suds. The suds were used for the purpose of oiling and cooling the lathes which were in use in the shop. Those vats or bins stood in a row against the wall, and above them at one point there was a tap. From time to time buckets full of suds were taken from the bins, sometimes by the workmen themselves and sometimes by labourers, part of whose duty it was to carry the buckets when required. In the process of carrying, it frequently happened that liquid fell to the ground or splashed out of the buckets and in consequence the floor became slippery. In order to deal with that situation, which was one of danger, the employers had a system under which labourers were provided, and in particular one labourer called Marsh, whose duty it was, among other things, from time to time to clean the floor or to put sawdust upon it and so prevent it from becoming slippery. There was provided, in the neighbourhood of this row of vats or bins, a loose duck-board—it was not exactly a duck-board but it was a loose wooden step a few inches high, put there in order to enable workmen to dip buckets into the tubs and fill them with suds. From the position in which it was kept it is clear that it might also be used for enabling a person to obtain access to the tap. It does not appear what the precise function of the tap was or for what purpose it was intended to be used ; so long as the duck-board was there a person wishing to get to the tap had to walk and stand on the duck-board. The plaintiff suffered her injury while she was in the act of going to the tap for the purpose of cleaning a cup from which she took her tea or other liquid refreshment ; it was caused by her slipping on the duck-board which at that moment was in a slippery condition owing to suds having been splashed over it and no sawdust having been put down to render it safe.

Subject to a point which I will mention in a moment, I do not think it can be disputed that if she had received her injury while going to the tap for a purpose immediately connected with her work (e.g., for the purpose of cleaning a tool) there would have been a breach of duty on the part of the employers for which they would be liable. It is the duty of an employer—and to that extent he loses the benefit of the doctrine of common employment :

> . . . to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is three-fold . . . Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation.

That is a short statement of a part of the principle taken from the speech of Lord Wright, in *Wilsons and Clyde Coal Co.* v. *English* (1), at p. 84 ([1937] 3 All E.R., at p. 644). The obligation to maintain proper plant and appliances is only one of the three obligations which are commonly classified together—another one, of course, being the obligation to provide a safe system of working. In the present case the employers provided what I think can only be called an appliance, namely, the duck-board. The duck-board was in a dangerous condition and was liable to get into a dangerous condition at any moment through the dropping of suds upon it. It was the duty, therefore, of the employers to take reasonable steps to see that the danger was nullified and that their employees were not exposed to it. It was suggested that this duck-board ought to be regarded as a part of the premises, and it was said that in respect of the condition of the premises themselves, as distinct from plant and appliances, the measure of the employer's duty is less than it is in respect of the actual plant and appliances themselves. I very much doubt the correctness of that proposition but it is not necessary to investigate it, for the simple reason that the particular article with which we have to deal was, I think, clearly an appliance provided for the purpose of enabling a person to reach a point which, without it, he would not have been able to reach. It was fulfilling precisely the same function as a ladder or a pair of steps fulfils when the heights which have to be dealt with are greater than they are here. The employers here had a system of rendering that particular dangerous thing safe. The system consisted of having a labourer who was instructed, among other duties, to put down sawdust when he thought it necessary. The judge, directing himself quite properly as to the law, held that this system of rendering this dangerous thing safe was not a proper system and that the dangerous condition of the duck-board at this moment was not to be attributed to the casual negligence of Marsh in not putting down sawdust when it was required. I think that the judge's conclusion on this point was based on a correct apprehension of the law and was amply supported by the evidence. This duck-board was liable to become dangerous at any moment, and (although it may seem a little bit hard on employers in a place like a factory) if the system adopted for rendering a dangerous thing innocuous is one which depends on the more or less fortuitous presence of the workman there at a particular moment, there is ample evidence on which the judge could say that that was a bad system and that the only proper system would have been one under which continuous attention was given. The facts as found by the judge appear to me to be based on adequate evidence and we cannot interfere with his conclusion.

The position would, therefore, have been quite clear if the activity in which the plaintiff was engaged had been directly connected with her work. The judge, quite clearly, would have held that liability existed had that been the case. But the matter in respect of which he held that the plaintiff failed was this. He said that when she went to the tap she was not going there for the purpose of her work, that she was going there for the purpose of washing her cup; and on that basis he held that the obligation of the employers at common law did not extend to the case and she was a mere licensee. It was argued by counsel for the plaintiff that even if she were a mere licensee his client was nevertheless entitled to recover. I do not find it necessary to express a concluded opinion on that argument but I can see great difficulties in the way of it, because she knew that the place on which she was going to put her feet, namely the duck-board, was apt to be dangerous and she did not investigate in order to see whether at that moment it was or was not dangerous. I prefer to examine the question by considering the extent of the common law obligation of an employer in respect of providing safe "appliances"—to use the word which I think is appropriate to this case. Does his obligation extend and apply only during such period as the workman is performing the acts of workmanship which he is engaged to do, or does it extend so as to cover any of those ordinarily and reasonably incidental acts which in the course of a day's work 999 workmen out of 1,000 will find occasion to perform? A workman may require to tie up his boot-lace; he may require to go to a tap to get a glass of water while he is working. He is not employed and paid to tie up his boot-lace, nor is he employed and paid to quench his thirst. But it seems to me that it would be an extravagant result if the common law obligation of the employer suddenly came an end the moment the workman ceased to perform the precise acts he was employed to perform and did something which was ordinarily and reasonably incidental to his day's work. It would lead to the most extraordinary results, if you take the present case. If the doctrine were as extreme as that, it would mean that if two workmen had gone to this tap, one for the purpose of cleaning his tools and the other for the purpose of drawing himself a glass of water to drink and both of them had met with an accident because the duck-board was dangerous, one would be entitled to recover and the other would not. It seems to me that the obligation of the employer extends to cover all such acts as are normally and reasonably incidental to a man's day's work. To take another example, if men are working on a scaffold at the top of a high ladder and one of them goes down the ladder to get a bag of nails and another goes down the ladder to go to the latrines which are provided, the one going down the ladder to get the nails would be protected by the employer's duty with regard to the provision of a safe ladder and the one going down to go to the latrines would not. I certainly am not going to be the first to lay down the proposition that the employer's obligation is limited in that way.

If that be a correct appreciation of the law, it has to be considered whether it applies to the present case. In the present case there were two places recognised for washing cups. The washing of cups was quite clearly regarded as an ordinary normal thing that these employees would do for the purpose of taking liquid when they needed it. No suggestion was put to any of the witnesses that it was a wrong or forbidden practice; there was no reference made to it by the witnesses for the defendants and we must take it, as the judge found, that the plaintiff was washing her cup for the purpose of necessary refreshment and that the use of the tap was with the tacit permission of the defendants. I do not think that I am misunderstanding the argument of counsel for the defendants. It was conceded by him that if she had gone to this tap for the purpose of drawing a glass of water in the course of her work it would have followed that the liability existed. To take a case on the other side of the line, I should imagine that if she had gone to the tap for the purpose of washing a pair of stockings the liability would not have existed because then she would have been doing something which was not one of the ordinary little things which a workman can be expected normally to do in the course of his day's work. But in the present case she was going, as the judge finds, for the purpose of washing her cup in order to take necessary refreshment and she did that (if that be material) not during the dinner hour but just before it began. If there was anything in the shape of filching a few minutes more than she was entitled to for her dinner, that ought to have been put to her; but no suggestion of the kind was made in the evidence. On the facts as found, I can see no difference between the present case and the case as it would have been if she had merely gone, in the course of her morning's work, to draw a glass of water because she was thirsty; and, in my opinion, the obligation of the employers extends to such a case.

There is one last point on which I should say something. Counsel for the defendants argued that the case was one where the principle of *volenti non fit injuria* should apply. He did not suggest that in the ordinary case where an employer has failed in his duty to take reasonable care to provide proper appliances the doctrine *volenti non fit injuria* would apply, but what he said was this: "Here was a case where there were two places from which she could select one in which to wash her cup; one of them was a dangerous place; the other must be taken to have been a safe place. She deliberately chose a place which she knew might be dangerous and, therefore, must be taken to have accepted the risk which arose from the negligence of the employers in not taking the necessary steps to make the approach safe." I do not think that that argument is really open to counsel for the defendants. This was a remitted action. There were pleadings while the action was still pending in the High Court, and the defence was signed by counsel. There is no suggestion of such a defence in the pleading, no such argument was adduced before the county court judge, and when the evidence is examined it is, in my opinion, quite inadequate to establish the proposition which counsel for the defendants puts forward. No particulars are given as to the other place at which cups could be washed: we were told that it was at the canteen but there was no evidence about it, nor was the matter pursued in any way before the county court judge. If that had been a defence which was being relied on, obviously more evidence ought to have been called and questions particularly directed to that matter ought to have been put to the witnesses. The fact that they were not put was due to the circumstance that the defence was not being put forward in the county court. Therefore, without expressing any opinion as to whether such a defence could succeed if it were open and there were facts sufficient to support it, I find that the defence is not one which is open to the defendants in the circumstances of this case.

In the result the appeal must be allowed and there must be judgment for the plaintiff for the amount (which is not in controversy) at which the county court judge assessed the damages in the event of the matter coming to this court and his judgment being reversed.

Finlay, L.J.: I agree.

Morton, L.J.: I also agree, and I only desire to add a few words, in regard to one argument which was put before us by counsel for the defendants. He contended that there was no evidence to support the county court judge's finding that the system adopted by the defendants to diminish the dangers due to the spilling of suds round the tank was inadequate and unsatisfactory, and that, if that finding were right, it would have been necessary for the defendants to have somebody stationed constantly beside the board, which has been referred to as a duck-board, in order that immediately any suds were spilled upon it they should be removed and sawdust applied. He suggested that that was not a reasonable precaution to expect the employers to take. One answer to this contention is that it would have been open to the defendants, the employers, to provide what the county court judge has described as something in the nature of a metal grating similar to a door-scraper, so that the suds could have passed through it. Instead of that they chose to provide a board which is described by the judge as follows:

> . . . it was of solid construction with a smooth wooden top and was of a dark colour, apparently from constant wetting with oil and water.

The defendants elected to supply that form of appliance, and under the circumstances it was their duty to see that it was not unsafe; they could have avoided the risk either by the elaborate precautions to which counsel for the the defendants referred or by the much simpler precaution of providing another form of duck-board which could have been stood upon without risk. For these reasons, as well as the reasons already given by my Lord, I think that that argument cannot be supported.

Appeal allowed with costs.

Solicitors: *Davies, Arnold & Cooper* (for the appellant); *L. Bingham & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

REECE *v.* MINISTRY OF SUPPLY AND MINISTRY OF WORKS AND PLANNING.

[Court of Appeal (Scott and Finlay, L.JJ., and Uthwatt, J.), **November 30, December 1, 8, 1944.**]

Workmen's Compensation—Stonemason—Industrial disease—Silicosis—Workman exposed to silica dust from time to time—Whether employed in a scheduled process—Successive employers—Whether workman should be directly engaged in a type of work specified in the Scheme—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 47)—*Various Industries* (*Silicosis*) *Scheme,* 1931 (*S.R. & O.,* 1931, *No.* 342).

The appellant was employed as a stonemason by the Ministry of Works from 1936 to 1941. He was then transferred to the Ministry of Supply by whom he was engaged on similar duties from time to time at a haematite iron ore mine underground. In Jan., 1943, he ceased work and the certificate of the Medical Board stated that he was suffering from silicosis as a result of his employment. He was earning enough in other employment for his claims for the future to be reduced to an application for a declaration of liability against the respondents under para. 2 of the Various Industries (Silicosis) Scheme, 1931. In refusing his application, the county court judge held: (i) that the appellant was not employed at any time in the processes covered by para. 2 of the scheme; (ii) that if the judge was wrong in that finding, then the appellant was not so employed to such an extent as to come within the scheme:—

Held: (i) the Various Industries (Silicosis) Scheme, 1931, imposes no requirement, express or implied, as to length, continuity or frequency of the time during which the appellant had to be "employed" in one or other of the named processes capable of causing the disease in order to bring him within its provisions.

(ii) the appellant was in fact engaged on work involving a risk to his health which was covered by the provisions of the scheme. "Employed" as used in the scheme meant "engaged in the processes," that is, "working at them."

[**EDITORIAL NOTE.** The main point here is the consideration of what amounts to "employment" for the purpose of a scheduled disease. Silicosis is a disease of gradual onset and it is held that a workman need not be continuously engaged in a process involving risk of exposure to the disease. Employment from time to time is sufficient; and the test is that laid down by Lord Hanworth, M.R., in *Kilbride* v. *William Harrison, Ltd.* (2), when he says that there must be reasonable evidence that the workman "has done this operation so reasonably often as to make it justifiable to say that he had been employed in it."

For the Various Industries (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 342), and the Sandstone Industry (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 346), see WILLIS'S WORKMEN'S COMPENSATION, 36th Edn.]

Cases referred to:

*(1) *Morgan* v. *Amalgamated Anthracite Collieries, Ltd.*, *Hutchings* v. *Amalgamated Anthracite Collieries, Ltd.* (1935), 28 B.W.C.C. 358; Digest Supp.

*(2) *Kilbride* v. *William Harrison, Ltd.* (1933), 26 B.W.C.C. 197; Digest Supp.

Appeal by the workman from an award of His Honour Judge Thomas made at Monmouth County Court and dated Aug. 17, 1944. The facts are fully set out in the judgment of the court delivered by Scott, L.J.

F. W. Beney, K.C., and *R. M. H. Everett* for the appellant.

The Solicitor-General (*Sir David P. Maxwell Fyfe, K.C.*), and *H. H. Roskin* for the respondents.

Scott, L.J. [delivering the judgment of the court]: The workman was a stonemason, admittedly disabled by silicosis from following that trade and certified by the Medical Board; but at the time of the hearing he was earning enough in other employment for his claims for the future to be reduced to a declaration of liability. If there is liability for past payments of compensation there will be an order for a new trial on the question of their amount. According to the argument for the workman both below and before us, his "last employer" (against whom he had under the legislation to proceed) was the Minister of Supply. The previous employer was the Ministry of Works and Planning, who were added by amendment in consequence of an unjustifiable attitude taken up by the Ministry of Supply. The case for the Crown as respondent was argued before us by the Solicitor-General. The judge's judgment, delivered nearly 11 weeks after the second day of hearing, is almost unintelligible in the light of his notes of the evidence, but we are satisfied that he has misunderstood or misapplied the law applicable, and that makes it necessary to refer to it in some detail.

The legislation about "industrial diseases" began with sect. 8 of the 1906 Act, and the general nature of the statutory structure then erected has been preserved by Parliament ever since. Its object is to make an industry conducted by processes, the nature of which is prone to cause specific diseases, carry its own casualties due to those diseases. An essential feature, however, of those diseases is that it is impossible, or at least extremely difficult, to know precisely either how and in whose employment or when a particular workman first contracted his disease. To fit the proposed extension of the benefit of workmen's compensation into the pre-existing statutory framework, Parliament accordingly adopted the device of rather elaborate but very sensible machinery. It directed (i) that an attack of certain diseases, which resulted in incapacity for work, should be treated as if it had been an injury by accident arising in the course of and out of the employment; (ii) that the date of the putative injury should be fixed by the medical certificate, which was also to be conclusive evidence that the disease was caused by the nature of the processes the workman had been performing; (iii) that the last employer in the employment to the nature of which the disease was due should be the party responsible for payment of the compensation, with a right of contribution from previous employers in a similar category; and (iv) that if immediately before the incapacity arose the workman was employed in one of the processes scheduled to the Act, the disease should be deemed to be due to the nature of the process unless the employer proved the contrary. The retrospective scope of the 1906 Act was limited to 12 months before the date (in effect) from which the medical certificate treated the workman as disabled. This system was in the main reproduced in the 1925 Act, sects. 43 and 44; but its scope was widened considerably by sect. 47, which delegated to the Secretary of State powers not only to add new diseases to the list but to make schemes of delegated legislation amending and enlarging the scope of the existing legislation. The Acts of 1930 and 1943 made certain further extensions not relevant to the present appeal. It is with the delegated legislation contained in two such schemes that we are concerned: The Various Industries (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 342), and the Sandstone Industry (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 346). The former is the important one; it is printed in WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., at pp. 1011-1018. On the same day two other Silicosis Schemes were made: the Metal Grinding Industries (Silicosis) Scheme, 1931, (S.R. & O., 1931, No. 343), and the Asbestos Industry (Asbestosis) Scheme, 1931 (S.R. & O., 1931, No. 344). The Various Industries (Silicosis) Scheme, 1931, as amended, provides (*inter alia*) by para. 2 that it is to:

> . . . apply to all workmen employed at any time . . . in any of the following processes:—(i) mining . . . of silica rock [defined as meaning various rocks, including sandstone]; . . . (iv) . . . dressing, shaping, cutting or carving of silica rock; . . . (vi) handling or moving of silica rock . . . or dry residue of silica . . . the processes mentioned in [sub-para. (iv)]; . . . (viii) in the under-mentioned trades, the processes specified and those processes only . . . haematite iron ore mines:—any operation underground. [Then follows a general proviso that] nothing in this scheme shall apply to the employment of a workman in any process included in . . . the Metal Grinding Industries (Silicosis) Scheme, 1931 or the Sandstone Industry (Silicosis) Scheme, 1931.

The various silicosis schemes (of which there were two others besides those I have mentioned) were thus intended to be self-contained and independent of each other. Para. 3 defines "processes" as those in para. 2. Para. 4 says:

> Where the medical board [appointed by the Secretary of State under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, which was made on Apr. 30, 1931] certify:—(3) that a workman, though not totally disabled, is suffering from silicosis . . . to such a degree as to make it dangerous for him to continue work in the processes, and is for that reason suspended from employment; and where the disease is due to employment in the processes whether under one or more employers, the workman . . . shall be entitled to claim compensation as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Act, but subject to the modifications hereinafter contained. Provided that no compensation shall be payable:—(*a*) if the medical board certify that the silicosis cannot have been contracted in the processes owing to the shortness of the time during which the workman has been employed therein . . . [Paras. 5 and 6 are important] 5. If the workman has been employed in the processes for a period or periods amounting to not less than five years, the disease shall be deemed to be due to employment in the processes unless the employer proves the contrary. 6. For the purposes of this scheme the date of the injury shall be deemed to be the date on or from which the workman is certified to be totally disabled or, while not totally disabled, is suspended from employment or, in cases where the workman dies without having been certified to be totally disabled or suspended, the date of death. [Para. 8 (1) says] The compensation shall be claimed and recoverable from the employer who last employed the workman in the processes; . . .

Para. 8 (2) provides for recovery by the last employer from other employers in the preceding five years.

The main argument for the Crown as respondent before us was that the issue before the county court was one of fact and, therefore, unappealable; but we do not think that the judge could possibly have arrived at his conclusions without error of law. The Solicitor-General's chief contention was that it was open to the county court judge, under the scheme, to deal at large with the question as to what proportion of the workman's time had been spent during the relevant period upon work in "processes" covered by para. 2 and to decide quantitatively whether in his opinion enough time had been so spent to bring the workman within the scheme. Counsel for the appellant conceded the ordinary principle of *de minimis* but submitted that the scheme did not contain any requirement as to either continuity of employment in the processes or frequency of such exposure or length of such exposure in the course of the employment. We were unable to get from the Solicitor-General any quantitative limitation, as he relied simply on his submission that it was for the county court judge to decide as a matter of estimation whether the exposure had been sufficient to bring the workman within the scheme. And this, indeed, would appear to have been the view taken by the judge himself—so far as his judgment permits us to discern what his view was. We agree with the submission of counsel for the appellant that the Various Industries (Silicosis) Scheme imposes no requirement, express or implied, as to length, continuity, or frequency of the time during which the workman has to be "employed" in one or other of the named processes capable of causing the disease. It could easily have done so had that been the intention of the Secretary of State. Para. 2 says merely that the scheme is to apply to "workmen employed at any time in the processes" and contains no condition whatsoever as to time. But note the contrast afforded by the Metal Grinding Industries (Silicosis) Scheme, although otherwise similar and on all fours with the Various Industries (Silicosis) Scheme, it does impose such a condition, contained in its exactly parallel para. 2, which says:

> Provided that nothing in this scheme shall apply to the employment of any workman in the processes mentioned in (i) or (ii)—(*a*) if such employment was occasional only and for not more than eight hours in any week.

The same is true of the Asbestos Industry (Asbestosis) Scheme, 1931, and of the Refractories Industries (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 345). All those schemes made in 1931 were produced in a batch even though two of three of them were of slightly later date than the Various Industries Scheme —the Refractories Industries Scheme being made on May 11 and the Sandstone Industry Scheme on May 20. Both of these are referred to in paras. 12 and 13 of the Schedule of all the Schemes dated Apr. 30, although they had not at that date been promulgated. Having regard to that inter-connection between all these schemes, it seems to us very difficult for the Crown to contend with success that, even if the employment was "only occasional" or "for less than eight hours a day" it should be disregarded by the court in considering whether the workman had been employed in the named processes.

The Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (S.R. & O., 1929, No. 2), as amended by the Workmen's Compensation (Cataract) Order, 1932 (S.R. & O., 1932, No. 424), contains in para. 2 an express provision about "long continued exposure," which illustrates the above point of interpretation very clearly. Silicosis, we were told, is a disease which comes on very gradually, no one knowing when it first starts. It is not an infection by germs but a gradual accumulation of particles in the interstices of the lungs, with the result that when the lung has become to a certain degree clogged up a very slight further inhalation of the silica dust may produce a disabling attack of the disease. The very fact that the exposure during a minimum antecedent period of five years is made by the scheme a condition of the statutory presumption in favour of the workman that his disability is due to whatever exposure to the dust he has suffered is, in my opinion, conclusive that "employment" in the processes from time to time is sufficient exposure to establish the presumption. The words "employed at any time in the processes" contain a latent ambiguity in that the word "employed" may mean either contractually employed or merely engaged in the processes, that is, working at them. The latter is the true meaning, but it may be that a reading of them in the other sense vitiated the argument addressed to us for the Crown; for in discussing the relevant named processes of sub-paras. (iv) and (vi) the Solicitor-General submitted that "the workman must be employed on the job of, for instance, a cutter or dresser"—using the word "job" almost as the equivalent of the trade of a joiner or of a cabinet maker. In our opinion, that is not the true sense in which the word "employed" is used in the schemes in relation to the named processes. The word has no relation to the capacity in which the employer contracts to employ the workman. The whole emphasis of the legislation is on the nature of the process on which the man is in fact engaged, because of the risk to health which it involves. Had the word used been "engaged" that meaning would have been apparent; but one of the meanings of the word "employed" is "engaged," and we have no doubt that that is the true meaning of the word "employed" in these schemes. In truth the reasoning, though not the decision, in the House of Lords in *Morgan* v. *Amalgamated Anthracite*

Collieries, Ltd. (1) is sufficient authority for the proposition that employment in the processes from time to time during the required period of five years—in the sense that the workman is engaged in performing the process—is sufficient to satisfy the statutory requirement. In that case the judgment of the county court judge, affirmed by the Court of Appeal, that the workman had not been "employed" in the process, was reversed. Lord Atkin said, at p. 365:

> It cannot be suggested that the clause only applies to workmen exclusively employed in a specified process . . . [and on p. 366 he said] I think therefore that if the workman's employment is such that he is from time to time employed in a specified process but by reason of that employment of which the process forms a part he is exposed to silica dust and contracts the disease he is entitled to compensation.

We are satisfied that there was no such deficiency of evidence of the "employment" of the workman in the named processes as would justify a decision of the judge that he was not employed in the processes. The criterion stated in the judgment of Lord Hanworth, M.R., in *Kilbride* v. *Harrison* (2) as to the "reasonable frequency" of such employment was fully met.

The workman's evidence, even on the abbreviated notes of the judge, contains repeated statements that he was employed in the named processes: and there is no hint anywhere in the notes or the judgment that the judge disbelieved the applicant. The witnesses for the Ministry of Works did not say he was not so employed; they only sought to minimise the extent of that employment or the number of such processes in which he had been engaged. The workman had been a stone-mason all his working life, and a list of his employers and the types of work he and they were engaged in, made by the workman and sent to his trade union, was before the court and is with our papers. It shows that he had been exposed to the risks of the disease for many years before Sept., 1936, when he was first employed by the Ministry of Works in their Ancient Monuments Branch. He was, therefore, very likely a typical subject to contract the disease with comparatively little additional exposure to silica dust. He did not, however, first claim against that Ministry because he, quite properly, supposed that the Ministry of Supply was "the last employer" under the scheme, and he, therefore, treated them as the proper respondent. It was only when they denied that he had been employed by them at their haematite iron ore mine underground that *ex majore cautela* he added the Ministry of Works under an alternative claim against them. Under the penultimate process of the Scheme, namely, "any operation underground in a haematite iron ore mine," he had an unanswerable case for treating the Ministry of Supply as "the last employer"; but the correspondence shows that the solicitors acting for the Ministry of Supply, on the instructions of the Ministry, not only denied liability but flatly denied the statement of his solicitors in the letter of Nov. 8, 1943, that the appellant "at one time went down the mine every day for a week." In that letter they asked the Ministry's solicitors to make enquiries as to the truth. The solicitors evidently made the enquiry as they wrote back the very next day:

> We have to inform you immediately that the statement made by your client is denied.

In fact the Ministry's own books at the mine showed all the times worked by the appellant underground duly recorded. The Solicitor-General, most properly, recognised that the Ministry's conduct was inexcusable and apologised to the court; but we feel bound to comment gravely upon the levity, coupled with insistence, with which the categorical statements were made. It is contrary to the high traditions of our civil service.

The judge held, first, that the appellant was not employed at all in the processes in question; and, secondly, if he was wrong in that finding, that he was not so employed to such an extent as to come within the scheme; and added in ink to his typed findings the words "as a fact." We regard it as quite beyond doubt that he misunderstood the law and that his decision was, in spite of those written words, a decision of law, and erroneous. There was a third finding by the judge, namely:

> In so far as it may be material, I find further that neither respondent was the last employer in any process under the scheme.

In light of the preceding findings, the third finding, if read as a finding of fact or as involving a finding of fact, can only be treated as a finding that some person other than the respondents was the last employer of the applicant in a process under the scheme. On the hearing of the appeal the Solicitor-General, while putting the point to us, properly did not press it, for it was not pleaded that some third party was the last employer in a process under the scheme and there was no evidence from which that conclusion could be drawn.

The appeal must be allowed with costs here and below, the whole of them to be paid by the Ministry of Supply. If there are any outstanding questions of past compensation, there will be a new trial as to amount.

Appeal allowed with costs.

Solicitors: *W. H. Thompson* (for the appellant); *Treasury Solicitor* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Dictum of LORD GREENE, M.R., at p. 245, *applied.* CANADA STEAMSHIP LINES, LTD. *v.* REGEM. [1952] 1 All E.R. 305.

ALDERSLADE *v.* HENDON LAUNDRY, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon L.J., and Uthwatt, J.), **January 22, 23, 24, 1945.**]

Contract—Laundries—Loss of article—Primary duty of laundry to launder—Ancillary obligations—Common law duty of a laundry company—Clause in contract limiting liability for loss—Liability only in cases of negligence—Limitation clause applicable to claim for lost articles.

The appellant laundry company lost certain articles received by it from the respondent for laundering. The terms upon which the company accepted its customer's goods included a clause in the following terms: "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering." In an action by the respondent for damages, the appellant company sought to limit its liability by relying on this clause. The county court found that as the loss arose out of the company's negligent manner of carrying on its business, the clause limiting liability did not apply. It was contended for the appellant company that as the damage in respect of which limitation of liability was sought to be imposed by the clause was one which rested on negligence and nothing else, the clause must be construed as referring to negligence, because if it were not so construed it would lack subject-matter. On behalf of the respondent it was contended that the loss of the respondent's property might take place either by negligence or by mere breach of contract, and, therefore, in the absence of clear words referring to negligence, loss through negligence could not be taken to be covered by the clause:—

HELD: (i) the primary obligation of the laundry company being to launder, it must be performed according to its terms and no question of taking due care entered into it. There were, however, certain ancillary obligations which only imposed on the laundry company the duty of taking reasonable care of the goods while in the company's possession or while being delivered to the respondent customer.

(ii) the necessity for limiting liability for goods lost could arise only in a case where the goods were lost by negligence and, therefore, the limitation clause applied to the claim of the respondent.

[**EDITORIAL NOTE.** The effect of the line of authority represented by *Rutter* v. *Palmer* (1) is that where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence only, the clause must be construed as extending to that head of damage. A laundry does not undertake an absolute obligation to return the goods, but to take reasonable care only and a claim against them for loss depends upon proof of negligence. The limitation clause, therefore, must be construed as applying to loss through negligence, since otherwise it would lack subject-matter.

AS TO OBLIGATIONS OF A BAILEE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 748-750, para. 1232; and FOR CASES, see DIGEST, Supp., Bailment, Nos. 140*a*, 140*b*, 211*a*.]

Cases referred to:

*(1) *Rutter* v. *Palmer*, [1922] 2 K.B. 87; Digest Supp.; 91 L.J.K.B. 657; 127 L.T. 419.

(2) *Turner* v. *Civil Service Supply Assocn., Ltd.*, [1926] 1 K.B. 50; Digest Supp.; 95 L.J.K.B. 111; 134 L.T. 189.

(3) *Fagan* v. *Green & Edwards, Ltd.*, [1926] 1 K.B. 102; Digest Supp.; 95 L.J.K.B. 363; 134 L.T. 191.

APPEAL by the defendants from a decision of His Honour JUDGE DRUCQUER, made at the Willesden County Court, and dated Oct. 18, 1944. The facts are fully set out in the judgment of LORD GREENE, M.R.

H. Heathcote-Williams for the appellants.

H. Lester for the respondent.

A LORD GREENE, M.R.: The terms upon which the laundry company accepted its customer's goods included a clause in the following terms:

The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering.

The company relied on that clause for the purpose of limiting its liability to the plaintiff in respect of certain handkerchiefs which he had sent to be laundered but B which were not returned to him. It was admitted at the hearing that the handkerchiefs were sent, were not returned, and cannot now be found. That last admission seems to me to be capable of one construction only, namely, that the handkerchiefs are lost. By admitting that they cannot be found the plaintiff must, I think, be taken to have admitted that the laundry company had taken all reasonable steps to trace them. The case must, therefore, be approached C upon that footing. The county court judge considered that the company had a negligent manner of carrying on its business, relying upon certain evidence given by the plaintiff which showed that he had on occasions received from them articles of clothing which did not belong to him, and on one occasion when the laundry company were informed of this they made no attempt to recover the article from him with a view to returning it to its true owner. On that footing he considered that this clause limiting liability did not apply. It was argued D before us for the laundry company, the appellants, that the clause did apply and was effective to limit liability for lost articles; and reliance was placed on a well-known line of authority dealing with clauses of this description. The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so E construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability F and not to liability based on negligence. A common illustration of the principle is to be found in the case of common carriers. A common carrier is, to use a common expression though it may not be quite accurate, an insurer, and his liability in respect of articles entrusted to him is not necessarily based on negligence at all. Accordingly, if a common carrier wishes to limit his liability for lost articles and does not make it quite clear that he is desiring to limit it G in respect of his liability for negligence, then the clause will be construed as only extending to his liability on grounds other than negligence. But if, on the other hand, the carrier, not being a common carrier and being only under an obligation to take reasonable care, makes use of that clause, then unless it is construed so as to cover the case of negligence there would be no content for it at all. That, broadly speaking, is the principle which falls to be applied in this case.

H I do not propose to go through the various authorities to which we have been referred. I may mention perhaps one or two of them: *Rutter* v. *Palmer* (1); *Turner* v. *The Civil Service Supply Association* (2); *Fagan* v. *Green & Edwards, Ltd.* (3). It must be remembered that a limitation clause of this kind only applies where the damage, in respect of which the limitation clause is operative, takes place within the four corners of the contract. A contracting party who goes outside his contract cannot rely upon the clause if the loss occurs during operations outside the contract as distinct from operations which the contract contemplates. But there is no room for the application of that principle in the present case because there is no material for finding that the loss of these handkerchiefs was due to some act by the laundry company outside what it had contracted to do. How and where they were lost is unknown.

It was argued by counsel on behalf of the respondent that the clause must be construed in the present case so as to exclude loss by negligence, and the county court judge so held. It was said that the loss of a customer's property might take place for one of two reasons, namely, negligence and mere breach of contract, and, that being so, in the absence of clear words referring to negligence, loss through negligence cannot be taken to be covered by the clause. In my opinion that argument fails. It is necessary to analyse the legal relationship between the customer and the laundry. What I may call the hard core of the contract, the real thing to which the contract is directed, is the obligation of the laundry company to launder. That is the primary obligation ; it is the contractual obligation which must be performed according to its terms, and no question of taking due care enters into it. The laundry company undertakes, not to exercise due care in laundering the customer's goods, but to launder them, and if it fails to launder them it is no use saying, "I did my best, I exercised due care and took reasonable precautions, and I am very sorry if as a result the linen is not properly laundered." But in addition to that, which is the essence of the contract, there are certain ancillary obligations into which the laundry company enters if it accepts goods from a customer to be laundered. The first one relates to the safe custody of the goods while they are in the possession of the company. The customer's goods may be waiting in the laundry premises to be washed ; while they are so waiting there is an obligation to take care of them, but it is in my opinion not the obligation of an insurer but the obligation to take reasonable care for the protection of the goods. If while they are waiting to be washed in the laundry a thief, through no fault of the laundry company, steals them, the laundry company is not liable. The only way in which the company could be made liable for the loss of articles which are awaiting their turn to be washed would, I think, quite clearly be if it could be shown that the company had been guilty of negligence in performing their duty to take care of the goods. Now that is one ancillary obligation which is inherent in a contract of this kind. Another relates to the delivery of the goods. The laundry company in most cases, and indeed in this case, makes a practice of delivering the goods to the customer, and in the ordinary case the customer expects to receive that service. But what is the precise obligation of the laundry in respect of the return of the goods after the laundering has been completed ? In my opinion it stands on the same footing as the other ancillary obligation that I have mentioned, namely, the obligation to take reasonable care in looking after and safeguarding the goods. It cannot, I think, be suggested that the obligation of the laundry company in the matter of returning the goods after they have been laundered is the obligation of an insurer. To say that they have undertaken by contract an absolute obligation to see that they are returned seems to me to go against one's common sense. Supposing the laundry is returning the goods by van to its customer and while the van is on its way a negligent driver of a lorry drives into it and overturns it with the result that it is set on fire and the goods destroyed. No action would lie by the customer for damages for the loss of those goods any more than it would lie against any ordinary transport undertaking which was not a common carrier. To hold otherwise would mean that in respect of that clearly ancillary service the laundry company were undertaking an absolute obligation that the goods would, whatever happened, be returned to the customer. It seems to me therefore that the only obligation on the company in the matter of returning the goods is an obligation to take reasonable care.

In the present case all that we know about the goods is that they are lost. There seems to me to be no case in which goods can be lost, in respect of which it would be necessary to limit liability, unless it be a case where the goods are lost by negligence. Goods sent to the laundry will not be lost in the act of washing them. On the other hand, they may be lost while they are in the custody of the laundry company before washing or after washing has been completed. They may be lost in the process of returning them to the customer after they have been washed, but in each of those two cases, if my view is right, the obligation of the laundry company is an obligation to take reasonable care and nothing else. Therefore, the claim of a customer that the company is liable to him in respect of articles that have been lost must, I think, depend upon the issue of due care on the part of the company. If that be right, to construe this clause, so far as it relates to loss, in such a way as to exclude loss occasioned by lack of proper care would be to leave the clause so far as loss is concerned —I say nothing about damage—without any content at all. The result, in my opinion, is that the clause must be construed as applying to the case of loss through negligence and, accordingly, it has its *prima facie* meaning which is comprehensive and clear.

The result is that the appeal succeeds, and the appropriate reduction in damages must be made in the order. I may say that I have the authority of UTHWATT, J., to say that he agrees both with the conclusion to which I have come and the reasons I have given for it.

MACKINNON, L.J.: I agree. Reliance upon cases between shipowners and owners of goods is illusory. It has been held in them that to relieve himself of liability for negligence, a shipowner must express that in clear terms. But a shipowner, if he has no contract with the owner of the goods, is liable for loss from any cause other than the act of God and the King's enemies. In the case of a bailment, where the bailee is liable only for loss or damage by reason of negligence, the position is very different. The rule or principle is very admirably stated by SCRUTTON, L.J. (who, incidentally, had argued nearly all the shipping cases in which the matter had been discussed) in a short passage in *Rutter* v. *Palmer* (1), where he said, at p. 92:

> In construing an exemption clause certain general rules may be applied: First, the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him.

Applying that principle to the facts of this case, I think that this clause does avail to protect the proprietor of the laundry in respect of liability for negligence, which must be assumed to be the cause of these handkerchiefs having disappeared. In the result, I agree that the appeal must succeed.

Appeal allowed with costs.

Solicitors: *H. R. Hodder & Son* (for the appellants); *Rayner, Hudson & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DAVIES *v.* COLLINS.

[COURT OF APPEAL (Lord Greene, M.R., Mackinnon, L.J., and Uthwatt, J.), **January 23, 24, 1945.**]

Contract—Personal contracts—Right to sub-contract—Cleaner and dyer—Garment lost by sub-contractor—" Whilst every care is exercised in cleaning and dyeing . . . the proprietors' liability for loss is limited . . . "—Contractor not entitled to sub-contract.

The appellant carried on the business of a dyer and cleaner. The respondent entrusted to the appellant, with whom he had dealt on previous occasions, a uniform for cleaning and for certain small repairs. On the docket given to the respondent when he handed over the uniform was the following clause: " Whilst every care is exercised in cleaning and dyeing garments, all orders are accepted at owner's risk entirely and we are unable to hold ourselves responsible for damage, shrinkage, colour or defects developed in necessary handling. The proprietors' liability for loss is limited to an amount not exceeding 10 times the cost of cleaning." The appellant sent the uniform to be cleaned by a sub-contractor and it was never returned. The respondent claimed the full value of the uniform and on his behalf it was contended that the clause limiting the appellant's liability was not applicable, inasmuch as there had been a deviation from the contract by the appellant sub-contracting the work. On behalf of the appellant it was contended that the sub-contracting did not amount to a breach of contract, and liability up to 10 times the value of the cleaning charge in accordance with the clause limiting liability was admitted :—

HELD : the mere presence of the particular limitation clause in the contract was sufficient to exclude from the contract any right on the part of the appellant to sub-contract the performance of the substance of the contract.

[**EDITORIAL NOTE.** The precise limits of this decision should be recognised. There are two classes of contracts for work and labour ; one, where, on the true construction of the contract, the work can only be performed by the contracting party himself or some member of his staff, the other where it is a matter of indifference by whom the work is carried out. The court does not hold that a contract to clean garments is necessarily always a personal contract which cannot be sub-contracted, but that the actual language of the condition here under consideration excluded any right to sub-contract. Further, it is only the service which is of the essence of the contract which cannot be sub-contracted, with consequent loss of control and supervision. Services which are ancillary to the main purpose of the contract, *e.g.*, delivery of the goods by carrier or by post, may be the subject of a sub-contract.

AS TO PERSONAL PERFORMANCE OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 187, 188, para. 266 ; and FOR CASES, see DIGEST, Vol. 12, pp. 588-592, Nos. 4906-4929.]

Cases referred to :

*(1) *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 All E.R 244.
(2) *Robson* v. *Drummond* (1831), 2 B. & Ad. 303 ; 12 Digest 589, *4909* ; 9 L.J.O.S. K.B. 187.
*(3) *British Waggon Co.* v. *Lea* (1880), 5 Q.B.D. 149 ; 12 Digest 589, *4911* ; 49 L.J.Q.B. 321 ; 42 L.T. 437.
*(4) *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014 ; [1940] 3 All E.R. 549 ; Digest Supp. ; 109 L.J.K.B. 865 ; 163 L.T. 343.
(5) *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510 ; 3 Digest 77, *163* ; 51 L.J.Q.B. 310 ; 44 L.T. 814.
(6) *Le Blanche* v. *London & North Western Ry. Co.* (1876), 1 C.P.D. 286 ; 8 Digest 100, *671* ; 45 L.J.Q.B. 521 ; 34 L.T. 667.

APPEAL by the defendant from a decision of His Honour JUDGE LILLEY, Bloomsbury County Court, dated Nov. 3, 1944. The facts are fully set out in the judgment of LORD GREENE, M.R.

S. Lincoln for the appellant.

Ronald L. Ziar (for *J. R. Ogilvie Jones*) for the respondent.

Lincoln : The appellant is entitled to sub-contract ; therefore, there has been no deviation from the contract and the principle of *Lilley* v. *Doubleday* (5) does not apply. Since the clause limiting liability is a term of the contract the respondent is bound by it.

[Counsel also referred to *Robson* v. *Drummond* (2), *British Waggon Co.* v. *Lea* (3), and *Nokes* v. *Doncaster Collieries, Ltd.* (4).]

Ziar : Upon the true construction of the clause limiting liability the appellant has undertaken to perform the contract in his own establishment and not to sub-contract ; further, where there is such a clause the contractor cannot sub-contract and thus extend the risk of loss to the customer. Therefore there has been a deviation from the contract and the rule in *Lilley* v. *Doubleday* (5) applies. Alternatively, the words " Whilst every care is exercised . . ." is an undertaking to use every care (*Le Blanche* v. *L.N.W. Ry. Co.* (6)), and a subsequent sentence limiting liability is an inconsistency which must be struck out.

LORD GREENE, M.R. : In this case the respondent, an officer in the United States Army, entrusted some uniform to the appellant, Collins, in order to have it cleaned and certain small repairs done upon it. Collins describes himself as a cleaner and dyer, and the respondent had dealt with him on previous occasions. Collins took steps to limit his liability in two ways : first, by exhibiting a notice-board on his premises for the information of customers, and, secondly, by printing certain conditions upon the docket which was handed to customers when goods were accepted for cleaning. The county court judge did not find that the respondent was fixed with notice of the board, but he did find that he must be taken to have seen the printed conditions on the docket which were sufficiently brought to his attention, in spite of the fact that he incautiously did not take the trouble to read them. That finding of the county court judge is not, and could not be, assailed. The conditions printed on the docket are headed with the words, "Please read conditions," and then they are as follows:

> Whilst every care is exercised in cleaning and dyeing garments, all orders are accepted at owner's risk entirely and we are unable to hold ourselves responsible for damage, shrinkage, colour or defects developed in necessary handling. The proprietors' liability for loss is limited to an amount not exceeding 10 times the cost of cleaning.

The uniform was not returned, and must be taken to have been lost for the purposes of this case. It so happened that Collins for some time had not been in the habit of cleaning garments himself, and by "himself" I do not mean himself personally but by his regular employees; his practice at this time was to farm out contracts of this kind to a sub-contractor. He would not, of course, by doing that exclude his duty and his liability under the contract towards his own customer, but that is what he did and it must be taken that the loss took place either when the goods were being sent to the sub-contractor or were being handled by the sub-contractor or were being returned by the sub-contractor, because Collins apparently never had them back. In those circumstances it was said on behalf of the plaintiff that the limitation clause does not apply for the reason that the goods were lost not within the four corners of the contract but while something was being done by or on the instructions of Collins which was outside the terms of the contract altogether. That contention, if it be right, of course would bring into operation the familiar rule, to which I have already alluded in my judgment, just delivered in the laundry case *Alderslade* v. *Hendon Laundry, Ltd.* (1), that limitation clauses of this kind do not apply where the damage that is suffered or the loss that has occurred is due to or takes place in the course of some operation which was never contemplated by the contract at all. The county court judge held that having regard to the nature of the work to be performed there was no right on the part of Collins to farm it out to a sub-contractor. I am not satisfied that the grounds upon which the judge formed that view are sufficient to support it, but nevertheless the conclusion to which he came was in my opinion the right one.

There is a well-known division of contracts for work and labour into two broad classes. One class is where the work and labour can, on the true construction of the contract, only be performed by the contracting party himself or by some staff that he employs. The other class is where, from all the circumstances of the case, including of course the true construction of the contract, it is to be inferred that it is a matter of indifference whether the work should be performed by the contracting party or by some sub-contractor whom he employs. In many contracts all that is stipulated for is that the work shall be done and the actual hand to do it need not be that of the contracting party himself; the other party will be bound to accept performance carried out by somebody else. The contracting party, of course, is the only party who remains liable. He cannot assign his liability to a sub-contractor, but his liability in those cases is to see that the work is done, and if it is not properly done he is liable. It is quite a mistake to regard that as an assignment of the contract; it is not. Here, again, these principles are well-known, and I do not propose taking up time in examining the authorities. I need only mention two well-known cases, one on each side of the line. One is *Robson & Sharpe* v. *Drummond* (2) which was, I cannot help thinking, a rather extreme case. The other is *British Waggon Co. and Parkgate Waggon Co.* v. *Lea* (3). To drive the point home I may usefully refer to a passage in the speech of VISCOUNT SIMON, L.C., in *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* (4). VISCOUNT SIMON, L.C., there says, at p. 1019 ([1940] 3 All E.R., at pp. 551, 552):

> The rules of law restricting the assignability of contracts are, however, by no means limited to contracts of personal service. In the case of contracts for the sale of goods, for example (unless the contract expressly or by implication covers the purchaser and his assigns), the seller is entitled to rely on the credit of the purchaser and to refuse to recognise any substitute. Similarly, the purchaser is entitled to rely upon the seller and to hold him responsible for due performance. I may add that a possible confusion may arise from the use of the word "assignability" in discussing some of the cases usually cited on this subject. Thus, in *British Waggon Co. & Parkgate Waggon Co.* v. *Lea* (3) the real point of the decision was that the contract which the

Parkgate company had made with Lea for the repair of certain waggons did not call for the repairs being necessarily effected by the Parkgate company itself, but could be adequately performed by the Parkgate company arranging with the British Waggon company that the latter should execute the repairs. Such a result does not depend on assignment of contract at all. It depends on the view that the contract of repair was duly discharged by the Parkgate company by getting the repairs satisfactorily effected by a third party. In other words, the contract bound the Parkgate company to produce a result, not necessarily by its own efforts, but, if it preferred, by vicarious performance through a sub-contractor or otherwise.

The question, therefore, in this case is whether the farming out of this work of cleaning was permissible according to the contract or not. If it was not, a loss which occurred by reason of such farming out would not be covered by the limitation clause. In contracts such as we have here, and in a multitude of contracts commonly made, no specific mention at all is made of this question of sub-contracting. Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances. The contract here, as in so many cases, has to be collected partly from the language used and partly from the acts of the parties. The nature of the work to be performed is, of course, always material. The county court judge appears to have thought that the nature of the work by itself was sufficient to exclude the right on the part of the cleaner to have it carried out by a sub-contractor, but as I have said I do not think I should agree that that by itself was sufficient. But there are other matters to which we must look, and although the evidence is not very full and the judge's note is very scanty, what appears to me to be the important consideration to which we have to direct our attention consists of the limitation condition itself and the language there employed. The condition starts off by saying: "Whilst every care is exercised in cleaning and dyeing garments." Now what does that mean? It would obviously be impossible for Collins to exercise care in the cleaning and dyeing of garments when that work is being done by a sub-contractor. He, no doubt, can exercise care in the choice of a sub-contractor, but in the actual work of cleaning and dyeing garments, if that is being carried out by a sub-contractor, there would, as it seems to me, be no room and no opportunity for him to exercise care. There is another phrase in this condition which is as follows: "We are unable to hold ourselves responsible for damage, shrinkage, colour or defects developed in necessary handling." The farming out to a sub-contractor cannot be described as "necessary handling" because there is nothing, so far as the customer knows, to prevent Collins doing the work himself or doing it by his ordinary staff. It seems to me therefore, although the point is perhaps rather a narrow one, that the actual language of this condition is sufficient to exclude any right on the part of the contractor to get the work done by a sub-contractor.

But there is another matter which I think is conclusive, and it is this: it is quite obvious that the risk which a customer runs under a limitation clause of this character is entirely different according as the work is to be carried out by the person with whom he contracts or by a sub-contractor. Let me expand that. If sub-contracting is not permissible, the risk that the customer runs in respect of loss is a very limited one because the opportunity of loss is restricted; if, on the other hand, it is permissible to farm out the contract to a sub-contractor, the area within which loss may occur is quite clearly very largely extended; not only does it mean that the negligence of a third party comes into the picture, but all the risks incidental to sending the goods to the sub-contractor and having them returned by the sub-contractor to the head contractor come into the picture too. It seems to me that the mere presence of this limitation clause by itself is sufficient to exclude from the contract any right on the part of the contractor to sub-contract. If it is intended that the customer is to be affected by that extended range of risk to which I have referred, it should be made clear to him that that is the risk which is being imposed upon him.

Now, it is important not to interpret what I have said as going beyond the facts of this case. This is a case where, according to the appellant's argument, the whole contract could be farmed out so that in order that the work might be done the goods could properly be sent to a sub-contractor who might be residing at the other end of England. The fact that the contractual work of cleaning could be farmed out would be a thing which, as I have said, would vastly extend the customer's risk. But it must not be taken from what I have said that the presence of such a clause necessarily precludes every kind of sub-contracting. I am dealing with a case where the sub-contracting which is said to be permissible is the substance of the contract itself. Different considerations may very well apply in the case, let me say, of returning the goods to the customer after they have been dealt with by the contractor. To say that it is illegitimate, or must be taken to be illegitimate, to employ such a sub-contractor for the carrying out of an ancillary service such as sending the goods back to the customer would in the majority of cases be completely unbusiness-like. For instance, goods may have to be returned by post after they have been cleaned; that is nothing more or less then employing a sub-contractor, namely, the Postmaster-General, to effect delivery. The mere handing of the goods to a cartage company such as Carter Paterson for delivery would be the employment of a sub-contractor. It must not be taken from what I have said that the presence of a limitation clause of this kind is sufficient to exclude the right to sub-contract in respect of a purely ancillary matter of that kind. With regard to matters of that sort the presence of a limitation clause would not have, in my judgment, the weight which I attach to it in the present case where the service in respect of which sub-contracting is said to be permissible is not a mere ancillary service of that kind but is the essence of the contract itself, namely, the contract between the customer and the cleaner.

For these reasons I am of opinion that this appeal must be dismissed.

I have the authority of UTHWATT, J., for saying that he agrees with the views that I have expressed and with the conclusion at which I have arrived.

MACKINNON, L.J.: I agree. I think the judge below came to a right conclusion, although I do not agree with the precise reasons that moved him. He seems to have arrived at his conclusion, having regard to the nature of the work to be done, on the view that it was the sort of work that could not properly be vicariously performed. I should not agree with that. If it was simply the case of a man bringing clothes to a dyer and cleaner, asking to have them cleaned, and the shopman acceding to his request, I think that would be work which the shopman could carry out vicariously within the principle laid down in the case of the *British Waggon Co.* v. *Lea* (3). But in this case the contract was not of that simple nature. The shopman agreed to do the work subject to written terms between himself and the customer. Those terms begin by saying that every care is exercised in cleaning and dyeing garments. That, I think, implies a promise that he will take such care, but such a promise can only be fulfilled if the work is carried out by servants whom he can control and supervise. If he is going immediately to send the goods away to a sub-contractor, the promise is manifestly futile. He cannot supervise and he cannot control.

In the result I think the judge was right in concluding that the defendant undertook to do the work on his own premises by his own servants, not for the reason on which the judge relied but for that which I have stated, namely, the special terms of the contract in this case.

In the result I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Burnett L. Elman* (for the appellant); *John B. de Fonblanque* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CRICKLEWOOD PROPERTY & INVESTMENT TRUST, LTD. AND OTHERS *v.* LEIGHTONS INVESTMENT TRUST, LTD.

[House of Lords (Viscount Simon, L.C., Lord Russell of Killowen, Lord Wright, Lord Porter and Lord Goddard), **November 21, 23, 1944, January 25, 1945.**]

Contract—Impossibility of performance—Frustration—Lease—Building lease.
Landlord and Tenant—Rent—Building lease—Degree of impossibility of performance—Whether doctrine of frustration applicable to a building lease.

By a building lease dated May 12, 1936, the predecessors in title of the respondents demised to the appellants for a term of 99 years certain land consisting of 2 parcels of land on which the appellants had undertaken to erect 24 shops, 10 on one parcel, 14 on the other. The town planning scheme for the area provided that 8 shops might be built at once, and, thereafter not less than 4 shops to each 200 houses occupied should be permitted to be built till the total of 24 was reached. The rent payable by the appellants for these sites was to be (*a*) as to each of the 10 shop sites on one parcel of land a peppercorn for the first year and thereafter £35 per annum for each site; (*b*) as to each of the 14 shop sites on the other parcel of land a peppercorn till the expiration of one year from notification by the landlords that erection of a shop thereon might proceed and thereafter £35 per annum in respect of each site for which notification had been given. The first 8 shops were to be built on one parcel of land not later than Mar. 25, 1937; the remainder were to be built within one year from the notification by the landlords that building might proceed but, in certain circumstances, an "abeyance period" might arise which would have the effect of postponing the obligation to build beyond the year. It was expressly provided that nothing in the clause dealing with this abeyance period should in any way affect the rent or rents payable in respect of the demised property or any part thereof or the time or manner of such payment. The lease gave the appellants the option of purchasing the shop sites on both parcels of land. The option was exercised by the appellants with regard to the parcel of land comprising the 10 shop sites. On the parcel of land with the 14 shop sites no shops were erected although notification that building might proceed had been given since Sept. 24, 1937, and by the provision for the abeyance period contained in the lease the appellants were not under an obligation to build. On May 17, 1938, the original lessors conveyed the land subject to and with the benefit of the lease to the respondents. In an action by the respondents for recovery of arrears of rent since Sept., 1939, the appellants contended that the lease was a contract which had been frustrated owing to the restrictions imposed on building and the acquisition of materials therefor, and that a building lease was a commercial contract to which the doctrine of frustration applied. The Court of Appeal held that the doctrine of frustration did not apply to a building lease so as to relieve the appellants from their obligations to pay the rent reserved under the lease. On appeal the questions for the determination of the court were: (i) whether, having regard to the circumstances in the present case, the lease had been determined by frustration; (ii) whether the doctrine of frustration could be applied to a building lease:—

Held: (i) by the terms of the lease it was contemplated that rent might be payable although no building was going on, and the interruption which had arisen as a result of the war was not of such a nature as to destroy the identity of the arrangement contemplated in the lease or to make it unreasonable to carry out the terms of the lease.

Metropolitan Water Board v. *Dick, Kerr & Co.* (7) *applied.*

(ii) (*per* Viscount Simon, L.C., and Lord Wright: Lord Russell of Killowen and Lord Goddard *dissenting*) the decision in *Matthey* v. *Curling* (1) is not authority for the proposition that frustration cannot arise in the case of a lease, although occasions on which frustration may occur are rare. The statement in the headnote to that case that *Whitehall Court* v. *Ettlinger* (5) was there approved is too widely expressed.

Decision of Asquith, J. ([1942] 2 All E.R. 580) *and the Court of Appeal affirmed.*

[**EDITORIAL NOTE**. This decision leaves the broad question of whether the doctrine of frustration can be applied to a lease in a very unsatisfactory position. Two of the Lords have expressed the view that it can and two have expressed the contrary view. There is no direct authority to the effect that it can, but the Lord Chancellor is satisfied that there is no authority binding on the House of Lords that it cannot. Lord Sumner, in *Hirji Mulji's* case (9), referred to the doctrine of frustration as "a device by which the rules as to absolute contracts can be reconciled with a special exception which justice demands," and it would appear that both Viscount Simon and Lord Wright are impressed with the possible injustice to a building lessee should legislation make building on the site acquired permanently illegal. But, as Lord Goddard points out, equal hardship would be caused if the fee simple were acquired for building purposes.

As to Applicability of Doctrine of Frustration to a Demise, see HALSBURY, Hailsham Edn., Vol. 7, p. 217, note (*e*); and for Cases, see DIGEST, Vol. 12, p. 399, Nos. 3229-3231.]

Cases referred to:

*(1) *Matthey* v. *Curling*, [1922] 2 A.C. 180; 31 Digest 342, *4857*; 91 L.J.K.B. 593; 127 L.T. 247.

(2) *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corpn., Ltd., The Kingswood*, [1942] A.C. 154; [1941] 2 All E.R. 165; 110 L.J.K.B. 433; 165 L.T. 27.

(3) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32; [1942] 2 All E.R. 122; 111 L.J.K.B. 433; 167 L.T. 101.

(4) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 12 Digest 371, *3093*; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356.

*(5) *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K.B. 680; 30 Digest 467, *1296*; 89 L.J.K.B. 126; 122 L.T. 540.

*(6) *London and Northern Estates Co.* v. *Schlesinger*, [1916] 1 K.B. 20; 30 Digest 343, *14*; 85 L.J.K.B. 369; 114 L.T. 74.

*(7) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 12 Digest 399, *3233*; 87 L.J.K.B. 370; 117 L.T. 766.

(8) *Paradine* v. *Jane* (1647), Aleyn. 26; 12 Digest 371, *3088*; Sty. 47.

*(9) *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497; Digest Supp.; 95 L.J.P.C. 121; 134 L.T. 737.

(10) *Tay Salmon Co.* v. *Speedie*, [1929] S.C. 593; Digest Supp.

(11) *Markeson* v. *Boyd*, [1942] S.C. 56.

(12) *Monk* v. *Cooper* (1727), 2 Ld. Raym. 1477; 31 Digest 257, *3973*; 2 Stra. 763.

(13) *Lofft* v. *Dennis* (1859), 1 E. & E. 474; 31 Digest 257, *3981*; 28 L.J.Q.B. 168; 32 L.T.O.S. 273.

(14) *Hart* v. *Rogers*, [1916] 1 K.B. 646; 31 Digest 101, *2391*; 85 L.J.K.B. 273; 114 L.T. 329.

(15) *Bute (Marquis)* v. *Thompson* (1844), 13 M. & W. 487; 12 Digest 380, *3145*; 14 L.J.Ex. 95; 4 L.T.O.S. 174.

(16) *Doe d. Graves* v. *Wells* (1839), 10 Ad. & El. 427; 31 Digest 470, *6157*; 2 Per. & Dav. 396; 8 L.J.Q.B. 265.

(17) *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180; 31 Digest 465, *6111*; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681.

(18) *Brewster* v. *Kitchel* (1698), Holt, K.B. 175; 12 Digest 299, *2459*; Carth. 438; Comb. 466; 1 Ld. Raym. 317; 12 Mod. Rep. 166; 1 Salk. 198.

Appeal by the respondents from a decision of the Court of Appeal dated June 4, 1943, and reported [1943] 2 All E.R. 97, affirming the decision of Asquith, J., given on Oct. 21, 1942, and reported [1942] 2 All E.R. 580. The facts are fully stated in the opinion delivered by Viscount Simon, L.C.

Roland Burrows, K.C., and *Robert Fortune* for the appellants.

H. St. John Field, K.C., *Gerald Gardiner* and *D. G. A. Lowe* for the respondents.

Viscount Simon, L.C.: My Lords, by a lease dated May 12, 1936, the predecessors in title of the respondents demised certain land at Potters Bar to the appellant company, hereinafter referred to as the tenants, for a term of 99 years, and the other two appellants joined in the lease as guarantors for the payment of the rent and performance of the covenants. It seems that the lessors were developing a building estate for residential purposes and the lease in question was a building lease under which the tenants were to build a number of shops to form what is commonly called, a shopping centre for the residents on the estate. The subject of the demise was two parcels of land, one coloured red and the other blue on the plan attached to the lease. A question had previously arisen between the lessors and the local authority under a town planning scheme for the area and there had been an appeal to the Minister. This appeal was compromised on terms which were scheduled to the lease and which in effect provided that not more than 24 shops in all should be built on these two parcels of land; that eight might be built at once, and, in addition, that not less than four shops to each 200 houses occupied should be permitted to be built in the future till the total of 24 was reached. The rent reserved was the aggregate of the following rents, (*a*) as to each of the 10 shop sites on the red land a peppercorn for the first year and thereafter a yearly rent of £35 for each site; and (*b*) as to each of the 14 shop sites on the blue land a peppercorn till the expiration of one year from notification by the landlords that erection of a shop thereon might proceed and thereafter a yearly rent of £35 for each site in respect of which such notification had been given. This notification that building might proceed was rendered necessary because of the compromise referred to above. Cl. 2 of the lease contained covenants by the tenants to pay the rent and outgoings and to build 24 shops on the demised land, 10 on the red and 14 on the blue. The first 8 were to be built on the red land not later than Mar. 25, 1937; the remainder were to be built within one year from the notification by the landlords that building might proceed, but in certain circumstances, which need not be set out in detail, an "abeyance period," as it was called, might arise which would have the effect of postponing the obligation to build beyond the year. It was, however, expressly provided that nothing in the clause which provided for this abeyance period should in any way affect the rent or rents payable in respect of the demised property or any part thereof or the time or manner of such payment.

It is clear, therefore, that the parties agreed that as soon as a year from the notification had elapsed the full rent was to be paid for the sites to which it related, although no buildings had been erected thereon. By cl. 4, a right of re-entry for non-payment of rent or breach of covenant was reserved, but it was provided that after any of the shops had been assigned or underlet this right should only be exerciseable upon the particular shop in respect of which the breach had occurred, the intention being that each should be held separately and independently of the others. The lease gave the tenants the option of purchasing both the red and blue sites; this option has been exercised as regards the red and consequently we are not concerned with it or with the shops built upon it. There was also a provision in cl. 6 of the lease enabling the tenants at the expiration of seven years from the date of the agreement to give notice to determine the lease as to any of the sites in respect of which notice that building might proceed had not been given. As regards the blue land, no shops had been erected when notice that building might proceed was given as to two sites on Sept. 24, 1937. Further notices were given on May 30, 1938, and Aug. 25, 1939, in each case as to four houses. No building has been begun on any of these ten sites, but it is admitted that by the provision for the abeyance period contained in the lease the tenants had not become under an obligation to build, nor were they in any other respect in default when this action was begun, except as to payment of rent.

On May 17, 1938, the original lessors conveyed the land subject to and with the benefit of the lease to the respondents, and as the appellant company had paid no rent since the outbreak of the present war, the respondents issued a writ dated Apr. 8, 1942, against the appellant company as tenants and against the other two appellants as guarantors, claiming arrears of rent since Sept., 1939. If the appellants are liable for any rent, there is no dispute that the amount due in this action is £419 14*s.* 3*d.* The respondents applied for summary judgment and in the affidavit filed in opposition on behalf of the appellants it was deposed that by reason of the outbreak of war the demand for these shops had ceased, that finance for their erection had become unobtainable and that the restrictions placed by the Government upon building and upon the acquisition of materials made it impossible to erect buildings on any of the sites or to continue the development. Consequently, it was said, the agreement in relation to the 14 sites had been frustrated and the appellants are under no liability thereunder.

On this affidavit the master gave leave to defend, and on appeal to the judge in chambers the present respondents admitted these allegations of fact and the admission was embodied in the order of the judge. He made the usual order for trial in the short cause list; the affidavit was treated as a pleading and no further defence was ordered.

Before this House, and apparently in both courts below, the appellants did not attempt to rely on the fact that the demand for shops had ceased, or on their inability to procure finance, as establishing a defence. They relied entirely on the impossibility of building created by the restrictions imposed on work of this character and on the acquisition of materials. Though these restrictions were not particularised, it must be taken that they were imposed by valid orders or prohibitions under the Defence Regulations, and while it would have been more satisfactory if the documents relied upon had been set out or referred to, the case has proceeded (as must this appeal) on the footing that the performance of the covenant to build was impossible, and continues to be so while the orders or prohibitions are in force.

ASQUITH, J., who tried the case, held on the authorities that the doctrine of frustration did not apply to a lease at all, and that for this purpose there was no distinction between a building lease and any other lease, though he said that had the doctrine applied he would have decided that the contract had been discharged. The Court of Appeal, in a judgment delivered by MACKINNON, L.J., said that the doctrine had never been applied to a demise of real property and that there was clear authority that it cannot be ([1943] 2 All E.R., at p. 98) ;

> It is impossible for the defendants to rely upon the doctrine of frustration to relieve them from their obligations as tenants under a demise of land for 99 years.

Against that judgment the tenants appeal to this House.

Two questions are raised by the appeal : first, can the doctrine of frustration apply to determine a lease ? and, secondly, even if it can, are the circumstances in the present case such as to produce the result that the lease has been determined by frustration ? If, my Lords, we all agree (as I understand we do) that the answer to the second question is in the negative, it is not essential in the present case to reach a conclusion on the first question (as to which I gather that our opinions are divided). Nevertheless, I propose to express my opinion with regard to both questions, since the more general issue has been much discussed and was pronounced upon in the courts below, where it was regarded as concluded by authority, including the authority of this House, in *Matthey* v. *Curling* (1).

The broad issue must first be considered as though it were *res integra* : then I propose to consider the effect of previous decisions. Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. (See the cases collected in *Joseph Constantine S.S. Line* v. *Imperial Smelting Corpn., Ltd.* (2).) But where it does arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition.

Is there any good reason why this conception of frustration should not ever apply to a lease of land and result in its premature determination ? I do not feel able to assert any *a priori* or absolute impossibility, though the instances in which the doctrine might apply to such a lease are undoubtedly very rare. A lease of land creates in the lessee an estate, which is a chattel interest : (Law of Property Act, 1925, s. 1 (1) (*b*).) Such an estate, by the nature of the case, lasts at most for the term stipulated and may come to an end sooner. In normal circumstances, the estate continues to exist for the period of the agreed term—in the present instance, for 99 years from Mar. 25, 1936—but it is liable to be determined by the landlord's re-entry for non-payment of rent or for breach of covenant. This is expressly provided for by cl. 4 of the present lease. The question, therefore, is whether, in addition to predetermination under such express provisions, it is possible that a lease for years should predetermine from a supervening cause which amounts to frustration. If so, the term ends, no further rent is payable, and the lessor recovers the property with all permanent structures erected upon it, at once. It is said that this cannot be so, because a lease is more than a contract and amounts to an estate: but this reasoning seems to me to be dangerously near to arguing in a circle; if we assume that frustration can only arise in cases where there is a contract and nothing else, the conclusion, of course, follows that frustration cannot arise in the case of a lease. Where the lease is a simple lease for years at a rent and the tenant, on condition that the rent is paid, is free during the term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration—though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. The lease, it is true, is of the "site," but it seems to be not inconceivable that, within the meaning of the document, the "site" might cease to exist. If, however, the lease is expressed to be for the purpose of building, or the like, and if the lessee is bound to the lessor to use the land for such purpose with the result that at the end of the term the lessor would acquire the benefit of this development, I find it less difficult to imagine how frustration might arise. Suppose, for example, that legislation were subsequently passed which permanently prohibited private building in the area or dedicated it as an open space for ever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessee and lessor, of buildings which it would now be unlawful to construct? It is no answer to say that it may be presumed that the legislature would make express provision, by compensation clauses or otherwise, to deal with such a case: we are entitled to test the applicability of the doctrine by assuming supervening illegality, without any qualification. Neither, I think, is the theoretic possibility of frustration got rid of by stressing the complications that might in some cases arise between the parties if the relation of lessor and lessee is prematurely terminated for all purposes by such a cause. In the case of pure contract also, the situation resulting from frustration has raised questions of difficulty which, after 40 years of doubt, were only settled by the decision of this House in the *Fibrosa* case (3); and even then it was considered just and necessary to modify the common law consequences by the Law Reform (Frustrated Contracts) Act, 1943.

A careful examination of the decided cases to which the Court of Appeal refers satisfies me that it is erroneous to suppose that there is authority binding on this House to the effect that a lease cannot in any circumstances be ended by frustration. In *Matthey* v. *Curling* (1), the House did not say so: the decision there was that requisitioning by the Government was no answer to a claim on the covenant for rent, any more than ouster by a trespasser would be: the remedy of the tenant was against the Government for compensation. Equally, destruction by fire, after the Government had requisitioned the place, left the tenant still liable on his covenant to deliver up in proper condition, for the tenant could have covered the risk by insurance. Thus, on the true construction of the document, the two covenants still bound the tenant. It seems clear that, if the actual decision in *Matthey* v. *Curling* (1) is as above set out, the Court of Appeal was mistaken in treating it as "clear authority" that the doctrine of frustration "cannot" be applied to a demise of real property. It is noteworthy that when *Matthey* v. *Curling* (1) was before the Court of Appeal, Atkin, L.J., in his dissenting judgment, observed (at pp. 199, 200):

> . . . it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of years. Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration.

This passage exactly expresses my view. I may further point out that in *Taylor* v. *Caldwell* (4), when the question was raised whether the hall which was burnt down was demised to the defendant or not, Blackburn, J., at p. 832, said:

> Nothing, however, in our opinion turns on this.

The impression, which I venture to think is erroneous, that this House in *Matthey* v. *Curling* (1) actually decided that frustration cannot arise in the case of a lease, is encouraged by the headnote to that case, which states that that decision affirmed *Whitehall Court* v. *Ettlinger* (5). It is true that Lord Atkinson in *Matthey* v. *Curling* (1), at p. 237, expressed the view that the *Whitehall Court* case (5) was rightly decided, but none of the other Lords either said or implied this. Moreover, in the *Whitehall Court* case (5), the primary decision of the Earl of Reading, C.J., was that the mere fact that the tenant was personally prevented from residing in the leased flat did not affect the existence of the chattel property vested in him under the lease. It is true that the Earl of Reading gave a further reason for his decision, which was based on the adoption of a sentence in the judgment of Lush, J., in *London & Northern Estates Co.* v. *Schlesinger* (6), but in this last quoted case, also, the actual decision of the divisional court was that a tenancy was not extinguished because the tenant for the time being was not allowed by law to inhabit the flat which had been leased to him. This was the ground of decision on which both members of the divisional court—Avory and Lush, JJ.,—concurred, and though Lush, J., added that a tenancy agreement was more than a contract and that the chattel interest created by the lease continued to be vested in the tenant, he did not in fact, I think, advance the abstract proposition that a lease can never be determined by events equivalent to frustration. At any rate, this House is not obliged to accept such a proposition, and, as I have indicated, I think it goes too far. The occasions, however, on which frustration terminates a lease must be exceedingly rare.

So much for the abstract and theoretical question. But there remains the practical issue whether what is proved to have happened in the present case could be enough to constitute frustration of such a lease. I do not agree with Asquith, J., that the orders requiring a suspension of building are sufficient to strike at the root of the arrangement. The lease at the time had more than 90 years to run, and though we do not know how long the present war, and the emergency regulations which have been made necessary by it, are going to last, the length of the interruption so caused is presumably a small fraction of the whole term. Frustration, where it exists, does not work suspension but brings the whole arrangement to an inevitable end forthwith. Here, the lease itself contemplates that rent may be payable although no building is going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over: this is the nature of the test for frustration suggested in the well-known case of *Metropolitan Water Board* v. *Dick, Kerr* (7). I therefore conclude, on the facts, that the liability for rent under the covenant continued uninterrupted, and I move your Lordships to dismiss the appeal with costs.

Lord Russell of Killowen [read by Lord Porter]: My Lords, I share the opinion which all your Lordships entertain, that no question as to what is called frustration can arise upon the facts of the present case. Unfortunately we have no pleadings and little evidence, owing to what seems to me a regrettable attempt to take a short cut in an important case. We must, therefore, assume it to be true (owing to an admission made by the respondents in judge's chambers) that no obligation on the part of the appellant company to erect shops on any of the 14 blue sites arose until after the outbreak of the war, and that Government restrictions on buildings and building materials made it impossible to erect shops on any of those sites. It seems, however, equally true that, if it had chosen so to do, it had ample time before Sept. 3, 1939, to erect shops on 6 of the sites. But apart from this last-mentioned fact, all that has happened is that for a portion of a span of 99 years the erection of shops on the sites has been postponed, with the result that for a time the appellant company will be liable to pay a rent of £35 per annum in respect of each site, although no shop has been erected thereon. But that is to carry out the very provisions of the lease which is said to be frustrated. The rent thereunder is payable in respect of sites, not in respect of shops; and cl. 2, after fixing times within which the tenant has to erect shops, provides in terms that nothing in the clause should in any way affect the rent or rents payable in respect of the demised property or any part thereof or the time or manner of such payment. It seems to me clear that the intention of the parties was that rent would be payable even though the sites were vacant, and that the landlord was not to be driven to sue for damages for breach of covenant to erect shops. To such an action the war-time restrictions might well afford a defence, but that is a consequence very different and far removed from frustration. Therefore, even upon the assumption that the doctrine of frustration can be applied to a lease, this appeal must fail.

On the broader question I confess that I am unable to grasp how the doctrine of frustration can ever apply so as to put an end to a lease and the respective liabilities of landlord and tenant thereunder. A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest none the less. As was said by LUSH, J., in *L. & N. Estates Co.* v. *Schlesinger* (6), at p. 24 :

> It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement. In my opinion it continues vested in him still.

That *dictum* of LUSH, J., was approved in *Whitehall Court* v. *Ettlinger* (5), a case which itself was approved by LORD ATKINSON in your Lordships' House without any dissent from his colleagues in *Matthey* v. *Curling* (1).

When a contract is frustrated it is because what is called the " venture " or " undertaking " which the parties have contracted to engage in can no longer be carried out. The court in such circumstances declares the contract to be, or treats it as being, no longer binding on the parties. That is an end of the matter. But when a lease is in question, and has been granted by one to another, it is the lease which is the " venture " or " undertaking " upon which the parties have embarked. The contractual obligations thereunder of each party are merely obligations which are incidental to the relationship of landlord and tenant created by the demise, and which necessarily vary with the character and duration of the particular lease. It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord and tenant—circumstances which might afford a defence to a claim for damages for their breach—but the lease would remain. The estate in the land would still be vested in the tenant. I know of no power in the court to declare a lease to be at an end except upon findings that some event has occurred upon the happening of which the lease terminates by reason of some express provision contained in the document. In such a case the term ends not because the court exercises a power to terminate it, but because in the events which have happened the lease operated only as a demise for the shorter period. Nor do I know of any power in the court to order a tenant (who, be it observed might have sublet part by way of mortgage or otherwise) to surrender his term to the landlord. The lease must of necessity continue. Some of the obligations thereunder may from time to time, from various circumstances, become difficult or impossible of performance by one or other of the parties ; but, in my opinion, it cannot have applied to it the doctrine of frustration. The rent will continue to be payable in accordance with the terms of the document.

Since preparing my opinion in this case I have had an opportunity of perusing a print of the remarks which my noble and learned friend LORD WRIGHT proposes to address to your Lordships and of considering the numerous references therein to a series of authorities cited by him. I wish to guard against it being said that your Lordships are in agreement with all my noble friend's statements. For myself I disagree with many of them ; in particular I disagree with the view in relation to a lease of land, which is expressed (at p. 262, *post*) in the following terms :

> If the contract is avoided or dissolved, as it may be by either party, under the express terms of the lease, the estate in land falls with it.

If by these words my noble friend only wishes to record the proposition that the exercise of a power to determine a lease will put an end to the lessee's estate in the land, well and good ; but, if he means that the estate in land necessarily comes to an end with leases of contractual liability, I disagree. A lease may come to an end, and with it the estate in the land and all contractual liability, by virtue of some provision in the lease, or by reason of some defect in the title of the person who purported to grant it. But, in my opinion, the cesser or suspension of some contractual liability under the lease will not destroy the estate in land which is vested in the lessee, unless the lease provides that in that event the term of years shall cease. Further I disagree with the view that there is anything in LORD BUCKMASTER'S judgment in *Matthey* v. *Curling* (1), or in *Brewster* v. *Kitchel* (18), or *Baily* v. *De Crespigny* (17) inconsistent with the view that the doctrine of frustration cannot apply to a lease of land, or favouring the view that it may so apply. I concur in the motion proposed.

LORD WRIGHT: My Lords, the respondents as lessors claim £419 14*s.* 3*d.* as rent due from the appellants as lessees under a lease dated May 12, 1936. This is the only claim made in the action. On the express terms of the lease the rent is due. But the appellants resist payment and say that they are not liable because the lease has died and has ceased to operate by reason of certain circumstances, consequent on the present war, which have caused impossibility of performance and have frustrated the adventure contemplated by the parties. That adventure was the building of shops by the appellants for the advantage both of themselves and the respondents on certain land owned by the respondents. The lease was what is commonly known as a building lease. The respondents or their predecessors in title were developing a building estate, and desired to secure the erection of a number of shops, proportionate to the number of houses, and for that purpose to appropriate two blocks of land in front of the residential area. These blocks of land were demised to the respondents by the lease which was somewhat complicated in its detail. It is fully before your Lordships. The two blocks leased were coloured red and blue respectively on the plan. At the date as at which the present question has to be considered, the only block left in the lease was that coloured blue. The portion coloured red had under the terms of the lease ceased to be included. The two blocks originally contained 24 sites in all on each of which a shop was to be built. These shop sites, which were the subject of the demise, were demised as vacant sites, on which the appellants covenanted to build shops according to the stipulations of the lease. When war broke out they had built the shops on the 10 sites included in the portion coloured red and, as I have observed, no question arises about them. The lease entitled the appellants to obtain the freehold on sites on which they had duly completed the erection of shops, and they had acquired the freehold of these sites. The rent, so far as concerns the sites in question, was to be a peppercorn rent until the time when the houses ought to have been built, that is, one year from the notification by the lessor: from that date the rent for each site was to be £35 a year. It is clear that the stipulated liability to pay rent was expressly made irrespective of any delay in the building, even if justified by the lease. There were provisions entitling either party to put an end to the lease in particular cases. The lease was for a term of 99 years.

The only claim in the action was, as already observed, for arrears of rent. The shop sites in respect of which rent was claimed in the earlier periods were six, in the later periods were 10, all of them forming part of the 14 sites included in the land marked blue on the plan. The writ was specially endorsed under Ord. 14. The defendants filed an affidavit by way of defence. Para. 6 of it is in the following terms:

> No obligation on the part of the defendant company to erect shops upon any part of these 14 sites arose until after the outbreak of the present war. By reason of the outbreak of war the demand for these shops ceased, finance for their erection became unobtainable and the restrictions placed by the Government upon building and materials therefor made it impossible to erect shops upon any of these sites or to continue the development of the same.

The respondents before the judge in chambers declared that they did not dispute these allegations of fact, and thereupon the judge gave the appellants liberty to defend the claim on these allegations of fact and no other. The appellants in para. 7 of their affidavit went on to submit that in consequence of the facts so alleged and admitted, the agreements as to the 14 sites were frustrated and the appellants were under no liability thereunder. Asquith, J., who tried the case, rejected the appellants' defence and gave judgment for the respondents. He said that the sole issue before him was whether the doctrine of frustration applied to a building lease such as that involved in the case. He held that it did not, though if it did he would have held that the contract had been discharged. However, he thought, there was clear authority that the doctrine of frustration cannot be applied to a demise of real property. The Court of Appeal affirmed his judgment on the ground that the doctrine of frustration could not be applied to a lease of real estate.

While I agree that the appeal must fail and the decisions of the courts below must be upheld, I prefer to base my conclusion on the ground that, whether the doctrine of frustration can apply or not to a demise of land, no circumstances are shown in the present case which would excuse the appellants from their covenant to pay rent for the 10 shop sites, which are the sites in respect of which rent is claimed. I think the case is concluded by the principles laid down by this House in *Matthey* v. *Curling* (1) in the opinion delivered by Lord Buckmaster, concurred in by Lords Sumner, Wrenbury and Carson. Lord Atkinson gave a separate opinion agreeing in the result. In that case demised premises had been lawfully requisitioned by the military authorities who continued in occupation during the remainder of the term. A month before the term ended the house was destroyed by fire. The claims in the action which the lessor brought against the lessee included (i) rent for the last quarter; (ii) damages for breach of covenants including the covenant to repair and deliver up in repair. The defence as to the former was that the lessee had been evicted by a title or authority which they could not withstand. Lord Buckmaster said, at p. 227, that there was not an eviction by title paramount or eviction by the lessor himself, but a mere eviction. He concluded that the question was:

> . . . how far the lessor has been deprived of the benefit of his covenant, and an act lawfully or unlawfully done, for which he is in no way responsible, cannot, in my opinion, have that effect, unless the covenant can be construed as excluding the event.

Further as to the repairing covenant, he held that the lessee was liable though the military had been in occupation when the house was burnt and continued in occupation until some time after the term ceased by effluxion of time. Lord Buckmaster was also of opinion that there was no impossibility of performance, though enjoyment of the premises had been interfered with by legal powers; he added that a terminable occupation by military authorities during an uncertain time for which compensation might prove to be recoverable constituted no answer to the obligations of the repairing covenant. It is clear that the agreed facts which the appellants rely on as relieving them from their obligation to pay rent under the covenant are not nearly so strong in their favour as those discussed by Lord Buckmaster. The appellants were not ejected in any shape or form from the demised premises. Neither the lessor nor anyone claiming under him interfered with the enjoyment of the land. All that happened was that for an uncertain term of the period, obviously likely to be short compared with the 99 years of the lease, they could not proceed with their building scheme. The period of interruption is not stated, but it seems to be accepted that it is limited to the duration of the present emergency. The covenants to pay rent are absolute in terms and are expressly made independent of the progress of the building operations. It seems to me impossible to hold that these covenants are discharged by the facts alleged by the appellants in their affidavit. Even if the doctrine of frustration can be invoked in the case of a lease the interruption of the building operations cannot be regarded as likely to be so long in its duration as to destroy the basis or foundation of the lease and to lead the court to declare that it is dissolved on the principles applied by the court in order to determine if a contract is frustrated. Thus in the *Metropolitan Water Board* v. *Dick, Kerr & Co.* (7) the test applied was whether the interruption was so long as to destroy the identity of the work and service when resumed with the work and service when interrupted, as Lord Dunedin put it, or in Lord Atkinson's words whether the interruption was so great and long as to make it unreasonable to require the parties to go on.

But a lease is more than a contract. It creates an estate in land: (Law of Property Act, 1925, s. 1 (1) (*b*).). The estate so created is limited and determined by the contractual terms of the lease and is governed by the agreement between the lessor and lessee. It may be that in earlier days the element of covenant bulked sometimes more largely in the eyes of the law than the question of tenure. In *Paradine* v. *Jane* (8) the judges do not mention the element of tenure. The claim was in debt. The court states the absolute character of the contract in language which has often been quoted. When a party by his own contract creates a duty or charge upon himself he is bound, they said (at p. 27):

> . . . to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

Lord Atkinson in his opinion in *Matthey's* case (1) quotes these expressions as a general statement of contract law, but so unqualified a statement would not be consistent with the modern law relative to the discharge of contractual obligations by impossibility of performance, as explained by this House in *Joseph Constantine Steamship Line* v. *Imperial Smelting Corpn., Ltd.* (2), and other well-known authorities. Indeed in *Constantine's* case (2), at p. 203, Lord Porter expressly enters a *caveat* against treating what he correctly calls the *dicta*, which I have just quoted, as universally applicable. I need not in detail refer to the mass of modern authority which would refute such a wide statement of the law. I may, however, refer to Lord Sumner's pithy description, in *Hirji Mulji's* case (9), at p. 510, of the doctrine of frustration as:

> . . . a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

But the doctrine of frustration can only be held to be applicable after a careful consideration of the particular case, and in particular after scrutinising the nature of the contract and the particular circumstances of the case. The nature of a lease not only involves a tenure as well as a contract, but has become the subject of precise rules which must be taken to be settled law of, at least, general application and to be understood by those who enter into transactions of lease. Hence, I think, the carefully guarded way in which Lord Buckmaster deals with the question before him in *Matthey's* case (1). He is careful to express no opinion as to the decision in *Whitehall Court* v. *Ettlinger* (5), which Lord Atkinson, at p. 237, says expressly "was rightly decided." The majority of the House said nothing about the case, and I think the statement in the head-note that *Whitehall's* case (5) was affirmed is not accurate if intended to apply to the judgment of the House. In *Ettlinger's* case (5), at p. 687, the Earl of Reading, L.C.J., held, indeed, that the requisition of the flats by the military authorities did not establish a case of eviction by title paramount and held that there was no reason:

> . . . why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally prevented from residing in the flats.

In so deciding he seems to me to follow the same lines of reasoning as Lord Buckmaster did in *Matthey's* case (1). The Earl of Reading also did, perhaps, recognise the distinction between an ordinary contract and a lease. But I cannot find that his language justified the head-note to the effect that the doctrine of the termination of a contract by the frustration of the adventure did not apply to the creation of an estate by demise. He was, I think, careful to limit his observations to the facts of the case before him. And in *London & Northern Estates Co.* v. *Schlesinger* (6) the lessee had become, by the outbreak of war, an alien enemy and prohibited from residing in the area in which the flat was situated. It was not difficult to hold that the prohibition did not put an end to the tenancy or discharge the obligation to pay rent, though the tenant's personal enjoyment of the premises was prohibited. On that ground the court held that performance of the contract was not rendered impossible. The tenant could, so it was held, sublet or assign the lease. That was enough to decide the case. Lush, J., however, added that nothing had happened in that case to affect the chattel interest vested by virtue of the agreement. He said, truly enough, that the tenancy agreement was not only a contract and nothing more, but a contract which created a term of years. It is clear that this is an element to be taken into account in considering whether events which have occurred, such as a requisition for a time, or a destruction of the demised dwellinghouse by fire, or the like, have put an end to the tenancy or the tenant's obligations under the tenancy. It may be broadly said that, as a general rule, this result does not follow casualties of that character, even though the tenant is deprived of the advantages, at least for a time, which the parties to the lease contemplated he would normally enjoy. It has been held over and over again that a temporary interruption of the tenant's use and occupation does not affect the covenants or the chattel interest. The rule may be different, it seems, in Scotland. See *Tay Salmon Co.* v. *Speedie* (10), and *Markeson* v. *Boyd* (11). But the Scotch authorities afford no analogy applicable to English law, because they proceed, it seems, on a different view of the contract and of the legal background. In England, since *Paradine* v. *Jane* (8) and earlier, the law has been that in general the tenant's covenant to pay rent or repair or deliver up in repair are not affected by casualties which interfere with his enjoyment of the demised land. The lessor as a general rule gives no warranty in these respects in favour of the tenants. The tenant must perform his covenants even though the demised house is destroyed by fire (*Monk* v. *Cooper* (12)), quite irrespective of what covenants as to repairs there may be (*Lofft* v. *Dennis* (13)), or whether the loss of enjoyment is due to the landlord's failure to fulfil his obligation to repair (*Hart* v. *Rogers* (14)). In that latter case the tenant would have his cross-claim against the landlord for damages. On the same principle it has been held that a covenant in a mining lease to raise and pay for a certain amount of coal is not affected if it turns out that the mine was so exhausted that there were not coals left in it (*Bute* v. *Thompson* (15)). These and many similar authorities show that by English law the lessees' covenants are generally absolute. The enjoyment and the covenant do not generally march together. I think the judgment of LORD BUCKMASTER proceeds on this basis. He does not put it on the circumstance that the lease also creates an estate in land. But though the lessees' covenants are generally absolute, there are qualifications which the law implies in relief of the lessee, even in the absence of express terms. In other words, covenants in the lease may be suspended or terminated by operation of law and the court will decree accordingly. Thus the covenant to pay rent may be suspended: for instance, if the lessor himself evicts the tenant, as LORD BUCKMASTER observed in *Matthey's* case (1), at p. 227, or if there is eviction by title paramount, a term to be narrowly construed, as LORD BUCKMASTER points out. The law has also implied a term that a lease may be forfeited if the lessee by matter of record or the like disclaims the lessor's title. Such a case was discussed in *Doe d. Graves* v. *Wells* (16). These results all flow from the general nature of the contract as understood in English law and its application to particular conditions of fact. I do not find that they depend on the circumstance that the lease involves a tenure and creates an estate in land. If the contract is avoided or dissolved, as it may be by either party, under the express terms of the lease, the estate in land falls with it. I do not see why this may not be also true if the lease were dissolved by operation of law. LORD BUCKMASTER does not mention this aspect, though *Ettlinger's* case (5) was cited in argument and was referred to by LORD ATKINSON in his opinion. LORD BUCKMASTER deals particularly with *Baily* v. *De Crespigny* (17). In that case a lessee claimed damages from his lessor for breach of his covenant not to permit building on a paddock facing the demised premises. The paddock was compulsorily taken by a railway company, which erected buildings upon it, including a urinal, thus impairing the amenities of the dwelling. It was held by a strong Court of King's Bench that the lessee could not recover. HANNEN, J., who delivered the judgment of the court, held that the lessor was discharged on the principle expressed in the maxim *lex non cogit ad impossibilia.* The court held that if the position had been reversed and it was the lessee who had covenanted and was being sued for breach of covenant, he would equally have been discharged from the covenant by the change of law, on the principle laid down in *Brewster* v. *Kitchel* (18). This comes very near to the idea of frustration, at least if the performance of the covenant is fundamental to the lease, and so do the words of HANNEN, J., which LORD BUCKMASTER quotes with approval, though he seems to put the decision on the narrower ground that the word "assigns" as used in the covenant was to be construed in a special and limited sense which did not include compulsory acquisition by a railway company. But I cannot trace in the judgment of LORD BUCKMASTER, any suggestion that as a universal rule the doctrine of frustration or some analogous principle could not be applied to a lease, which was enunciated to be the rule by the Court of Appeal. It is true that there is no reported case in which the rule has been applied and that it could be applied only in rare and exceptional cases. But the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula. I am not, therefore, prepared to state as a universal principle that it can, in no circumstances, be applied to a lease. Let me suggest a single instance, which might some day prove to be of not merely theoretical interest. Let me put the case of a building lease for a term of 99 years, and let it be supposed that a public body acting under statutory authority, soon after the lease was executed, prohibited building on that site for an indefinite time, the end of which, if it ever came, could not be foreseen. In effect that would be a prohibition total for all practical purposes both in extent and time, which would override and control both lessor and lessee. Would in that event the lessee continue bound to pay under the lease the yearly rent for 99 years, or would the relationship of landlord and tenant be dissolved by operation of law in respect of that site? As a matter of general principle I would say that the lease was avoided and the term came to an end. But I abstain from further discussion of the point. I agree with the opinion which my noble and learned friend VISCOUNT SIMON, L.C., has just delivered.

I would dismiss the appeal accordingly.

LORD PORTER: My Lords, the appellants relied upon the facts which have been stated to your Lordships in order to establish their contention that the agreement between the parties in relation to the fourteen sites had been frustrated and the tenancy had been determined so far as those sites were concerned. Both courts below rejected their contention broadly upon the ground that the doctrine of frustration does not apply to a lease. Indeed, ASQUITH, J., indicated that if it did apply he would have found frustration in the present case.

It is natural, therefore, that in their case as presented to your Lordships the appellants should state that the question raised by the appeal is whether the doctrine of frustration applies to a lease. That question no doubt is an interesting and difficult one, but it does not necessarily arise in the case now before the House. A narrower question may well be all that your Lordships have to determine, *viz.*, whether the rent claimed to be due under the lease of May 12, 1936, is owed by the appellants to the respondents. To defeat this claim the only answer presented to your Lordships was that the lease or the agreements contained in it had been frustrated. The exact question for your Lordships, therefore, is not whether the doctrine of frustration applies to leases generally, but, in the circumstances has this lease been frustrated? It was conceded on behalf of the appellants that the cases in which a lease can be frustrated are rare and exceptional. A lease is more than a contract. It has long been recognised as creating an estate in land and by statute is enacted to do so (see Law of Property Act, 1925, ss. 1 (i), 205 (xxvii)). Moreover, the rent is payable for the site and issues out of the land. In these circumstances it obviously is not easy to visualise conditions in which the doctrine of frustration would apply. The land in some form is there and the payment of rent is not prohibited. Some terms of the tenancy may be impossible of performance at least for the time being but the tenancy itself is not thereby necessarily determined. Its basis still exists. Building may not be feasible, yet I do not think the tenancy has come to an end for that reason.

But exceptional circumstances might conceivably arise which could be plausibly put forward as a cause of frustration and until it is necessary to pronounce definitely one way or the other I prefer to reserve the point. What I think is clear, and I believe all your Lordships agree, is that the lease now in question has not been frustrated by the inability of the tenants in the circumstances now existing to use the land for the purpose which both parties contemplated, *viz.*, the building of shops. The lease is a long one and the interruption comparatively short. Moreover, the obligation to pay rent is not dependent upon the appellants' ability to erect or upon the actual erection of shops. It is payable from a date to be ascertained from the landlords' notice that erection may proceed.

If frustration can apply, the fact that there are in the contract provisions dealing with the circumstances said to cause frustration is not necessarily fatal to the application of the doctrine. That the circumstance is only one, is an element to be considered. In the present case there is, it is true, a clause temporarily excusing for a time the obligation to build, but it is noteworthy that this abeyance clause, as it is called, though it excuses immediate building does not do away with the obligation to pay rent during the period of abeyance.

In such circumstances I can see no reason for invoking the doctrine of frustration. The basis of the contract is not gone and if the theory of an implied term be relied upon, I cannot think that a lessor, however reasonable, must be considered to have contracted upon the basis that the tenancy would come to an end in case the building of shops became impossible for a number of years.

I agree with the opinion of Viscount Simon, L.C., and, agreeing with it, am of opinion that the appeal should be dismissed.

Lord Goddard [read by Lord Porter]: My Lords, Asquith, J., who tried this case, decided in favour of the respondents on the ground that the doctrine of law, usually called frustration, does not apply to a lease, and that this was as true of a building lease as of any other. But earlier in his judgment he said that, had the doctrine applied, he would have decided that the contract, by which he must have meant the lease, had been discharged. The Court of Appeal agreed with him that the doctrine did not apply to a lease, but, as I read their judgment, they also held that in any case it could not be said that this particular lease was discharged, thereby differing from the judge. I agree with the Court of Appeal on both points. We are obliged, as were both courts below, to deal with the case simply on the admission, embodied in the order made by the judge in chambers, that the restrictions placed by the Government upon building and materials made it impossible to erect shops on any of the sites not already built on or to continue their development. No reliance was placed on the other admissions contained in the order. Obviously the restrictions referred to are those imposed by orders made under the Defence Regulations which have effect only for the period of the present emergency, though how long that will continue no one can say. On that one fact it is impossible to say, supposing the doctrine to be applicable to a lease, that one for 99 years had been frustrated. Even if the restrictions remain in force for 10 years, that is a very small part of the life of this lease. Moreover, the rent is reserved in respect of sites, not shops, and begins 12 months after notice is given that building may proceed on any site, although by reason of what the lease calls an abeyance period the tenant may not be obliged to build within that period and may not do so. This abeyance period might quite conceivably last for a considerable time, if there were no demand for shops, but the rent would none the less be payable. If, however, the tenants came under an obligation to build, but were prevented from so doing by the orders, that would furnish them with a good defence, were they sued for breach of their covenant to build, but not to a claim for rent under this lease.

But I think it right to say that I agree also with the Court of Appeal on the wider question. There is no doubt, I think, that the opinion prevails generally in the profession that the doctrine in question does not apply to a lease, and if there is any doubt on the subject I venture to think that it is desirable in the interests of lessors, lessees, and their advisers that it should be resolved. I agree with the opinion of Lord Russell of Killowen, which I have had the advantage of reading, but as the matter is of obvious importance and interest I will shortly state my own reasons. The reason why the doctrine does not apply was first stated by Lush, J., during the last war in *L. & N. Estates Co.* v. *Schlesinger* (6), and was that the lease creates a term of years which is vested in the tenant. I cannot but think that this principle was accepted by this House in *Matthey* v. *Curling* (1). In that case a house let on lease had been requisitioned by the War Office who remained in possession till the end of the term. Among other arguments it was contended that performance by the lessee of his covenants was thereby rendered impossible and was excused, it being an implied condition that the lessee should be allowed to continue in possession and enjoyment of the premises. Dealing with this contention Lord Buckmaster said, at p. 230:

> There is no question here of performance having become impossible owing to its prohibition by statute, for no law has prohibited performance, though enjoyment of the premises has been interfered with by legal powers.

LORD SUMNER and LORD CARSON agreed with his opinion, and none of them expressed any dissent from LORD ATKINSON who expressly approved the decision in *Whitehall Court* v. *Ettlinger* (5), which in turn had approved the opinion of LUSH, J. It is now sought to apply this doctrine of frustration to a lease because circumstances have arisen and restrictions have been imposed which, while not divesting the tenant of his interest, do prevent him from putting the land to the use intended both by him and the landlord. Whatever be the true ground on which the doctrine is based, it is certain that it applies only where the foundation of the contract is destroyed so that performance or further performance is no longer possible. In the case of a lease the foundation of the agreement, in my opinion, is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant there is no frustration though particular use may be prevented. There can also be no doubt that if there be frustration the contract is destroyed so that both parties are released from its bonds. If, then, this doctrine applies to a lease some strange and unjust results would follow, though to use the well known words of LORD SUMNER, in *Hirji Mulji* v. *Cheong Yue Steamship Co.* (9), at p. 510, the doctrine :

> . . . is . . . a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

In the present case if some shops had been built on the blue land and the lease were held to be frustrated the landlords could presumably repossess themselves of the land with the buildings upon it for which they would have to pay nothing. If the lease were now to be regarded as at an end the tenants would have no title, however willing they might be to continue to pay rent and resume building when the orders ceased to have effect. And what would then be the position of those to whom the shops had been sublet or of mortgagees from whom finance for the building had been obtained ? It is no doubt easy to envisage a hard case ; building lessees may find soon after a lease has been granted that a statute is passed prohibiting building on the land in perpetuity, and if the legislature should not see fit to provide for compensation or to make provision for what is to happen to leases in such cases hardship would result, but no greater than if they had purchased the fee simple of a building estate which subsequent legislation prevented them from developing. In either case it is not the estate in the land which is affected, but the use to which it can be put. In my opinion the Court of Appeal was right on both grounds and I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors : *Langford, Borrowdale & Thain* (for the appellants) ; *Leslie Freeman & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

AINLEY *v.* AINLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), **January 16, 1945.**]

Divorce—Adultery—Condonation of adultery—Subsequent desertion but not for statutory period—" Matrimonial offence "—Desertion of insufficient duration not reviving adultery—Matrimonial Causes Act, 1937 (c. 57), *s.* 2 (*b*).

The parties were married in 1922. In 1934 the husband committed adultery but the petitioner forgave him and the parties lived together until Sept. 2, 1942, when the petitioner left home owing to the husband's conduct. The husband made no efforts to persuade the petitioner to return to him, nor did he in any way support her. In June, 1943, the petitioner obtained a maintenance order against her husband on the ground of desertion. In May, 1944, the petitioner filed her petition for divorce relying on the husband's desertion as reviving the condoned adultery, although the desertion was not of three years' duration :—

HELD : a matrimonial offence which was a ground for a decree of judicial separation or divorce, and which had been condoned, could only be revived by a matrimonial offence which might itself have been a ground for a decree of judicial separation or divorce.

Higgins v. *Higgins and Bannister* (1) *not followed.*

[**EDITORIAL NOTE.** The difficulty here is to decide what is a "matrimonial offence" sufficient to revive a matrimonial offence which has been condoned. In *Higgins* v. *Higgins & Bannister* (1), PILCHER, J., held that desertion is a matrimonial offence *per se* and is sufficient to revive condoned adultery, although by reason of falling short of the statutory duration, it would not of itself give rise to a remedy. BARNARD, J., here decides otherwise, holding on the older authorities that revival must be by a matrimonial offence which also affords in itself complete grounds for a decree of judicial separation or divorce. This may follow from the earlier cases, which were influenced by the ecclesiastical theories of marriage and divorce, but it would appear to deprive the doctrine of revival of much of its value. Desertion is a matrimonial offence but only affords a ground for a decree if it continues for the statutory period.

AS TO CONDONATION AND REVIVAL OF OFFENCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679, 680, paras. 1004-1006; and FOR CASES, see DIGEST, Vol. 27, pp. 345, 346, Nos. 3266-3276.]

Cases referred to :

*(1) *Higgins* v. *Higgins and Bannister*, [1943] P. 58; [1943] 2 All E.R. 86; 112 L.J.P. 55; 169 L.T. 45.

*(2) *Jordan* v. *Jordan*, [1939] P. 239; [1939] 2 All E.R. 29; Digest Supp.; 108 L.J.P. 104; 160 L.T. 368.

*(3) *Palmer* v. *Palmer* (1860), 2 Sw. & Tr. 61; 27 Digest 337, *3172*; 29 L.J.P.M. & A. 124; 2 L.T. 363.

*(4) *Houghton* v. *Houghton*, [1903] P. 150; 27 Digest 346, *3274*; 72 L.J.P. 31; 89 L.T. 76.

*(5) *Copsey* v. *Copsey & Erney*, [1905] P. 94; 27 Digest 346, *3275*; 74 L.J.P. 40; 91 L.T. 363.

*(6) *Henderson* v. *Henderson*, [1944] A.C. 49; [1944] 1 All E.R. 44; 113 L.J.P. 1; 170 L.T. 84.

PETITION by the wife for the dissolution of her marriage on the ground of her husband's adultery. The facts are fully set out in the judgment.

J. A. Petrie and *J. M. McLusky* for the petitioner.

BARNARD, J.: In this case the question which I have to decide is whether desertion of insufficient duration to be a ground for a decree is none the less sufficient to revive condoned adultery.

The parties were married in 1922, and the petitioner has proved to my satisfaction that her husband committed adultery in the year 1934, but she forgave him and the parties lived together until Sept. 2, 1942, when she finally left him in circumstances which satisfied me that he was the deserter and on May 11, 1944, filed her petition for divorce. On Aug. 31, 1942, the petitioner discovered a letter, purporting to come from a woman signing herself "Winnie," in her husband's possession. She spoke to her husband about this letter, but he informed her that it was not intended for him; but the same night he attempted to commit suicide, and this so frightened her that two days later she left him. From then onwards the husband made no efforts to persuade his wife to return to him, nor did he in any way support her. On June 30, 1943, she obtained a maintenance order against him from the West Riding justices sitting at Halifax, on the ground of desertion. Adultery was charged against the husband in the wife's petition in respect of the finding of the letter, which was said to be lost and was not produced, but the contents of which were proved by the petitioner, and were of an affectionate nature. I was not prepared to find adultery on this evidence, and counsel for the wife did not press me to do so, but contented himself with relying on the desertion as reviving the condoned adultery. Counsel referred me to a decision of PILCHER, J., in *Higgins* v. *Higgins and Bannister* (1), in which case, following some *obiter dicta* of LORD MERRIMAN in *Jordan* v. *Jordan* (2), he held that desertion independently of its duration revived condoned adultery. I assumed that PILCHER, J., based his decision on the following passage in *Jordan* v. *Jordan* (2), at p. 251 :

> It seems to me to be equally clear that the offence exists under the Act of 1937 independently of its duration.

Reluctantly I find myself unable to agree with the decision of PILCHER, J. It seems to me that it would of necessity follow from this decision that a husband who committed adultery, was forgiven by his wife, and then some twenty years later left his wife after a quarrel, could be divorced by her; the desertion for a period of a few days' duration would have revived the condoned adultery. Moreover, this might happen in spite of the fact that the husband was repentant and genuinely willing to return to her, for he might be forestalled from telling A her so, and thus terminating the desertion, by the prompt filing of her petition, whereas a maintenance order could be discharged on proof of the above facts. I cannot believe that this is the law, and in coming to this conclusion I have also considered some of the older authorities.

A great deal of confusion has arisen from the expression "matrimonial offence." But, in my opinion, the decision in *Palmer* v. *Palmer* (3), three years after the passing of the Matrimonial Causes Act, 1857, makes it quite clear that B a matrimonial offence which might have been the foundation of a sentence in a Matrimonial Court and which has been condoned, could only be revived by a subsequent offence which might itself have been a ground of a sentence of divorce *a mensa et thoro*. Further, in the year 1903 SIR FRANCIS JEUNE, P., held, in the case of *Houghton* v. *Houghton* (4), which was a wife's suit for a divorce, that the condoned adultery of a husband was revived by his subsequent desertion for C two years and upwards without reasonable excuse. Counsel for the wife, in the case now before me, argued logically that in the case of *Houghton* v. *Houghton* (4) the wife had to establish desertion for two years and upwards to enable her, together with the adultery thereby revived, to obtain a decree of divorce. But GORELL BARNES, J., in the case of *Copsey* v. *Copsey & Erney* (5), which was a husband's suit for divorce, followed *Houghton* v. *Houghton* (4), and decided that a wife's condoned adultery was revived by her subsequent desertion for two years D and upwards without reasonable excuse. The husband in that case only needed the revived adultery to entitle him to a divorce, but none the less the judge seems to have considered that the spouses were on an equal footing as regards the revival of a condoned matrimonial offence, and that the husband had to establish desertion for two years and upwards in order to revive his wife's condoned adultery. From the above authorities the law seems to me to be E clear that a matrimonial offence which is a ground for a decree of judicial separation or divorce, and which is condoned, can only be revived by a matrimonial offence which is also a ground for a decree of judicial separation or divorce, and I do not consider that it makes any difference that desertion, to provide such a ground, now has to be of three years' duration and continuing prior to the presentation of the petition instead of for the period of two years and upwards, as it was prior to the Matrimonial Causes Act, 1937. I am fortified in F that view of the law by what LORD SIMON, L.C., said in his speech in *Henderson* v. *Henderson* (6). He therein stated, at p. 54 ([1944] 1 All E.R., at p. 46), that:

> . . . if the spouse who had been forgiven past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for a divorce . . .

The words "further ground for a divorce" seem to me to indicate that the reviving matrimonial offence must of itself be a ground for a decree.

G Owing to the extension of the grounds for divorce by the Matrimonial Causes Act, 1937, the doctrine of revival has lost much of its importance, but condoned adultery, for instance, can still be revived by failure to comply with a decree for restitution of conjugal rights, such failure to comply being a ground for a decree for judicial separation.

Therefore, this petition fails, and must be dismissed.

H *Petition dismissed.*

Solicitors: *Jacques & Co.*, agents for *Moore, Shepherd & Whitley*, Halifax (for the petitioner).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

IN THE MATTER OF WARDEN & HOTCHKISS, LTD. AND IN THE MATTER OF THE COMPANIES ACT, 1929.

[Chancery Division (Uthwatt, J.), **December 21, 1944.**]

Companies—Notice of meetings—Articles requiring service of notice on all members—Failure to serve notices on members resident abroad—Service of notices inconvenient or useless—Invalidity of meeting—Companies Act, 1929 (*c.* 23), *ss.* 115, 117.

The petitioning company sought the confirmation of the court to an alteration of the company's Memorandum of Association with respect to its objects. The company which was limited by shares and had been incorporated under the Companies Acts purported to effect the alteration by a special resolution passed at a meeting which, it was alleged, was not duly convened by reason of the fact that five members who had registered addresses in South Africa had not been served with any notice of the meeting as required by the company articles. On behalf of the company it was contended that it was unnecessary to serve a notice on members with registered addresses outside the United Kingdom because (i) it was inconvenient, or (ii) because personal attendance was unlikely and the lodging of proxies in due time was perhaps impossible :—

Held : upon the true construction of the relevant articles of association notice was required to be served on all the members. The fact that it was inconvenient or useless to send the notice did not validate a meeting not duly convened.

Re Union Hill Silver Co., Ltd. (4) and *Re Newcastle United Football Co., Ltd.* (5) not followed.

[**EDITORIAL NOTE.** There is authority for holding that a notice of a meeting of a company need not be served as required by the articles on shareholders resident abroad. It is the practice in Chambers of the Company Court, however, to refuse to certify that a special resolution has been duly passed in such cases, and the court here refuses to follow the *Union Hill Silver Co.* case (4) and holds that the meeting was not duly convened although it would have been inconvenient or useless to send a notice to the absent shareholders.

As to Necessity of Serving Notice of Meetings to Members Resident Abroad, see HALSBURY, Hailsham Edn., Vol. 5, pp. 431, 432, para. 710 ; and for Cases, see DIGEST, Vol. 9, pp. 564, 565, Nos. 3746-3749.]

Cases referred to :

(1) *Re Anglo-International Bank, Ltd.*, [1943] Ch. 233 ; [1943] 2 All E.R. 88 ; 112 L.J.Ch. 305 ; 169 L.T. 82.
(2) *Smyth* v. *Darley* (1849), 2 H.L. Cas. 789 ; 13 Digest 339, *774*.
(3) *Halifax Sugar Refining Co., Ltd.* v. *Francklyn* (1890), 59 L.J.Ch. 591 ; 9 Digest 517, *3390* ; 62 L.T. 563.
*(4) *Re Union Hill Silver Co., Ltd.* (1870), 22 L.T. 400 ; 9 Digest 564, *3746*.
*(5) *Re Newcastle United Football Co., Ltd.*, [1932] W.N. 109 ; Digest Supp. ; 173 L.T.Jo. 344.

Petition by a limited company incorporated under the Companies Acts, 1862-1893, for a confirmation by the court of the validity of a special resolution passed at a meeting of the company of which notice had not been duly served on all the members. The facts are fully set out in the judgment.

Gordon Brown for the company.

Uthwatt, J. : Warden & Hotchkiss, Ltd., a company incorporated on July 15, 1898, under the Companies Acts, 1862 to 1893, as a company limited by shares, seeks by this petition the confirmation by the court under the Companies Act, 1929, s. 5, of an alteration of the provisions of its memorandum of association with respect to its objects.

The company purported at a meeting held on Jan. 19, 1944, to pass a special resolution providing for that alteration. All the members of the company entitled to vote save five were duly served with notice of the meeting. The excepted five members had registered addresses in South Africa and none of them was sent a notice. All of them have since expressed their concurrence with the substance of the special resolution ; but that is irrelevant.

It is argued that it was not necessary to serve these members and that the special resolution was passed at a meeting duly convened. Apart from the question of the validity of the special resolution as affected by the failure to serve the five members referred to, the case is one in which I should be prepared to confirm the alteration. The only matter to be considered, therefore, is the validity of the special resolution. That depends upon the terms of the Companies Act, 1929, and the articles of association of the company.

Sect. 117 (2) of the Act requires that a resolution shall be a special resolution when it is passed by a specified majority and :

> . . . at a general meeting of which not less than 21 days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given.

Sect. 117 (6) provides that for the purposes of the section a notice of meeting shall be duly given when the notice is given " in manner provided by this Act or the articles." The reference to " this Act " is a reference to sect. 115 of the Act. There has been no order under sect. 115 (2) and subsect. (1) is out of the picture, for the articles of association of the company make provision as to the service of notices of meeting.

The matter is, therefore, governed by the company's articles of association. The relevant provisions are contained in Arts. 42, 109 and 111 :

> Art. 42. Seven days' notice at least, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting ; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.
>
> Art. 109. A notice may be served by the company upon any member, either personally or by sending in through the post in a prepaid letter, addressed to such member at his registered place of abode.
>
> Art. 111. Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post ; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

I may observe upon art. 111 that there may be at the present time some difficulty in applying the phrase " in the ordinary course of post " for the purpose of deciding the time when a notice sent by post is served, but that matter is not in issue here.

The point taken is that it is not necessary to serve members with a registered address outside the United Kingdom. The contention is based on the inconvenience which would result from the necessity of serving such notices and the futility of sending them.

As regards inconvenience, it is said that meetings could not be summoned except by a notice sent long before the date settled for the holding of the meeting. Further, it was pointed out that at the date when the company was formed two meetings were required to pass a special resolution, the second being held at an interval of not less than 14 days nor more than one month from the date of the first meeting and it was said that the necessity of serving members with registered addresses abroad might have rendered it impossible to pass a special resolution unless indeed the two meetings were convened by one notice—not at the date of the company's incorporation a common practice.

As regards the futility of sending a notice, personal attendance in the present case was, to say the least, unlikely, and there was perhaps impossibility in lodging in due time the proxy in the form required by the articles.

Why, it was argued, should the company be under an obligation to serve a notice which is for all practical purposes useless ?

I do not propose to criticise the basis on which this argument is rested beyond saying first that Companies Acts leave it to a company to frame its articles of association as it thinks proper and that precedents for convenient articles relating to notices of meetings are to be found, for example, in Table A contained in the Companies (Consolidation) Act, 1908, and in the Companies Act, 1929, and, therefore, that any inconvenience resulting from the provisions as to service of notices contained in particular articles are of the company's own making, and, second—upon the point as to futility—that it is always possible to serve a notice of meeting of greater length than 21 days. It is not suggested that it is a rule of law that articles may not lawfully require notices of meeting to be served on members with foreign registered addresses. Nor do I understand it to be suggested that a company is not bound to observe any bargain with its shareholders as to notices which is contained in the articles. It would, indeed, be a novel proposition that it was open to a company to disregard such a bargain because in its opinion compliance would be inconvenient or futile though, as in the *Anglo-International Bank* case (1), there may be circumstances which suspend the obligation to comply with certain articles.

The sole question here is whether upon the true construction of the articles service upon members with registered addresses abroad is demanded. Inconvenience and futility—if assumed to exist under the articles—may perhaps be A relevant in determining the proper construction of articles of doubtful import, but otherwise are irrelevant.

Looking at this matter apart from authority, it is to my mind apparent that under art. 42 notices are required to be sent to all members. I cannot see that there is any ambiguity or vagueness of expression which enables me to read into arts. 42 or 109 or 111 any exception excluding from members to whom notice is to be given members with foreign registered addresses; throughout B all the other articles, I may add, the expression "members" obviously includes all members.

The construction I place on the articles is not based upon a rigid interpretation of detailed provisions in the articles, but upon the plain meaning of the words used.

There is, however, some authority upon the matter to which it is necessary to refer. In *Smyth* v. *Darley* (2), it was suggested that it was not necessary to C serve notices of a special meeting of the Dublin Corporation upon members of an electoral body "beyond summoning distance—as for instance abroad." But it does not appear from the report in that case that there was any independent statutory provision requiring all members to be served and in the absence of any such provision the right to be served with notice of meeting was treated as dependent upon the substance of the matter—the possibility of voting. D Dispensation from the necessity of serving notice depended on the circumstances of the case. The decision in *Halifax Sugar Refining Co., Ltd.* v. *Francklyn* (3), is referable to the same principle. But the structure of the legislation relating to the due passing of a special resolution treats the due convening of a meeting as a substantive matter not dependent on the possibility of voting.

The Union Hill Silver Co.'s case (4), is directly relevant. The company there concerned was governed by the Companies Acts, 1862-1867 and Table A of the E Act of 1862 constituted its articles of association. The relevant statutory provisions and facts cannot be legitimately distinguished from those applicable to the case before me. MALINS, V.-C., held that it was not necessary for the validity of a special resolution that notices of the meeting should be sent to shareholders resident in New York. He puts that matter thus, at p. 402:

> Now, if the petitioner's construction of this section is right, namely, that every F shareholder must have notice of a general meeting, no matter in what part of the world he may happen to be, it is a most inconvenient construction; because a company cannot, without serious injury to itself, delay the transaction of important business until every shareholder in every part of the world has had notice of the meeting at which the business is to be discussed. I think that such a construction would be entirely opposed to the spirit and intention of the Act. It seems to me that the Act has reference only to shareholders who can be reached by the ordinary English post, and that, in fact, it was not necessary to serve these absent shareholders. G

I may observe in passing that this matter did not turn upon the construction of sect. 52 of the Act of 1862, but upon the construction of the articles contained in Table A, but this point is for practical purposes immaterial.

In BUCKLEY ON COMPANIES, 8th Edn., at p. 224, this statement is shortly disposed of by the learned authors with the question "On what grounds can this be so?" Their question contains five monosyllables: their answer, H I think, would contain only one. The case is not referred to in the present edition.

The next case is *Re Newcastle United Football Co., Ltd.* (5). In that case, the registrar had refused to find that the special resolution altering objects was good on the ground that two shareholders outside the jurisdiction had not received the requisite 21 days' notice of the meeting. The decision of MAUGHAM, J., is reported as follows, at p. 109:

> MAUGHAM, J., in granting the petition, said that, while observing that the decision

in *Re Union Hill Silver Co.* (4) was a decision on a section which did not appear in the Companies Act, 1929, he would follow that case. Accordingly the resolution could be taken as having been properly passed.

I have called for the court records of the case, which was the 53rd petition dealt with by the court on Apr. 11, 1932. It appears that the two shareholders in question were husband and wife both with registered addresses in Malta. There was evidence that notice had been sent to all shareholders. At the hearing an affidavit made by the wife, which was not before the registrar, was produced. In that affidavit the wife stated that she had received the notice on Aug. 29, 1931—but this was less than 21 days before the meeting. There was no evidence filed by the husband who was abroad, but the wife's story, if accepted, would cover the notice sent to the husband. Both husband and wife were apparently in agreement with the resolution. The case is indistinguishable from the present case; but the reported observations of MAUGHAM, J., hardly wear the appearance of a considered acceptance of the *Union Hill Silver Co.* case (4), as a good authority on law or construction. That judge, as he was entitled to do, leant on the decision rather than supported it.

So far as reported authority goes, the matter rests there. But that authority has not been accepted in practice. The registrar to the court in company matters, whose experience on questions arising in checking the evidence as to the due passing of special resolutions extends over thirty years, informs me that both before and after the decision in the *Newcastle* case (5), the practice in Chambers of the companies court has been to refuse to certify that the special resolution has been duly passed in cases such as the present. The cases which the registrar can recall fell generally into two classes (i) cases where the articles were in much the same form as the present and service on the shareholders with a registered address abroad was defective in point of time or entirely absent, and (ii) cases where the articles authorised service on such shareholders by posting up a notice in the registered office and there had been no such posting up. In most of these cases the companies on being told of the difficulty accepted the position and started afresh. As regards such of these cases as were brought into court, the registrar is unable to recall any occasion, other than the *Newcastle* case (5), where the court accepted the resolution as duly passed. According to his recollection authorities were not cited in the majority of cases, but in some cases authority was cited. I may add that to fortify himself in dealing with the companies the registrar to the court kept a collection of his notes of the cases where questions of service came before the court. Unfortunately, as a result of enemy action, that collection has been destroyed. Specific instances cannot be referred to.

Lastly, in the *Anglo-International Bank* case (1), the articles of association were in substantially the same form as the articles in the present case and it would have been unnecessary either for BENNETT, J., or the Court of Appeal to consider the question whether the right of shareholders in enemy occupied countries to receive notice of meetings was suspended by reason of their enemy status if residence abroad was of itself a sufficient reason for not sending them notice.

In these circumstances, I do not feel that I am bound to follow *Re Union Hill Silver Co., Ltd.* (4), and give a decision for which I cannot adduce any reason. I hold that the supposed resolution was not validly passed by reason that the meeting was not duly convened.

Petition dismissed.

Solicitors: *Burton, Yeates & Hart*, agents for *Johnson & Co.*, Birmingham (for the petitioner).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re AFFAIRS OF ELSTEIN.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Lawrence, L.JJ.), **January 19, 1945.**]

Judgments—Appeal—Adjustment order—Order by consent—Application to vary order on ground of mistake—Jurisdiction of court—Liabilities (War-Time Adjustment) Act, 1941 (*c.* 24).

The appellant company was the landlord of premises occupied by the A debtor under a lease which could not be terminated before 1950. On May 24, 1944, the debtor obtained a protective order under the Liabilities (War-Time Adjustment) Act, 1941. On June 30, 1944, an adjustment order on a proposal submitted by the debtor was made by the county court as follows: " . . . 10*s.* on landlord's debt, including rent up to date, and damages . . . for disclaimer and dilapidations." The appellant applied to the county court for a variation of the order on the ground B that it understood the order to mean that the payment of 10*s.* in the £ was to be in respect of rent only and that it would still be entitled to claim damages for disclaimer of the lease and for dilapidations. In refusing the application the county court held that the order was made exactly as the court intended and as the court understood the parties intended it to be. It was contended on behalf of the appellant that as the assent C was obtained by mistake the order ought to be varied:—

Held: there was no power to alter the order made by the county court. If there was any remedy, it could only be enforced by independent action.

[**EDITORIAL NOTE.** This is a practice point arising out of the Liabilities (War-Time Adjustment) Act, 1941. It is held that where the judge's proposals have been accepted by the parties and embodied in an order which correctly states the proposals and D one of the parties subsequently alleges that he did not understand the effect of the proposal and did not, therefore, intend to consent to the order as made, the mistake cannot be remedied by an application in the pending proceedings themselves. It is not a " slip."

As to Judgments and Orders by Consent, see HALSBURY, Hailsham Edn., Vol. 19, pp. 222-224, paras. 522-525; pp. 267, 268, para. 568; and for Cases, see DIGEST, Practice, pp. 620-625, Nos. 2571-2604.] E

Appeal by the applicant company from an order of His Honour Judge Drucquer, made at the Willesden County Court, and dated June 30, 1944. The material facts are set out in the judgment of Lord Greene, M.R.

G. H. Crispin for the appellant.

Valentine Holmes for the respondent.

Lord Greene, M.R.: I am afraid this court can do nothing to assist the F appellant in these proceedings. The judge, on his note at the original hearing, has put down in his own language the suggestion that he orally made to the parties at the trial, and which he understood them to accept. Counsel for the appellant says that he understood the judge's suggestion to mean that the payment of 10*s.* was to be in respect of rent only, and that his clients would still be entitled to claim for dilapidations and damages for disclaimer. That, he says, is all he intended to consent to, and that is what he understood was the G proposal. In support of that he calls attention to the judge's proposal as written down by the judge at the time and stated in the note. That statement is very concise and is as follows:

> Adjustment Order as proposal submitted by debtor, subject to (1) 10*s.* on landlord's debt, including rent up to date, and damages . . . for disclaimer and dilapidations.

That includes under one head two things: rent up to date, in respect of which H counsel for the appellant says that was the only thing he consented to so far as the 10*s.* was concerned, and also damages for disclaimer. I must confess I would have read this as meaning that the 10*s.* was to cover the rent up to date and damages for disclaimer. That is what I should have thought it meant. I am not suggesting for one moment that the actual language used by the judge did not mislead counsel for the appellant. But when the matter was brought before the judge on an application to vary the judgment which followed the construction which I have suggested on that note, the judge said:

But that is exactly what I intended. It is not the case that the order is different to what I intended. It is exactly what I intended and what I understood the parties to be agreeing to.

In those circumstances, counsel for the appellant asks us to set aside the judge's refusal to alter the order, and he asks us to alter it. That is quite impossible. The question of what the judge said is a question which would have to be decided on evidence. The question of what meaning the judge's words conveyed to the A parties and their counsel again would have to be decided on evidence. The question might very well arise, even if it turned out that there was a misunderstanding, whether it would be possible to set it right, in view of the fact that the order has been acted upon. I cannot find that this is a case in which we can say that, according to the ordinary practice, the mistake, if it be a mistake, can be remedied by an application in the proceedings themselves once the order has been completed, as it has been completed in this case. If, indeed, B there is any remedy in this case, it must be a remedy by independent action on which evidence can be called, and the relevant facts ascertained. It must not be thought for one moment that I am expressing any view, or implying any view as to the possibility of success in such an action. That would turn on matters which have not been established before us. All I am saying is that if there is a right to have this judgment set aside and a different judgment entered C that right can only be enforced in an independent action and cannot be enforced by an application in the pending proceedings themselves. Therefore, in the result, the appeal must be dismissed.

MACKINNON, L.J.: I agree.

LAWRENCE, L.J.: I agree.

Appeal dismissed with costs.

D Solicitors: *Williams & Poole* (for the appellant); *Treasury Solicitor* (for the respondent.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

E

R. *v.* HURLE-HOBBS, *Ex parte* SIMMONS.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Singleton and Cassels, JJ.), **December 5, 1944.**]

Local Government—District auditor—Statutory power of district auditor to compel witness to attend the audit—Failure of witness to comply with notice to attend—Witness fined—Issue of subpoena ad testificandum and duces tecum—Jurisdiction—Local Government Act, 1933 (c. 51), *s.* 225 (1) (2). F

The Local Government Act, 1933, s. 225, conferred powers on a district auditor to require the production before him of all books and documents necessary for the purpose of the audit. Neglect or refusal to comply with such requirement was made punishable summarily by a fine not exceeding £2. A district auditor of the London audit district requested the applicant G to attend before him at the audit of the London County Council accounts and to produce certain documents which the applicant had in his possession relating to the trading accounts and profit and loss accounts of a firm for which the applicant acted as accountant. The applicant did not comply with the notice and was, on prosecution, ordered to pay the maximum penalty. The district auditor then served the applicant with a further notice to attend which was also ignored. Thereupon the district auditor H applied to the Crown Office for a *subpoena ad testificandum* and *duces tecum* to compel the attendance of the applicant. The Master of the Crown Office granted the *subpoena*. On a motion to set aside the *subpoena* it was contended on behalf of the applicant that the legislature having provided a special sanction by the Local Government Act, 1933, s. 225 (2), the powers exercisable by the King's Bench Division were thereby excluded:—

HELD: the legislature, having prescribed by the Local Government Act, 1933, s. 225 (1) a duty and having provided by sect. 225 (2) a penalty for the non-performance of that duty, must be taken to have excluded resort to that aid by way of *subpoena* which the King's Bench Division might lend to an inferior tribunal.

Pasmore v. *Oswaldtwistle Urban Council* (5) *applied.*

[**EDITORIAL NOTE.** In *R.* v. *Roberts* (4), Cozens-Hardy, M.R., expressed his opinion that an auditor had no power to *subpoena* witnesses. In such cases of inferior tribunals the King's Bench Division gives its assistance to compel the attendance of witnesses, but it is the practice to refuse assistance where other means of enforcement has been given by statute. The Local Government Act, 1933, s. 225, provides a remedy where a witness has failed to appear before a district auditor, and it is, accordingly, held here that this precludes the auditor from applying to the court to issue a *subpoena*.

As to Powers of District Auditor to Compel Attendance of Witness at Audit, see HALSBURY, Hailsham Edn., Vol. 21, p. 223, para. 413.

As to Subpoena ad Testificandum and Duces tecum, see HALSBURY, Hailsham Edn., Vol. 13, pp. 733-735, 737, 738, paras. 808, 811 ; and for Cases, see DIGEST, Vol. 33, p. 40, No. 217 ; Vol. 22, pp. 421-423, 427, 428, Nos. 4316-4336, 4409-4428.]

Cases referred to :

*(1) *R.* v. *Wiltshire Appeal Tribunal, Ex parte Thatcher* (1916), 86 L.J.K.B. 121 ; 22 Digest 453, *4730* ; 115 L.T. 650.

(2) *R.* v. *Greenaway, R.* v. *Carey* (1845), 7 Q.B. 126 ; 22 Digest 422, *4331* ; 2 New Sess. Cas. 103 ; 1 New Mag. Cas. 393 ; 14 L.J.M.C. 190 ; 5 L.T.O.S. 370.

(3) *Amey* v. *Long* (1808), 9 East 473 ; 22 Digest 427, *4409*.

*(4) *R.* v. *Roberts*, [1908] 1 K.B. 407 ; 33 Digest 40, *217* ; 77 L.J.K.B. 281 ; 98 L.T. 154.

*(5) *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A.C. 387 ; 33 Digest 22, *91* ; 67 L.J.Q.B. 635 ; 78 L.T. 569.

(6) *Doe d. Rochester* (*Bp.*) v. *Bridges* (1831), 1 B. & Ad. 847 ; 42 Digest 750, *1737* ; 9 L.J.O.S. K.B. 113.

Motion by the applicant R. W. Simmons for an order to set aside a *subpoena* served upon him by the respondent Hurle-Hobbs, a district auditor of the London audit district, requiring the applicant to attend an audit in order to testify and to give evidence touching claims for payment made by the Hortensia Garages Co., Ltd., upon the London County Council. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

H. G. Garland for the applicant.

C. Erskine Simes for the respondent.

Viscount Caldecote, L.C.J. : This is a motion to set aside a *subpoena duces tecum* which has been issued out of the Crown Office as irregular, oppressive, contrary to law and an abuse of the process of the court. The party on whose behalf the motion is made has been required by a *subpoena ad testificandum* and *duces tecum* to appear before the district auditor of the London audit district to testify and to give evidence touching claims for payment made by a company, Hortensia Garages, upon the London County Council, and to produce trading accounts and profit and loss accounts of the company. The motion is based upon the submission—I think it amounts to this—that, in view of the provisions of the Local Government Act, 1933, s. 225 (2), the power to issue such a *subpoena* has been replaced by the powers which are contained in that subsection. That is upon the assumption that there was a power to issue a *subpoena* of this character in pursuance of the general power of the King's Bench Division to assist inferior tribunals by enforcing the attendance of witnesses. I think it is convenient to read a passage from the case of *R.* v. *Wiltshire Appeal Tribunal* (1), where Swinfen Eady, L.J., made some observations with regard to this power or the practice of the King's Bench Division to lend its aid to inferior tribunals. He said, on p. 137 :

> Then, with regard to the attendance of witnesses before them, the tribunals, being inferior courts and not in this respect in the position of one of the superior courts, have in themselves no power to enforce the attendance of witnesses. For that reason they have to invoke the assistance of the King's Bench Division to compel the attendance of witnesses in proper cases, and the Master of the Crown Office, on being satisfied that they are proper cases, has power to issue a *subpoena*. Therefore it must not be considered that the *subpoena* in this case was improperly issued. The power of the King's Bench Division to give such assistance is referred to in many cases. Thus in *R.* v. *Greenaway* (2), Lord Denman, in delivering the judgment of the court, said : "On the general point no doubt can be entertained. The course of practice, during a long period, was certified to us by our officer ; and it is necessary for the due administration of justice. This court has in all times lent its aid to inferior tribunals, where

> they have wanted the means of enforcing the attendance of witnesses. If *viva voce* evidence is alone required, the ordinary *subpoena ad testificandum* will attain the object; if documents are wanted, recourse must be had to the equally well-known writ of *subpoena duces tecum*. The principle is well and forcibly asserted in the important judgment delivered by LORD ELLENBOROUGH in *Amey* v. *Long*" (3). True it is that since this case power has been given to tribunals which had not the authority themselves to compel the attendance of witnesses, and, therefore, this power is much less frequently resorted to than before, and in some of the books it is said that of late years applications have been discouraged; but the power exists, and is there, and it cannot be said that in the present case the *subpoena* was not properly issued.

That passage, I respectfully think, must be taken to state the current practice for the purposes of this present case.

The question which arises is not as to the application of the statements made by SWINFEN EADY, L.J., but whether in view of the provisions of the Local Government Act, 1933, s. 225, that power exists with regard to the enforcement of the attendance of witnesses or persons required to produce documents where they refuse to comply with the summons or the direction or the requisition by the district auditor. Sect. 225 is a re-enactment in slightly different words of a provision to be found in the Public Health Act, 1875. It provides:

> A district auditor may by writing under his hand require the production before him of all books, deeds, contracts, accounts, vouchers, receipts and other documents which he may deem necessary for the purpose of the audit, and may require any person holding or accountable for any such document to appear before him at the audit or any adjournment thereof.

Subsect. (2) says:

> If any person neglects or refuses to comply with any such requirement, he shall be liable on summary conviction to a fine not exceeding forty shillings,

It is pointed out to us, and I think it is right, that the district auditor, acting under the code which is contained in the Local Government Act, 1933, is performing judicial duties. I am satisfied on that point not merely by what FARWELL, L.J., said in the case of *R.* v. *Roberts* (4), but I am satisfied also by the provision in the Local Government Act, 1933, which gives a right of appeal from the district auditor's decision. FARWELL, L.J., says, at p. 438:

> . . . subsects. 6 and 7 appear to me conclusive to show that the auditor has functions of a judicial nature to perform.

Being in that position and being charged with a duty contained in the Local Government Act, 1933, to make an audit and to take certain action in certain events he requires evidence to be available for him in order to enable him to perform his duty, which makes it plain that it is very desirable that he shall be armed with sufficient powers. There is the auditor charged with a duty. It would be absurd to suppose that he can perform that duty if he cannot obtain the materials he requires. Parliament evidently foresaw that. It is so obvious that provision is almost certain to be made for the position that when once the auditor was charged with the duty of making a report as to the legality or otherwise of payments by the local authority whose accounts were being audited, there should be a provision enabling him to make demands upon certain persons for their attendance or for the production of certain documents, and that is of the greatest importance. Parliament thought that it was necessary to provide a means by which the district auditor should obtain the necessary evidence and documents. That is quite plain from the language of sect. 225, which says:

> A district auditor may by writing under his hand require the production before him of all books . . . which he may deem necessary for the purpose of the audit . . .

It follows necessarily that some sanction must be given to him to enforce compliance with his requisition. Parliament has said that the sanction shall be a fine not exceeding forty shillings if any person neglects or refuses to comply with any such requirement.

The short question which arises in this case is whether or not that enactment giving that power, which is put in the hands of the district auditor, excludes a resort to that aid which the King's Bench Division may give to inferior tribunals, as explained in the passage I have read from the judgment of SWINFEN EADY, L.J. On the one hand, it is said by counsel for the applicant that Parliament, having provided a sanction, cannot have intended that some greater penalty by way of sanction should be imposed. Counsel for the respondent, on the other hand, says that, even though a person may be subjected to a penalty of £2, it does not follow that it would be possible to enforce his attendance, however often he may be fined, and that it is very important that the power of issuing a *subpoena duces tecum* should be exercisable, I will not say in the last resort, but on a proper occasion.

In this particular case Simmons, upon whom the *subpoena* has been served, has been required by the district auditor to produce certain documents which he admits have been or are in his possession. Such a requirement has been made by the district auditor once already, and Simmons has been fined the maximum penalty of £2 for non-compliance with that requirement. The district auditor says: "The time has come when I must turn the screw more tightly and the only means open to me is to seek the aid of the King's Bench Division by obtaining a *subpoena duces tecum*." As between those views—and there is a good deal to be said for each of them—I have come to the conclusion that the right view is that Parliament intended, as counsel for the applicant said, to exclude the powers which are exercisable by the King's Bench Division.

We have referred counsel, who appears for the district auditor, to what Lord Halsbury said in *Pasmore* v. *Oswaldtwistle Urban Council* (5). The two material provisions in that case were, first of all, a section of the Public Health Act, 1875, which required a local authority to keep in repair all sewers belonging to them, and sect. 299 which provided:

> Where complaint is made to the Local Government Board that a local authority has made default . . . the Local Government Board . . . shall make an order limiting a time for the performance of their duty in the matter of such complaint.

The appellants in that case sought to enforce the performance of that duty by the urban council by an application for a *mandamus*. Lord Halsbury said, at p. 394:

> There is no such provision in the statute, and it appears to me that the whole purview, object and purpose of the statute is one which would not justify such an addition to the language of the *mandamus* . . . The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges* (6). He says: "where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

Those sentences stating the principle seem to me to be most material for our consideration. Where Parliament has prescribed a duty and a particular penalty for breach of that duty, it is not open to a party to say that a more specific penalty can be enforced by resorting to a different process to compel compliance with the law. The point is not easy, and I have found my mind turning from one consideration to another. In the result, I have come to the conclusion that Parliament, having prescribed a duty and having said what the penalty was for non-performance of that duty, must be taken to have excluded the power to resort to the action of the King's Bench Division referred to by Swinfen Eady, L.J., in *R.* v. *Wiltshire Appeal Tribunal* (1). I, therefore, think this motion to set aside the *subpoena* must succeed.

Singleton, J.: This is an unusual case. By a notice of Sept. 12, 1944, the district auditor of the London audit district called upon the applicant, who is an accountant, to attend before him on an audit and to produce certain documents. The applicant failed to do that after further notice and he was prosecuted and was fined the sum of £2 and £3 costs for his failure to comply with the notice given by the district auditor. The district auditor has since served a further notice upon him calling upon him to produce documents and to attend, but it appears that the applicant is unwilling to do so. The district auditor thereupon applied to the Crown Office for a *subpoena* to compel the attendance of the applicant and to compel him to produce the documents. That *subpoena* was granted. The applicant now moves to set aside the issue of that *subpoena*.

The practice is dealt with in Short & Mellor's Crown Office Practice, 2nd Edn., at p. 405, in two short paragraphs:

> Moreover, the court has in all times lent its aid to inferior tribunals where they have

wanted the means of enforcing the attendance of witnesses. But in practice it is not confined entirely to such cases. Upon that principle *subpoenas* were issued for the attendance of witnesses before revising barristers prior to the statute, giving them power to summon witnesses, and even before arbitrators, but in both cases they are now refused.

I suppose the reason they were then refused, or are now refused, is that another means was given of enforcing the attendance of witnesses in those cases. In the present case the power is given to the district auditor by the Local Government Act, 1933, s. 225, by writing under his hand to require the production before him of all books and other documents which he deems necessary for the purpose of the audit and also to require any person holding such document to appear before him at the audit. That is the material part of sect. 225 (1). Subsect. (2) provides :

> If any person neglects or refuses to comply with any such requirement, he shall be liable on summary conviction to a fine not exceeding forty shillings, and if any person knowingly and wilfully makes or signs any such declaration which is untrue in any material particular, he shall be deemed to be guilty of an offence under the Perjury Act, 1911, s. 5.

This case is different from the cases referred to in SHORT & MELLOR'S CROWN OFFICE PRACTICE, at p. 405, because the statute which created district auditors or their predecessors in title provides a remedy in case those they require as witnesses fail to attend or those they require to produce documents fail to produce those documents. Sect. 225 of the 1933 Act follows quite closely the Public Health Act, 1875, s. 247. That Act created the system of audit and it created officers, those who are now district auditors. I assume that district auditors are tribunals. The tribunal, the district auditor, is given a remedy if the person he requires as a witness fails to attend. He can then take steps to enforce the attendance of the witness. He can haul the defaulter before the magistrates' court and a fine may be imposed. That is the remedy given to the district auditor or the means of compelling the attendance of a witness given to him by the Act which created his office, and *prima facie* I should have thought that that was the only remedy he has. I appreciate the argument of counsel for the respondent that the fact that other means are given of compelling the attendance of witnesses may not take away the power which is given to this court to assist inferior courts or tribunals, but it is of importance to notice that the legislature, at the time of creating officers who are now known as district auditors, gave them the means of enforcing the attendance of witnesses before them. If it be right that a district auditor acting under sect. 225 and failing to secure the attendance of a witness can obtain a *subpoena* from the Crown Office, what does it mean ? It means that those who desire the attendance of a witness can go to the Crown Office and say : " We have had a fine imposed upon this man, but that does not appear to us to be enough," and they may then ask for the issue of a *subpoena*, and, if they satisfy the Master of the Crown Office to that effect, he may grant one. That can only mean that he, upon their request, is coming to the conclusion that the remedy or means of enforcing the attendance given by sect. 225 (2) of the Act, given by Parliament, is not sufficient. I cannot think that that can be right.

There are two other matters to which reference should be made. We were referred to the case of *R.* v. *Roberts* (4) and to the judgment of FARWELL, L.J., in that case, and, as CASSELS, J., pointed out in the course of the argument, COZENS-HARDY, M.R., in the course of his judgment in that case, said, in regard to the Public Health Act of 1875, s. 247, at p. 418 :

> The statute has enabled an auditor, who, in my opinion, has no power to administer an oath or to *subpoena* witnesses, and who is not a judicial officer in the ordinary sense, to decide that a member of a local authority has been guilty of negligence or misconduct . . .

I would add this. Parliament having given a remedy, *prima facie* that remedy is the remedy which should be applied, and the fact that the applicant has not answered to a fine of £2 and £3 costs, must not be taken as meaning that some other remedy is necessary. It may not be very convenient, but it is open to the auditor to give a further notice to the applicant, and if he fails to obey that notice, to take him before the magistrate again and another fine can be imposed. It is true that that takes time and it causes a little delay and difficulty. It may hold up the audit for a time, but it is a weapon in the hands of the district auditor that he can take that course if he is so advised. The applicant may not like a repetition of a fine and it may prove efficacious. Parliament has laid down what should be done, as it seems to me, and those responsible for this comparatively small penalty may well have thought that in many such cases it is likely that the person summoned would be a professional man, and the serving of this notice would be sufficient with or without a fine.

I wish it to be understood that although I take the view that this *subpoena* should be set aside, I am by no means saying that the position is satisfactory as it stands. I should have thought that it was the duty of a professional man to help in matters of this kind as far as he can, and, if he says someone is or was abroad so that he could not get proper instructions, by now he may well have had time to do so. If he has not by now, he may by the time the next summons in the police court is issued. I am not satisfied that there is any need in the circumstances of this case for the issue of a *subpoena* ; I think the remedy provided by the legislature is, and is likely to be, sufficient for the purposes of this case. I agree with the judgment delivered by Viscount Caldecote, L.C.J.

Cassels, J. : I agree.

Judgment for the applicant. No order as to costs. Leave to appeal granted.

Solicitors : *Alfred C. Warwick* (for the applicant) ; *Sharpe, Pritchard & Co.* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

SMITH *v.* H. BAVEYSTOCK & CO., LTD.

[King's Bench Division (Hilbery, J.), **December 21, 1944.**]

Factories—Dangerous machinery—Circular saw—Guard incorrectly adjusted by operator—Operator injured—Operator skilled workman—Whether employers' statutory duty delegated to operator—Contributory negligence—Woodworking Machinery Regulations, 1922 (*S.R. & O.*, 1922, *No.* 1196), *regs.* (9) (*b*), (10) (*c*), (23).

The plaintiff, a skilled worker with a circular saw, was employed by the defendants in their sawmills. During the course of his employment the plaintiff cut his finger on the edge of the saw with which he was working. The Woodworking Machinery Regulations, 1922, reg. (10) (*c*), dealing with the duties of employers, provides that the guard on a circular saw shall extend as low as practicable at the cutting edge ; and by reg. (23), every person employed on a woodworking machine is required to use and maintain in proper adjustment the guards provided. At the time of the accident the guard had been adjusted ⅝ths of an inch too high, the adjustment having been made by the plaintiff himself. The plaintiff brought an action on the grounds of a breach of statutory duty on the part of the defendants, or alternatively, a breach of the defendants' common law duty. The plaintiff contended that under reg. (10) (*c*) the duty of having the guard properly adjusted was on the defendants and that, therefore, even if they left the adjustment to the plaintiff, it remained their adjustment. The defendants denied a breach of duty on their part and contended that the plaintiff himself was in breach of the duty imposed on him by the Regulations, and further that he was guilty of contributory negligence :—

Held : (i) the defendants, being a corporation and, therefore, obliged to entrust the duty imposed on them to an agent, were entitled to delegate to a skilled worker, such as the plaintiff, the statutory duty placed upon them for ensuring the safety of that worker ; on the evidence, it was clear that the defendants' duty under the Regulations was delegated to the plaintiff, and the improper adjustment of the guard was his own act and default, for the consequences of which he could not recover.

Vincent v. *Southern Ry. Co.* (2) *applied.*

(ii) the plaintiff was guilty of contributory negligence.

(iii) the defendants were not guilty of any breach of duty owed by the master at common law to his servant.

[**EDITORIAL NOTE.** It is here held that an employer is entitled to delegate to a workman the carrying out of safety regulations, and if the workman carries out his duties in breach of those regulations he cannot recover if he is injured. The case may be contrasted with *Lay* v. *D. & L. Studios, Ltd.*, ([1944] 1 All E.R. 322), where a similar guard was improperly adjusted over a long period and the workman was given no instruction in adjustment.

As to Fencing Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131 ; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to :

(1) *Miller* v. *William Boothman & Sons. Ltd.*, [1944] K.B. 337 ; [1944] 1 All E.R. 333 ; 113 L.J.K.B. 206 ; 170 L.T. 187.

*(2) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430 ; Digest Supp. ; 96 L.J.K.B. 597 ; 136 L.T. 513.

Action to recover damages for personal injuries. The plaintiff, a workman, claimed that his accident and injury were the result of (i) a breach of statutory duty on the part of the defendants, his employers, or (ii) alternatively, a breach of their duty to him at common law. The facts are fully set out in the judgment.

S. R. Edgedale for the plaintiff.

N. R. Fox-Andrews for the defendants.

Hilbery, J. : The plaintiff, who is 27 years of age, is an experienced and skilled worker with a circular saw. On Oct. 13, 1943, he was following his occupation at a circular saw in the defendant's sawmills where he was employed when he cut the index finger of his left hand on the cutting edge of the circular saw with which he was working. The wound subsequently became septic, and on Nov. 17, 1943, the finger had to be amputated. He now brings this action claiming damages against his employers alleging that his accident and injury were the result of breach of statutory duty on the part of his employers, the defendants, or, alternatively, were caused by a breach of duty owed to him by his employers at common law. It was conceded by counsel for the plaintiff that, in view of the decision of the Court of Appeal in *Miller* v. *William Boothman & Sons, Ltd.* (1) he could not argue before me his claim based upon an alleged breach of the duty imposed on an employer by the Factories Act, 1937, s. 14 (1), since the defendants' sawmill was subject to the Woodworking Machinery Regulations, 1922. The plaintiff contended, however, that his accident was caused by a breach of these Woodworking Machinery Regulations and by a breach of the defendants' common law duty. The case for the plaintiff was argued before me as one of breach of statutory duty. The defendants' contentions were that in the circumstances there was no breach by them either of the statutory Regulations or of their common law duty, that the plaintiff was himself in breach of the duty imposed upon him by the same statutory Regulations, and further that the plaintiff was himself guilty of contributory negligence. The Woodworking Machinery Regulations, 1922, reg. (10), defines the duties of the employer in the fencing of circular saws. Subsect. (*c*) provides, *inter alia*, that the guard on the saw :

> . . . shall extend from the top of the riving knife [which is at the back of the saw] to a point as low as practicable at the cutting edge of the saw.

Reg. (23) deals with the duties of persons employed and provides :

> Every person employed on a woodworking machine shall (i) use and maintain in proper adjustment the guards provided in accordance with these regulations . . . except when . . . use of the guards or appliances is rendered impracticable.

The guard provided by the defendants and fixed on the circular saw at which the plaintiff was working at the time of his accident was what is called an " Eclipse " guard and is one of the guards a picture of which is given in the Home Office Safety Pamphlet, No. 8, entitled " Fencing and other safety precautions for woodworking machinery." The guard was admitted to be one of the model guards and no criticism of it as a guard was offered. It complied with the Regulations and was in all respects a proper guard and in good order. Of necessity, since the wood to be cut by the saw must be presented to the cutting edge of the saw, the guard requires adjustment so as to allow the wood which has to be cut to pass under it. If too much clearance is allowed, or, in other words, if too much space is allowed, between the bottom of the guard and the top of the wood, the fingers of the worker at the saw can come into contact with the cutting edge of the saw. The cutting edge of the saw is necessarily unguarded to the extent of the space left between the top of the wood and the bottom of the guard. The breach of statutory duty on the part of the defendants relied on by the plaintiff was the fact that the guard was not adjusted to a point as low as practicable at the cutting edge of the saw on the occasion in question.

The plaintiff's evidence was that at the time of his accident he was cutting planks one inch thick and had himself adjusted the guard to 1½ inches from the bench, thus leaving a clearance or unguarded space of half-an-inch. The plaintiff's expert, Mr. Thomas, said that the guard should be adjusted—indeed, must be adjusted—so as to give a slight clearance over whatever wood was being cut and that ⅛th of an inch clearance was ample. In addition, Mr. Thomas told me that it was not necessary, for the sake of clearance, to adjust the guard to half inch above the plank which had to be cut and that if such an adjustment was made the danger was obvious. In those circumstances I am satisfied that at the time of the plaintiff's accident the guard provided in accordance with the Regulations was not in proper adjustment, since it was not adjusted to extend to a point as low as practicable to the cutting edge of the saw. If the evidence of Mr. Thomas given on behalf of the plaintiff is taken as a guide, it was ⅜ths of an inch too high. While the plaintiff admits that this adjustment was made by him, he contends that the duty to fence the circular saw by having the guard adjusted so as to extend to a point as low as practicable to the cutting edge of the saw is placed by the Regulations upon the defendants, the employers, and that, if they did leave that adjustment to the plaintiff, it remained their adjustment for which they must take responsibility if, in consequence, the plaintiff suffered injury.

The defendants are a limited company and can only act through human agents. Being a corporation they must necessarily entrust the duty imposed on them to some agent. I can see no reason why they should not leave the performance of the duty of adjusting the guard to such a worker as the plaintiff. Provided the employee at a circular saw is sufficiently trained to work that class of machine, the Regulations contemplate his being employed at a machine belonging to that class without supervision; (see reg. (9) (*b*)). The plaintiff was a fully trained and experienced worker at a circular saw. He was 26 years old and was an intelligent and skilled man. There was no reason, therefore, why the plaintiff should be supervised by someone else. If it was proper to leave him to work the saw, it is difficult to see why it should be improper to leave the adjustment of the guard to him. From the standpoint of what was practical, he was the best person to do it, since he was the person to put the wood through the machine and could very quickly and easily adjust the guard to the work in hand. The adjustment of the guard is the simplest possible matter and would take only a matter of moments.

There is authority for saying that as a matter of law a limited company can delegate to a worker a statutory duty placed upon the company for the purpose of ensuring the safety of that worker. *Vincent* v. *Southern Ry. Co.* (2) is a case very much in point. The subject of the claim there was that a man named Vincent had met his death on the Southern Railway while an employee of the railway, through breach of certain rules binding on the company. The Prevention of Accidents Rules, 1902, r. 9, is as follows:

> With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose, shall be expressly instructed to act for such purpose and shall be provided with all appliances necessary to give effect to such look-out.

In the course of his speech in that case, VISCOUNT CAVE, L.C., said at p. 436:

> . . . I am disposed to agree with the view, which was expressed by ATKIN, L.J., in his judgment on the appeal, that it is a mistaken view of the rule to say that the company have complied with it by merely making regulations under which a foreman is entrusted with the duty of seeing that there is a look-out man, and that the company have not performed their duty unless in pursuance of that delegated task the foreman does in fact provide and appoint a look-out man. The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed

> to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself. [I stress the words " other than the foreman himself."] This does not mean that, in my opinion, the company in charging the foreman or ganger with the duty of deciding whether danger exists and of appointing a member of his gang to act as a look-out is taking an unreasonable course. Being a corporation, they must necessarily entrust that duty to some agent, and I see no sufficient reason why the foreman or ganger (who will be on the spot) should not be selected for that duty; but nevertheless if he should fail in that duty, the company may be liable for the consequences of the default to any person not concerned in it.

Vincent was the foreman or ganger and it was his duty under the rule, in a case where the work to be done involved danger to the men, to appoint a look-out man, and it was in respect of Vincent's death on the occasion when he was said to have appointed Stockwell as look-out man that the claim in that action was made. Lord Cave, L.C., went on to say that there were present in the case two considerations which appeared to him to be fatal to the claim of Vincent's representative. At pp. 437, 438, he said:

> In the first place there is, in my opinion, no evidence on which the jury could have found that Vincent failed to appoint a look-out in accordance with the company's regulation. The jury have found that Stockwell was provided as a look-out man, which involves a finding that the work on which Vincent was engaged was a one-man job and left Stockwell free for that purpose; and in my opinion there was ample evidence on which they could so find. Further the whole of the evidence appears to me to be consistent with the view that Vincent when he went to work on the locking bar instructed Stockwell to keep a look-out, and that Stockwell in fact did so and warned Vincent of the approaching down train; but that both the men, when they left the down line in order to allow the fast down train to pass, failed to observe the approach of the up express and, instead of remaining in the six foot way, stepped on to the up line. If so, the right conclusion appears to be that at which the jury arrived—namely, that the accident was due, not to any negligence or breach of duty on the part of the company, but to the carelessness of the two unfortunate men, and there is no ground for directing a new trial.

That part of the judgment is upon the conclusion of fact in the case that Vincent, to whom was delegated the duty of appointing a look-out man, the duty which the regulations put upon the defendant company, had performed the duty by appointing Stockwell. Lord Cave, L.C., passed on to consider Vincent's representative's claim in the action and what her situation was on the assumption or basis that the statutory duty imposed on the company and delegated by them to Vincent had not been performed by Vincent. That is the parallel to the situation in this case where the plaintiff is concerned. Lord Cave, L.C., continued, at p. 438:

> But, secondly, if it were otherwise, and if it were found that Vincent had failed to instruct Stockwell to keep a look-out, the plaintiff would still be in the difficulty pointed out by the Court of Appeal. In that case Vincent would have been in default for not complying with the company's regulation which bound him to appoint a proper look-out, and his representative could not recover for the consequences of his own default.

Lord Sumner in his speech put the situation tersely when he said, at p. 441:

> If Vincent acted as look-out, he was killed because he failed to observe the up boat train in time and to act accordingly. If he failed to post any look-out, either Stockwell or himself, he was killed because there was no look-out at all. If he posted Stockwell and was not warned by him in time, his widow could only recover, if under the rule the company is liable not merely for not providing a person to act as look-out, but also for the negligence of that person, if, being so posted, he fails to look out properly. As to the first two possibilities, I agree with the Court of Appeal, that the plaintiff was in a dilemma. If Vincent failed to post a look-out or, being the look-out himself, failed to be duly vigilant, he contributed to his own death.

Two things seem to me to emerge from that decision: first, that, even if a regulation is made for the safety of a worker employed by a corporation, the corporation can delegate to a worker the duty of performing that which the regulation requires to be done for the safety of the worker; secondly, it seems to me to show that if, with that duty delegated to the worker, the worker suffers an injury by his own default in carrying out that duty, he cannot successfully claim damages in a court of law in respect of the injury which he suffers in consequence of that default.

I turn now to the case that I am at present considering. Although it is true to say in this case that there was no evidence that on some particular occasion the plaintiff had been expressly told that the performance of the defendants' duty under the Regulations was delegated to him, it is clear from the evidence that the duty was in fact delegated to him and that he knew and accepted the situation that the adjustment of the safety guard to the particular work he had in hand was delegated to him by the defendants and was a part of his duty. The plaintiff is in the same kind of difficulty as Vincent's representatives were **A** in *Vincent* v. *Southern Ry. Co.* (2), for the improper adjustment of the guard which resulted in his injury was his own act and default. He knew he was leaving a dangerous space between the bottom of the guard and the top of the wood ; he knew the purpose of the guard, the way it should be adjusted, and that a higher adjustment than necessary was a breach of the Regulations requiring the circular saw to be guarded and that such an adjustment was disapproved by his employers. I am satisfied that the managing director of the defendant **B** company more than once had spoken to the plaintiff calling his attention to the fact that he was working with this guard too high. It is beyond any question that it was the plaintiff's own act in adjusting the guard, so that the bottom of it was too high above the work he had in hand that resulted in his injury. But, as I have already said, the performance of the statutory duty of adjusting the guard to comply with the Regulations was part of the plaintiff's own duties at this circular saw. If that is right, then in the words of LORD CAVE, L.C., **C** summarising and approving the view on this point expressed by the Court of Appeal in *Vincent* v. *Southern Ry. Co.* (2) the plaintiff cannot recover for the consequences of his own default.

An effort was made to show that the defendants connived at this high adjustment of the guard and would have reprimanded the plaintiff if he had constantly adjusted the guard. The foreman of the defendant company was offered for **D** cross-examination by the defendant company and, when cross-examined, he said at first that if the plaintiff had adjusted the guard for every piece of wood he would have reprimanded him. When I asked the foreman " Did you know that he worked with the guard high up ? " instead of answering that question he said :

> Well, speaking theoretically to try and tell an experienced sawyer how to work is very difficult for a foreman. I would say, to supervise that machine and anybody with his **E** experience and capability, I should not think it necessary to interfere with him.

But he did not say he had ever seen the plaintiff working with the guard too high, and then had done nothing about it. He did not say he ever gave any orders or made any suggestion or gave any hint to the plaintiff about how he should have the guard or how it should be adjusted while the plaintiff did his work. The impression left on my mind by that witness, by his evidence about reprimanding the plaintiff for adjusting the guard to every piece of work or too **F** frequently, is that it is untrue and that in truth he would not think of interfering at all with a worker of the skill and experience of the plaintiff over the way the plaintiff chose to have his guard or to work his saw.

Even if the plaintiff's claim is not answered upon the grounds and for the reasons I have given, in my view it is certainly a case where, in the circumstances I have already detailed, the plaintiff must fail because of his own contributory **G** negligence. He created a danger which, according to the evidence called on his behalf, was obvious. His act in creating the danger was not the result of any direct order by the defendants but was his own act done of his own volition. There was no proof before me that the defendant company either knew and approved this act of his or connived at it. He was a man fully experienced and skilled in working with a circular saw and he knew and appreciated the dangers and how to obviate them by the proper use of the guard. He must have known **H** that his adjustment of the guard was a misuse of the guard and was dangerous. His injury was suffered in consequence of a danger created by him by a deliberate misuse of the guard. It seems to me to be inescapable that the plaintiff here in such circumstances was himself guilty of contributory negligence.

I do not think it necessary to say any more than I have said with regard to the claim so far as it is put and kept open as a claim at common law. As I have said, the case was argued before me as a breach of the statutory duty. I do not mean by that that counsel for the plaintiff abandoned his common law claim, but it was not argued upon that basis. As that common law claim is still open, I will only say that I can discover no possible ground of any breach of the duty owed by the master at common law to his servant, and, therefore, there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Stanley & Co.* (for the defendants).

A [*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re SHELTON'S SETTLED ESTATE, SHELTON *v.* SHELTON AND OTHERS.

B [CHANCERY DIVISION (Vaisey, J.), **January 18, 1945.**]

Wills—Construction—Referential trusts—Property devised to trustees to be held, subject to prior life interest, on same trusts as created by earlier settlement of another property, the S. estates, " or as nearly corresponding thereto as the circumstances will admit "—S. estates settled on testator for life with remainder to sons successively in tail male—Creation of base fee before testator's death— C *Enlargement to fee simple during prior life interest in property devised.*

By his will dated Sept. 2, 1896, and a codicil thereto dated Dec. 23, 1898, the testator devised his estate at Wraysbury, subject to the life interest of his daughter Miss Shelton therein, " to the trustees of the estates at Sandhurst of which I became tenant for life on the death of my brother W., and of which my eldest son F., is next in succession to be held by them upon the same trusts with the same powers and for the same intents and D purposes as the said Sandhurst estates or as nearly corresponding thereto as the circumstances of the case will admit." The will contained a residuary devise and bequest, in the events which happened, to the testator's granddaughter, D. St.J. (the third defendant). By an indenture of 1868, the Sandhurst estates had been settled on the testator's brother W., for life with remainder to his sons successively in tail male with remainder to the testator for life with remainder to his sons successively in tail male E with remainders over. The testator died on Dec. 30, 1898, leaving 2 sons and 2 daughters. The testator's daughter Miss Shelton died in 1942. In 1894, the testator's elder son, F., had executed a disentailing assurance of the Sandhurst estates, and had settled the estates upon himself, his wife and issue; but as no consent of the protector was obtained, the assurance only operated to create a base fee. In 1899, after the testator's death, F. enlarged the base fee into a fee simple. F. died without issue in 1923, F leaving a widow who died in 1935, the Sandhurst estates then passing under F.'s will to the testator's younger son and ultimately, under the will of the latter, to his executors, the first two defendants. In view of the above dealings with the Sandhurst estates, the question for the decision of the court was as to how, upon the true construction of the referential trusts in the testator's will, the Wraysbury property devolved on the death of G Miss Shelton, the tenant for life. It was contended on behalf of the residuary devisee and legatee that, as a base fee cannot be created by will, the dispositions of the will and codicil save as regards Miss Shelton's life interests were void, and that accordingly, on Miss Shelton's death, the property fell into the testator's residue:—

HELD: upon the true construction of the will, the words " trusts," " powers," " intents " and " purposes " included the creation of the base H fee, the one relevant disposition of the Sandhurst estates during the testator's lifetime; but that, in view of the words " or as nearly corresponding thereto as the circumstances of the case will admit," it was necessary to execute the trust *cy-pres*, if its execution *modo et forma* were not possible. The result was, therefore, that the Wraysbury property passed to the second defendant, the elder son of the testator's younger son, since assuming there was a base fee in the Wraysbury property, it was never enlarged but determined in the lifetime of Miss Shelton, the tenant for life, by reason of the death of the testator's elder son without male issue.

[**EDITORIAL NOTE.** The difficult problem of construction arising out of this referential trust is held to be susceptible of three possible solutions. It may be said (*a*) that the trusts powers intents and purposes referred to are those in the earlier settlement, ignoring subsequent dealings with the property; or (*b*) that the subsequent dealing with the property in the testator's lifetime involving the creation of a base fee is to be considered; or (*c*) that the creation of the base fee and the subsequent enlargement into a fee simple in the lifetime of the life tenant is to be regarded. The court decides in favour of the second interpretation.

As to Referential Trusts, see HALSBURY, Hailsham Edn., Vol. 29, pp. 803-806, paras. 1110-1113; and for Cases, see DIGEST, Vol. 43, pp. 602-608, Nos. 492-529.

As to Base Fees, see HALSBURY, Hailsham Edn., Vol. 27, pp. 692-694, paras. 1185-1190; and for Cases, see DIGEST, Vol. 38, pp. 726-728, Nos. 704-719.]

Cases referred to:

(1) *Re Slade, Witham* v. *Watson* (1919), 89 L.J.Ch. 412; 44 Digest 417, *2478*; 122 L.T. 321.

(2) *Badham* v. *Mee* (1830), 1 Russ. & M. 631; 28 Digest 246, *1028*; *subsequent proceedings* (1831), 7 Bing. 695; (1832), 1 My. & K. 32.

(3) *Re Paul's Settlement Trusts, Paul* v. *Nelson*, [1920] 1 Ch. 99; 44 Digest 784, *6414*; 88 L.J.Ch. 530; 121 L.T. 544.

(4) *Re Campbell's Trusts, Public Trustee* v. *Campbell*, [1922] 1 Ch. 551; 40 Digest 568, *1054*; 91 L.J.Ch. 433; 127 L.T. 236.

(5) *Re Gooch, Gooch* v. *Gooch*, [1929] 1 Ch. 740; Digest Supp.; 98 L.J.Ch. 285; 141 L.T. 150.

Adjourned Summons by the trustees of the testator's will and the codicil thereto to determine a question of construction arising thereunder. The facts are fully set out in the judgment.

Wilfrid Hunt for the plaintiffs, the trustees.

E. M. Winterbotham for the first defendant, an executor of the will of the testator's younger son.

Geoffrey Cross for the second defendant, the Rev. Ralph Norman Shelton, the elder son of the testator's younger son.

I. J. Lindner for the third defendant, Dorothy Mary Beaufort St. John, the testator's granddaughter, entitled under the testator's will to his residuary estate.

B. G. Burnett-Hall for the three remaining defendants.

Vaisey, J.: By his will dated Sept. 2, 1896, the testator, Captain Frederick Shelton, among other dispositions devised all his real estate at Wraysbury in the county of Buckingham (to which I will in this judgment refer as the Wraysbury property) as follows:

> . . . to the trustees for the time being of the estates at Sandhurst in the county of Kent of which I became tenant for life on the death of my late brother Captain William Shelton and of which my eldest son Frederick William Shelton Shelton of Bath is next in succession on my decease to be held by them upon the same trusts with the same powers and for the same intents and purposes as the said Sandhurst estates or as nearly corresponding thereto as the circumstances of the case will admit.

These are the words upon which arises the question which I have now to decide. There is a residuary devise and bequest in favour (in the events which have happened) of the testator's granddaughter, the defendant Dorothy Mary Beaufort St. John, but it may be material to notice that in an event which did not happen there was a direction for the payment and transfer of the residue (quoting the words of the will):

> . . . unto the trustees for the time being of the said estates at Sandhurst and Wraysbury to be held by them upon the same trusts and with the same powers and for the same intents and purposes as the said estates or as nearly corresponding thereto as the circumstances of the case and the differences between realty and personalty will admit.

On Dec. 23, 1898, the testator made a codicil to his will. After reciting the terms of the devise of the Wraysbury property and stating his desire to vary such devise by interposing a prior life interest in the Wraysbury property in favour of his daughter Catharine Florence Shelton, he proceeded to give and devise the Wraysbury property to his said daughter for life as therein mentioned. Then follow these words:

> And upon her decease I give and devise the same to the trustees for the time being of the said estates at Sandhurst upon the trusts and in manner in my said will mentioned and in all other respects I confirm my said will.

The testator died on Dec. 30, 1898, and his will and codicil were proved at Gloucester on Jan. 31, 1899. Captain William Shelton named in the will was the testator's elder brother and had died on Oct. 29, 1894, without issue. The testator left issue him surviving two sons and two daughters. To his elder son Frederick William Shelton Shelton I will refer as the elder son and to the younger son, the Rev. Norman Wilfred Shelton, I will refer as the younger son. The elder of the two daughters is the one named in the codicil; I will call her Miss Shelton; the younger married a Mr. St. John and died on July 31, 1915. The defendant Dorothy Mary Beaufort St. John is her only child. The elder son died without issue on Dec. 3, 1923; he left a widow who died in 1935. The younger son died on Jan. 7, 1940, having had, with other issue, the defendant the Rev. Ralph Norman Shelton, his eldest son. Miss Shelton died on Oct. 7, 1942, and now the question of how the Wraysbury property devolves upon her death has to be determined.

The Sandhurst estates to which the testator made reference had by an indenture dated May 8, 1868, been settled to the following uses, that is to say, to the testator's brother William for life with remainder to his sons successively in tail male with remainder to the testator for life with remainder to his sons successively in tail male with remainders over, and trusts were thereby constituted for the purpose of preserving contingent remainders and of exercising certain powers of management during infancies. Consequently, according to the tenor of those limitations, the elder son became on the death of the testator tenant in tail male by purchase in possession. It is, however, necessary at this point to take note of certain events which had happened in the testator's lifetime. On June 25, 1894, with a view to his marriage, the elder son had executed a disentailing assurance (subsequently in due course enrolled) of the Sandhurst estates. His tenancy in tail male was then, of course, in reversion, and as no consent of the protector (his uncle, William Shelton) was obtained the assurance only operated (as it only purports to operate) to create a base fee. By two deeds dated June 26, 1894, the elder son settled the estates upon himself, his wife and issue, but the property of the elder son which was comprised in that settlement, in the events which have happened, reverted on the death of his widow in 1935 to the estate of the elder son and passed under his will to the younger son and ultimately under the will of the latter to his executors, the defendants Laurence Hugh Shelton and the Rev. Ralph Norman Shelton. The first of the two deeds of June 26, 1894, contained a covenant by the elder son (in effect) to enlarge the base fee into a fee simple. From the death of William Shelton on Oct. 29, 1894, to his own death on Dec. 30, 1898, the testator was tenant for life of the Sandhurst estates and protector of the settlement. It appears not to be known, and it may be immaterial to know, whether any approach was made to him by the elder son for his consent to the enlargement of the base fee; it is even possible that he was unaware of its existence. In fact the base fee continued to exist as such until after the death of the testator, that is to say, until by a deed dated Feb. 14, 1899 (subsequently in due course enrolled) it was enlarged into a fee simple. The Sandhurst estates have all been sold, and the proceeds have, as already mentioned, passed to the executors of the younger son. There is no difficulty about the due devolution of the Sandhurst estates, but the fate of the Wraysbury property is what I am now deciding. The problem is, in my judgment, a difficult one.

Whatever the nature of the settlement of the Wraysbury property was, it is clear that Miss Shelton was the protector of it. No one has disentailed or purported to disentail the Wraysbury property or any part of it at any time. These points at least are clear.

Let me attempt at this stage to indicate the difficulties by setting out the several possible views of the matter. First, it may be said that the "trusts," "powers," "intents" and "purposes" to which the testator refers are those to be found in the settlement of 1868 and nowhere else, and that no regard ought to be had to any disposition or dealing with his interest on the part of any particular *cestui que* use, such, for example, as the conversion of an estate in tail into a base fee or fee simple. On this view the Wraysbury property evidently vested on the death of Miss Shelton in the defendant the Rev. Ralph Norman Shelton as tenant in tail male by descent. Secondly, we have to consider what would be the consequence of holding that the "trusts," "powers,"

" intents " and " purposes " do here include the one relevant disposition or dealing which had taken place in the testator's lifetime, so that it is necessary to have regard to the creation and existence (both at the date of the will and at the date of the death) of the base fee in the elder son. Upon that view alternative and conflicting arguments were addressed to me. It was said, on the one hand, (*a*) that the words " or as nearly corresponding thereto as the circumstances of the case will admit " enable and, indeed, compel me to execute the trust as it were *cy-pres* (assuming, that is, that its execution *modo et forma* is not possible) with the same result as in the first view, because, assuming that there was a base fee in the Wraysbury property, it was never enlarged, and in fact determined in Miss Shelton's lifetime by reason of the death of the elder son without male issue. The other contention was (*b*) that as a base fee cannot be created by will and, indeed, cannot in strictness be " created " at all (the theory being that it is an estate which merely arises by operation of law as a sort of compensation for a frustrated intention, namely, the intention to create a fee simple) the dispositions of the will and codicil, save as regards Miss Shelton's life interest, are void and have failed (*cf. Witham* v. *Watson* (1)), and, accordingly, that the Wraysbury property falls as from her death into the testator's residue, and has passed to the defendant Dorothy Mary Beaufort St. John. As to the nature and quality of a base fee, see Lewis on Perpetuities, at p. 268 ; Gray on Perpetuities, 4th Edn., at p. 34 (note (5) to sect. 35) ; and Challis's real Property, 3rd Edn., ch. 22, pp. 325-338 : see also *Badham* v. *Mee* (2).

Thirdly, there is the view that I have to take into account not only the creation of the base fee in the lifetime of the testator, but also its enlargement into a fee simple after his death but in the lifetime of Miss Shelton. If that is right, the Wraysbury property has followed the Sandhurst estates into the elder son's marriage settlement passing thence into the estate of the elder son and ultimately into the estate of the younger son. I will deal with this last contention first. It really amounts to saying that the Wraysbury property became a mere accretion to the Sandhurst estates, and must follow them (or, I suppose, the proceeds of their sale) to whatever destination they may reach, and in support of this argument *Re Paul's Settlement Trusts* (3) was cited. That was a decision upon words which are not the same as we have in the present case, but even if it applied here (which, in my judgment, it does not) I should have hesitated to follow it having regard to the later authorities of *Re Campbell's Trusts* (4), and *Re Gooch* (5). I see great objections to reading the words " trusts," " powers," " intents " and " purposes " as indicating whatever the trusts, etc., affecting the Sandhurst estates might have been at the death of Miss Shelton, for on that view of the matter it would presumably not have been possible to effect any dealing with the Sandhurst estates without affecting the Wraysbury property at the same time. Such a view of the matter would certainly contravene the presumption in favour of early vesting, and it seems to me that the rights of the persons entitled in remainder after the life interest of Miss Shelton must (whatever those rights may have been) have been ascertainable at the death of the testator, and not left shifting about, and, as it were, dancing attendance upon and blindly following the Sandhurst estates through all their unpredictable vicissitudes : (*cf. Re Gooch* (5)). Fortunately I have not on this occasion to consider what the position would have been if at the relevant date (whatever that may be) the Sandhurst estates were found to have gone as to one part in one direction and as to another part in another, but such a possibility undoubtedly adds to the risks inherent in the practice of making devises or bequests " by reference," following the precedent of the practice of legislating by reference which, however convenient, has given rise to a great deal of uncertainty and confusion.

In my judgment, the third view is untenable, and I have to decide between the first and second views, or rather between the claim of the defendant the Rev. Ralph Norman Shelton (who may succeed either under the first view or under head (*a*) of the second view) and that of the defendant Dorothy Mary Beaufort St. John whose case rests on head (*b*) of the second view. I have come to the conclusion that the claim of the defendant the Rev. Ralph Norman Shelton succeeds. If the first view is (as it may well be) the correct view, the road to that conclusion is straightforward, and I need not linger upon it. On the whole, however, I incline to the second view, and hold that the creation and existence of the base fee is not to be ignored but must be included as one of "the circumstances of the case" within the meaning of that expression in the testator's will. On that footing, I am not prepared to accept the counsel of despair which bids me to hold that this particular circumstance is of such a character as to preclude the possibility of discovering or formulating any trusts, etc., "corresponding to" the trusts, etc., to which the testator has made reference. The "correspondence" must be as near as the circumstances will admit, which of course implies that it may be more or less near and also more or less distant. I am reluctant to lay down with any approach to precision the exact form which the corresponding trusts would take, but, however framed, they would inevitably (so far as I can see) have now carried the property over (the younger son being dead) to the defendant whose claim I am allowing. Counsel for the defendant the Rev. Ralph Norman Shelton suggested that the trust should be for the elder son so long as any issue male of his are living with remainder to the younger son in tail male, but so that at any time with the consent of Miss Shelton during her life the elder son or the heir male of his body for the time being should have power to convert the estate into an indefeasible fee simple. That may well be one way of doing it. Another way that has occurred to me would be the interposition of a long term, say, of 2,000 years in favour of the elder son, limited to cease upon failure of heirs male of his body, and conferring powers of appointing the fee simple commensurate with the powers of enlarging a base fee, so that, for example, any exercise of such powers during Miss Shelton's lifetime would have required her consent. There may be other or better ways than either of these, and it may be necessary to limit the appropriate power of quasi-enlargement to some period allowed by the rule against perpetuities. I do not particularise further, because equity would, in my judgment, find it quite possible to deal with the difficulty somehow and would not permit the intentions of the testator to be frustrated and the trusts to fail for want of the necessary ingenuity of adaptation.

Declaration accordingly. Cost of all parties as between solicitor and client to be paid out of residue.

Solicitors: *Waterhouse & Co.*, agents for *Winterbotham, Gurney & Co.*, Cheltenham (for the trustees and the first and third defendants); *Jacques & Co.*, agents for *Watts & Son*, Dewsbury (for the second defendant); *Iliffe, Sweet & Co.* (for the three remaining defendants).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

NOTE.

FISHER *v.* RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **February 20, 1945.**]

The Court of Appeal reversed the decision of MACNAGHTEN, J., reported [1944] 2 All E.R. 149, intimating that their reasons would be delivered later. Leave to appeal to the House of Lords was granted.

Re ALFRED FORD.

[Chancery Division (Vaisey, J.), **December 19, 1944.**]

Wills –Construction—Equal division of residuary estate among voluntary hospitals —Whether a "dispensary" is a hospital—Voluntary Hospitals (Paying Patients) Act, 1936 (*c.* 17), *s.* 1.

By his will dated Dec. 5, 1938, a testator directed that his residuary estate was to be equally divided among the voluntary hospitals of Birmingham and Solihull and two other named institutions. An order made on May 14, 1943, directed an inquiry to be held for the purpose of identifying such institutions entitled to participate in the residue. In a certificate issued by the master it was found that there were 16 such institutions. The Birmingham General Dispensary made an application to have the certificate varied by including them as the seventeenth institution with a claim to the residue. The "dispensary" had 11 branches in the city of Birmingham including a dental department, a massage department, foot-clinic and a number of industrial casualty clinics. It was supported by voluntary contributions and it had a full-time salaried and trained staff and also consultants in practically every department of medicine and surgery. The question for the determination of the court was whether the "dispensary" came within the description of a "voluntary hospital":—

Held: the applicant institution was not a voluntary hospital since its purpose was merely for occasional medical or surgery aid.

[**EDITORIAL NOTE.** This case contains a useful definition of "hospital" as a building where in-patients are received for continuous treatment. It is, accordingly, held that a dispensary where out-patients attend for treatment is not a hospital within the meaning of a bequest to voluntary hospitals in a given district.

As to Hospitals, see HALSBURY, Hailsham Edn., Vol. 4, pp. 334, 335, para. 564; and for Case, see DIGEST, Vol. 8, p. 382, No. 1972.]

Summons by the Birmingham General Dispensary asking for the variation of a certificate issued as a result of an order made by Simonds, J., on May 14, 1943. The order directed that an inquiry be made for the purpose of identifying the institutions entitled to the residuary estate left by a testator for equal division among the voluntary hospitals of Birmingham and Solihull. The inquiry resulted in the master issuing a certificate finding that 16 institutions, all voluntary hospitals, were entitled to a share in the residuary estate. The Birmingham General Dispensary asked to be included in the certificate as a seventeenth participant. The facts are fully stated in the judgment.

Wilfred Hunt for the applicant.

Raymond Jennings for the executors and trustees.

Vaisey, J.: The testator in this case directed that his residuary estate should be held in trust for division equally among the voluntary hospitals of Birmingham and Solihull and two other named institutions. On May 14, 1943, Simonds, J., made an order which declared in effect that the voluntary hospitals for Birmingham and Solihull and the two institutions which I have mentioned were entitled to participate in the residue in equal shares as between themselves and he directed that an inquiry should be made to identify the voluntary hospitals of Birmingham and Solihull. The inquiry proceeded in chambers and resulted in a certificate by the master finding that there are 16 institutions in question—voluntary hospitals—among which are such institutions—admittedly hospitals—as the Birmingham Maternity Hospital, the Birmingham General Hospital, the Queen Elizabeth Hospital and the Birmingham and Midland Ear and Throat Hospital.

This is a summons on the part of the Birmingham General Dispensary asking that the certificate should be varied by including as a seventeenth participant the applicant institution. Let me say at once that the merits of the Birmingham General Dispensary are indubitable. No more beneficent and useful institution than that appears to be could well be imagined. It carries on a most useful work for the benefit of the citizens of Birmingham and Solihull. It is most admirably organised and administered. It was founded as long ago as 1793 and includes among its past presidents such distinguished names as those of

Sir Robert Peel in the year 1855, Joseph Chamberlain, 1874 to 1876, and other members of his distinguished family. It is supported by voluntary contributions. It is not run for profit and publishes annually an audited statement of accounts and balance sheet. The only question I have to decide is whether or not it falls within the description of a voluntary hospital. It appears from an affidavit made by its secretary that it has eleven branches in the city of Birmingham, including a dental department, a massage department, foot clinic and a number of industrial casualty clinics. In 1943 there were treated at these various branches no fewer than 29,916 patients. It has full-time salaried medical, dental, pharmaceutical, nursing, and other specially trained staffs and, in addition, it has consultants in practically every department of medicine and surgery.

The question remains, is it a hospital ? Little guidance is given me by the definition of hospitals or voluntary hospitals in Acts of Parliament or other documents, though it is to be observed that for some purposes a hospital has been described as including an out-patients dispensary. Under the Voluntary Hospitals (Paying Patients) Act, 1936, a voluntary hospital is defined as "an institution . . . which provides medical or surgical treatment for in-patients." This, in my judgment, is a question which turns upon the ordinary meaning of the English word " hospital " as the testator must be assumed to have understood it. Little guidance can be derived from the etymological history of the word, but it seems to me, *prima facie*, to indicate a place in which patients are received for continuous treatment and to exclude places to which patients merely resort for the purpose of occasional medical or surgery aid such as is normally obtained at the out-patients' department of hospitals. In the ordinary sense of the word I am of opinion that "hospital" signifies a building where in-patients are received and the fact that in ordinary parlance a hospital is regarded as being something different from a dispensary is indicated in the affidavit of the secretary. In reference to the casualty clinics of the applicants, he tells me that they have been set up to treat minor industrial injuries and ailments hitherto catered for by hospitals only. That, in my judgment, is a significant statement and implies, none the less cogently because unconsciously, that the deponent regarded the casualty clinics as such in contra-distinction to hospitals. It appears to me that if anyone were asked to give a list of the hospitals in Birmingham he would not have included these eleven departments of the applicants severally and I do not see my way to say that the totality of them constitutes within the ordinary meaning of the English language a hospital.

The sixteen successful claimants very naturally have no wish at all to exclude this admirable institution, the Birmingham General Dispensary, from participation in the testator's bounty but, of course, they have no right to relinquish their funds to any institution which is not legally entitled to share with them, and the rather distasteful task is given to me of protecting their funds by declaring what, in my judgment, is the true interpretation of the words of the testator, that interpretation being that this institution is not to come in as a hospital.

Therefore I am compelled, with a reluctance which the other participants share, to dismiss this application. I wish to make it perfectly clear that I could imagine no more beneficent institution than this dispensary appears to be, and my decision rests entirely on this—that, in my judgment, it is not in the proper sense of the word a hospital. I shall dismiss the application and order the costs to be paid out of the estate.

Application dismissed.

Solicitors : *Burton, Yeates and Hart,* agents for *Johnson & Co.,* Birmingham (for the applicant) ; *Saunders, Sobell & Greenbury,* agents for *Whitehouse & Son, Birmingham* (for the executors and trustees).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re HOLLYMAN.

[Court of Appeal (Lord Greene, M.R., MacKinnon, L.J., and Uthwatt, J.), **January 22, 1945.**]

Infants and children—Adoption—Consent of parents—Consent must be operative when adoption order is being made—Adoption of Children Act, 1926 (c. 29), *ss.* 2 (3), 3—*Adoption of Children* (*County Court*) *Rules,* 1926 (*S.R. & O.,* 1926, *No.* 1602), *rr.* 4 (*a*), 5, 7, 9—*Adoption of Children* (*Summary Jurisdiction*) *Rules,* 1936 (*S.R. & O.,* 1936, *No.* 19), *r.* 8 (1).

The consent by the parents of a child to an adoption order, as required by the Adoption of Children Act, 1926, ss. 2 (3), 3, must be operative at the very moment when the order is made. The Adoption of Children (County Court) Rules, 1926, provide for the method of proving the consent which is necessary under the Act but do not preclude a parent who has given his consent from withdrawing that consent down to the moment when the order is made.

[**EDITORIAL NOTE.** Consent to an adoption order, and the method of proving that consent, are two different matters. Rules under the Adoption of Children Act, 1926, may provide for proof of consent but they cannot affect the right of a parent to retract at any time before the order is made. The depriving of a parent of all parental rights being a very serious matter, the statutory safeguards must be strictly maintained.

As to Adoption Orders, see HALSBURY, Hailsham Edn., Vol. 17, pp. 680-684, paras. 1408-1413 ; and for Cases, see DIGEST, Supplement, Infants, Pt. XIa.]

Appeal by the mother of a child from an adoption order made by His Honour Judge Thomas, at the Cardiff County Court, dated Oct. 9, 1944. The facts are set out in the judgment of Lord Greene, M.R.

Michael Bowles for the appellant, the mother.

S. L. Elborne for the respondents, the adopters of the child and the father.

D. F. Brundrit for the respondents, the County Education Authority.

Lord Greene, M.R. : The Adoption of Children Act, 1926, s. 2 (3), lays it down that :

> An adoption order shall not be made [save in specified cases] except with the consent of every person . . . who is a parent . . . of the infant . . .

By sect. 3, the court making an adoption order must be satisfied :

> (*a*) that every person whose consent is necessary . . . has consented to and understands the nature and effect of the adoption order for which application is made . . .

The language of these provisions makes it abundantly clear that what the parent must consent to is the adoption order. That consent must, as it appears to me, exist at the moment when the order is made. The consent and the method of proving it are two quite different matters, and rules as to the latter cannot operate so as to affect the necessity of the former. The depriving of a parent of all parental rights is, of course, a serious matter, and one upon which a parent may very well feel one thing at one moment and another thing at another. The rules are made under sect. 8 (2), which provides :

> Rules in regard to any matter to be prescribed under this Act and directing the manner in which applications to the court are to be made and dealing generally with all matters of procedure and incidental matters arising out of this Act and for carrying this Act into effect shall be made by the Lord Chancellor.

The Adoption of Children (County Court) Rules, 1926, r. 4, provides :

> The petition shall be served on (*a*) the parent or parents of the infant . . .

R. 5 is:

> Every consent required under subsects. (3) and (4) [then should be inserted the words " of sect. 2 "] of the Act shall be in writing and shall be in accordance with the form in the appendix and shall be attested by one witness.

Under r. 9 it is provided that all parties are to be given notice of the hearing—that, of course, would include the parents—and r. 7 is as follows :

> The petition shall be verified by affidavit paragraph by paragraph. There shall be exhibited to the affidavit all certificates, consents and other documents proper for

proving the allegations in the petition. Evidence shall be by affidavit, unless the judge thinks proper to direct evidence to be given orally, which he shall have power to do.

The procedure contemplated, therefore, is: the petition must allege that consent has been obtained from, among other persons, the parents; the allegations in the petition must be supported by an affidavit; and the affidavit which is tendered with a view to proving consent shall have exhibited to it a form of A consent duly signed by the parents. That was done in the present case.

The short facts are as follows. The mother signed a form of consent which was exhibited to the affidavit in support of the petition. When the case came on for hearing she opposed the application saying, in the first place, that the consent had been improperly obtained from her. On that the county court judge decided against her, but she remained throughout objecting to the making of the order; in other words, the written consent which she had given she B resiled from and decided that she no longer was agreeing to the order which was asked for. That was the position before the county court judge, but he disregarded her opposition, relied on the written consent exhibited to the affidavit and made the order.

In my opinion the order cannot possibly stand. The Rules merely provide for the method of proving the consent which under the statute is necessary. C If the Rules had purported to dispense with the consent which the statute required, they would have been *ultra vires*. They merely provide for the method of proof, and all that the consent exhibited to the affidavit proves is the fact that consent has been given. Of course, that consent remains operative unless revoked, but in my opinion no Rule could have laid it down that the consent once given could not be retracted, for the simple reason that the Act requires, as I have said, that the consent shall be operative at the very moment when D the order is made. It is not unimportant to point out that this requirement for a written consent exhibited to an affidavit does not appear either in the Adoption of Children (High Court) Rules, 1926, which are silent on that point, or in the Adoption of Children (Summary Jurisdiction) Rules, 1936. In the latter, r. 8 (1) provides that, subject to certain provisions, an adoption order is not to be made:

> E . . . except after the personal attendance before the court of the applicant and all the respondents [which would include the parents], notwithstanding, in the case of any of the respondents, that written consent has been obtained or that the court is asked to dispense with consent.

It is perfectly clear, therefore, that, in the case where the proceedings take place in a court of summary jurisdiction, consent down to the moment of the making of the order is required. In the Adoption of Children (High Court) Rules, 1926, F again, no provision is made, and the matter of proving consent must be governed by the ordinary rules of evidence. In the case of the county court procedure, special rules relating to the method of proving consent are laid down, but, as I have said, they do not in any way preclude the consenting parent from withdrawing that consent down to the moment when the order is made.

In the result the appeal must be allowed, the order must be discharged, and steps must be taken to ensure that the entries, which we are told have been G made by the Registrar-General, under sect. 11 of the Act, are vacated.

MACKINNON, L.J.: I agree.

UTHWATT, J.: I agree.

Appeal allowed; adoption order discharged.

Solicitors: *Spector & Spector*, agents for *M. Spector*, Bournemouth (for the appellant, the mother); *Theodore Goddard & Co.*, agents for *Elfyn David & Hamblen*, Cardiff (for the respondents, the adopters and the father) and for *S. Tapper Jones*, Cardiff (for the respondents, the County Education Authority).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SLAVIN *v.* A. M. CARMICHAEL & CO., LTD.

[House of Lords (Viscount Simon, L.C., Lord Thankerton, Lord Macmillan and Lord Simonds), **December 13, 14, 1944, January 20, 1945.**]

Workmen's Compensation—Driver of tractor to which scraper was attached—Injury arising from adjusting a defect in the scraper—No prohibition or instruction from employers as to workman's duty regarding adjustment—Dangerous act for purposes of employer's trade or business—Whether risk incidental to employment—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1) (2).

The appellant was employed by the respondents to drive a tractor with a scraper attached to it for the purpose of removing top-soil which was covering outcrop coal. The operations of the scraper were controlled from the tractor-driver's seat by levers and ropes. On July 9, 1942, while the appellant was driving the tractor, the slide in the scraper jammed. The appellant attempted and managed to release the jam with an iron bar. The powerful spring by which the slide was actuated came into operation with the result that the appellant's leg was caught by the connecting rope and he sustained serious and permanent injuries. The appellant claimed compensation on the ground that the accident arose out of and in the course of employment, or should be deemed to have so arisen by virtue of sect. 1 (2) of the Workmen's Compensation Act, 1925. It was found as a fact by the arbitrator that the appellant in releasing the jam on the scraper "was acting without instructions from the respondents . . . but he had never been expressly prohibited from doing so, nor had he been warned not to do so . . . The act of releasing the jammed slide was done for the purpose of and in connection with the respondents' trade or business . . . On certain occasions the tractor-drivers with the knowledge of their foreman or of fitters had made, without objection, minor running repairs on the scrapers." The arbitrator came to the conclusion that the appellant's act "was not within the scope of his employment with the respondents and, therefore, did not arise out of and in the course of his employment," and disallowed the appellants claim. The Court of Session affirmed the arbitrator's findings; on appeal the question for determination was whether the risk taken by the appellant was reasonably incidental to his employment:—

Held: in the absence of any instructions by the respondents as to the duty of the appellant in the event of any repairs to the scraper being necessary, the risk incurred by the appellant was reasonably incidental to, and therefore arose out of and in the course of, the employment.

[**EDITORIAL NOTE.** The court here asks the question put by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co., Ltd.* (7), "Was the risk one reasonably incidental to the employment?" and answers it in the affirmative. The arbitrator held that the employment of fitters amounted to an express prohibition of attempted repairs by the workman but it is held that minor repairs are within the sphere of the employment and arguments drawn from shot-firing cases are unsound, since the duty of shot-firing is imposed by statutory regulation.

As to Accidents Arising out of and in the Course of the Employment, see HALSBURY, Hailsham Edn., pp. 822-861, paras. 1160-1181; and for Cases, see DIGEST, Vol. 34, pp. 284-287, Nos. 2389-2407.]

Cases referred to:

(1) *Thom* (*or Simpson*) v. *Sinclair*, [1917] A.C. 127; 34 Digest 320, *2619*; 86 L.J.P.C. 102; 116 L.T. 609.

*(2) *Wilsons & Clyde Coal Co.* v. *McFerrin*, *Kerr* v. *Dunlop* (*James*) *& Co.*, [1926] A.C. 377; 34 Digest 301, *2499*; 95 L.J.P.C. 130; 135 L.T. 164; *affg.* S.C. *sub nom. McFerrin* v. *Wilsons & Clyde Co., Ltd.*, *McAulay* v. *Dunlop* (*James*) *& Co., Ltd.*, 18 B.W.C.C. 633, 680.

(3) *Hutchison* v. *McKinnon*, [1916] 1 A.C. 471; 34 Digest 319, *2614*; 85 L.J.P.C. 98; 114 L.T. 570.

(4) *Dennis* v. *White* (*A. J.*) *& Co.*, [1917] A.C. 479; 34 Digest 321, *2627*; 86 L.J.K.B. 1074; 116 L.T. 774.

(5) *Kerr* v. *Baird & Co., Ltd.*, [1911] S.C. 701; 34 Digest 298, *e*.

(6) *Thomas* v. *Ocean Coal Co., Ltd.*, [1933] A.C. 100; Digest Supp.; 102 L.J.K.B. 142; 148 L.T. 219.

*(7) *Plumb* v. *Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 34 Digest 288, *2415*; 83 L.J.K.B. 197; 109 L.T. 759.

(8) *Lancashire & Yorkshire Ry. Co.* v. *Highley*, [1917] A.C. 352; 34 Digest 290, *2425*; 86 L.J.K.B. 715; 116 L.T. 767.

(9) *Shotts Iron Co., Ltd.* v. *Fordyce*, [1930] A.C. 503; Digest Supp.; 99 L.J.P.C. 101; 143 L.T. 200.

APPEAL by a workman by way of case stated on an arbitrator's findings, affirmed by the Court of Session, in a claim under the Workmen's Compensation Act, 1925, s. 1 (1) (2). The facts and arguments are fully set out in the opinion delivered by LORD THANKERTON.

James Walker, K.C., and *T. J. D. Connolly* for the appellant.

L. Hill Watson, K.C., and *J. A. Crawford* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, I have had the advantage of reading in print the opinion which LORD THANKERTON is about to deliver in this case; I agree with him on all points and think that this appeal should be allowed. As we are reversing the decision of the Court of Session (which felt itself bound by findings of fact), I propose briefly to formulate my own conclusion in my own words. There is no need to restate the details, which are fully set out by LORD THANKERTON. The question is whether this accident arose out of the plaintiff's employment, and there is plenty of authority to show that the "employment" includes not only the work which the man is expressly employed to do, but also what is incidental to it. (See, for example, the analysis of LORD SHAW OF DUNFERMLINE of the term in *Thom (or Simpson)* v. *Sinclair* (1), at p. 142.)

The appellant was not employed merely to drive a tractor; he was employed to drive a tractor which was drawing a scraper, and he was in sole charge of this double apparatus for the purpose of removing top-soil which was covering outcrop coal. If all went well, the operations of the scraper were controlled from the tractor-driver's seat by levers and ropes, but if the scraper "stuck" in the course of its run, what was the appellant to do? He had never been prohibited from getting down from his driver's seat to see what was the matter or to form a judgment as to whether a minor adjustment would put things in working order: he had never been prohibited from touching the scraper, or directed that if any part of the scraping apparatus jammed, he must leave it alone and summon the fitters, or remain stranded till they presented themselves. On the contrary, he or other tractor-drivers in the same employ had previously made minor running repairs on scrapers without rebuke and with the knowledge of their foreman, or of the fitters; though I should doubt whether the release of a jammed slide could in any event be properly regarded as a "repair." The appellant, as the arbitrator finds, was not actuated by bravado, or curiosity, and was not foolhardy, but, believing that nothing more than a simple operation was involved, tried to release the jammed slide "so that he should continue his work." If it were open to the House to decide, as a matter of fact, whether the accident in these circumstances arose out of the appellant's employment I should certainly advise your Lordships that it did; but, of course, we have to take the decision of fact from the arbitrator, assuming that there is evidence to support it (which I beg leave to doubt) and that he had not misdirected himself in law. But I think he has misdirected himself, for, as LORD THANKERTON is about to point out, he has misapplied the test of VISCOUNT DUNEDIN as formulated in the twin cases of *McFerrin* v. *Wilsons* and *McAulay* v. *James Dunlop* (2). That test was to ask whether the claimant, when he met with his injury, was "doing what he has not been engaged and is not entitled to perform." But this test was formulated in reference to cases where there was a statutory regulation prohibiting what the workman was doing; in such cases, his act could not, therefore, be incidental to his main employment, for he was prohibited from so acting. That is not analogous to the present situation at all: there is really nothing to place the action of the appellant outside the scope of his employment other than the fact that fitters (who were not on the spot) were appointed to undertake major repairs. But this is not enough. It by no means follows that the driver, in the absence of directions to the contrary, was not "entitled" to touch the scraper. What he attempted to do was in relation to apparatus under his sole control and in direct connection with the work on which he was employed, and in order to enable him to continue it. There is neither evidence nor finding that nobody save fitters released jammed slides. The case is manifestly different from suggested illustrations where the guard of a train arrogates to himself the duty of driving the engine or the booking clerk takes on himself to move signals. Those are cases in which the boundary of one employment is clearly distinct from, and does not impinge upon, the other. I hold, therefore, that the appellant succeeds under sect. 1 (1) of the Act, and I move that this appeal be allowed with costs.

Lord Thankerton [read by Lord Porter]: My Lords, In the present case the arbitrator refused the appellant's application for compensation under the Workmen's Compensation Acts, and, on an appeal by stated case, the First Division of the Court of Session have declined to interfere with the decision of the arbitrator. I am of opinion that the arbitrator has misdirected himself, and that the appeal should be allowed.

On July 9, 1942, while the appellant was driving a tractor drawing a 13-yard Le Tourneau scraper, the slide in the scraper jammed in the course of its run. The appellant attempted and managed to release the jam with an iron bar. The powerful spring by which the slide is actuated came into operation and the appellant's leg was caught by the connecting rope, and he sustained serious and permanent injuries. He is still totally incapacitated, though it is likely that in time he will recover partial capacity. It is now right to state the material findings by the arbitrator of facts proved:

> (5) The claimant was acting without instructions from the respondents in releasing the jammed slide, but he had never been expressly prohibited from doing so, nor had he been warned not to do so. It was not proved that he had received any instructions what he should do or what, if any, examination he should make in the event of the slide's jamming. There was no notice on the premises relating to the matter.
>
> (9) From the latter part of Nov., 1941, the claimant had been employed by the respondents at Prestwick, Ayrshire. There he was employed chiefly as a greaser. He also drove a tractor drawing a scraper; shortly before the accident he was transferred to Crigglestone, and at Crigglestone he was employed as a tractor-driver drawing a scraper. Before entering the respondents' employment the claimant had been engaged for about a year as a tractor-driver drawing a scraper.
>
> (10) The claimant had no mechanical training. He had no knowledge of scrapers other than what he had picked up by observation in the course of his said employment. Prior to July 9, 1942, the date of the accident, he had never worked a 13-yard Le Tourneau scraper or any scraper containing a slide. He had never previously released a jammed slide. He was not acquainted with the mechanical working of the said scraper.
>
> (11) The duty of tractor-drivers drawing scrapers is to drive the tractor and to operate the levers and brakes thereon which by means of wire ropes control the movements of the scraper. To do this they do not require to leave the tractor. At Crigglestone two fitters and a foreman fitter were provided whose duty it was to make repairs on the scrapers, and the claimant knew this. The tractor-drivers are provided with keys for the tractor but they are not provided with keys for the scraper. It was proved, however, that on certain occasions the tractor-drivers with the knowledge of their foreman or of fitters had made, without objection, minor running repairs on the scrapers, such as replacing broken ropes, adjusting brakes and the like, and that keys had been handed to them in order to do this.
>
> (12) On the morning of July 9, 1942, when the claimant came to his work at 4.30 a.m., it was found that the winch required tightening and after waiting till 7 a.m. the claimant was handed a key to do this by a foreman and told to do it himself, which he did.
>
> (14) A workman, experienced in making such repairs, such as a fitter, before attempting to release a jammed slide would have put in a block so as to wedge the tail gate or apron and prevent the machinery from moving when the slide was released, in addition to putting on the brake on the tractor which controlled the machinery on the scraper. It was not safe to release the slide without doing that, and any person having a knowledge of the mechanism of the scraper would have known that. There was no suitable block at hand.
>
> (15) On the slide being released the spring would bring the machinery, including the slide, into violent action. This action would continue uncontrolled until any slack on the rope was taken up. Thereafter it would be controlled by the brake on the tractor if the brake held, but there was a considerable risk that under this strong force the brake would slip and that the motion of the slide and the rest of the machinery would continue.
>
> (16) It was not established at the proof whether the motion of the slide was due to too much slack being left on the rope or to the brake slipping or to both causes.
>
> (17) The fitters at the time of the accident were absent for dinner, but were due to return at 1.30, about ten minutes later.

> (18) The claimant, owing to his ignorance of mechanics and of the working of this particular scraper, was not awake to the danger in attempting to release the jammed slide as he did. He thought it would be a simple operation. The motive of the claimant in releasing the slide was to put the scraper into operative condition so that he should continue his work. He was not actuated by bravado or curiosity, or any other motive than that already mentioned, nor was he foolhardy.

I have omitted finding (13) as the evidence of Sproule, unless brought home to A the knowledge of the claimant, appears to me to be irrelevant. The arbitrator then states his inferences in fact and in law. After finding the amount of compensation to which the claimant, if successful, would be entitled, the arbitrator states :

> (2) The act of releasing the jammed slide was done for the purpose of and in connection with the respondents' trade or business. (3) The said act of the claimant was not within the scope of his employment with the respondents, and therefore the B accident did not arise out of and in the course of his employment.

He therefore disallowed the claim.

The appellant's claim is put alternatively under sect. 1 (1) of the 1925 Act, or, otherwise, under sect. 1 (2), which was first enacted as sect. 7 of the 1923 Act. While it would seem that the same question—whether the accident arose out of the appellant's employment—will be decisive in this case under C either subsection, in view of the arbitrator's findings, I propose to confine myself to subsect. (1).

It is settled law that two questions are normally involved, namely, what the nature and terms of the employment are, and, secondly, whether the accident arose out of and in the course of the employment within the meaning of sect. 1 (1) of the Act. The first of these questions is one of fact, whereas the second is one of law. (*Hutchison* v. *McKinnon* (3), per LORD ATKINSON, at p. 476 ; D *Dennis* v. *White & Co.* (4).) In view of the facts found proved in para. 5 of the stated case, it is difficult to see how the arbitrator found himself able to arrive so quickly at para. 3 of his inferences in fact and law, but a perusal of his note shows clearly how he arrived at it, and shows equally clearly that the arbitrator has misdirected himself. He has applied the observations of VISCOUNT DUNEDIN in *McFerrin* v. *Wilsons and Clyde Coal Co.*, and *McAulay* v. *James Dunlop & Co.* (2), which were decided at the same time, and were both cases of a breach E of statutory regulations, which prohibited the workman's action, whereas, in my opinion, they afford a useful contrast to the present case. The case of *Kerr* v. *Baird* (5), referred to by VISCOUNT DUNEDIN, involved the breach of a statutory regulation as to the use of explosives in coal mines, and the later case of *Thomas* v. *Ocean Coal Co.* (6), referred to by the arbitrator, was also the case of a breach of a statutory regulation. Para. 5 of the facts here found proved shows that F there was no such prohibition in the present case. The cases of *McFerrin* and *McAulay* (2) were admittedly not within subsect. (1) ; the only question was whether that situation was relieved in favour of the workman by the provisions of sect. 7 of the 1923 Act.

I take it that, generally speaking, the determination of the question whether the accident arose out of the employment may be said to depend on whether it arose from an act of the workman which he was employed to perform or was G reasonably incidental thereto. It is obvious that an act in breach of a statutory regulation, or other express prohibition cannot be said to be a purpose of the employment, or to be reasonably incidental thereto. The arbitrator has treated the employment of the two fitters and a foreman fitter as amounting to an express prohibition, and the judges appear to have adopted the same view. With all respect to them, that is not a correct view. After his quotation from VISCOUNT DUNEDIN, the arbitrator says :

H

> Accordingly the question is whether in releasing the jammed slide the claimant was arrogating to himself duties which he was neither engaged nor entitled to perform.

In my opinion, the phrase " nor entitled to perform " was used by VISCOUNT DUNEDIN because of the appropriation of the duty of shot-firing to the duly appointed shot-firer by statutory regulation. That was a clearly separable act in its nature from anything which the miner was employed to do, or reasonably incidental thereto. Later, the arbitrator adds :

> That question has two branches. First, what were the duties which the claimant

was engaged or entitled to perform, and, secondly, was he, when he met with the accident, doing those duties ? Or in other words, what was the scope of the claimant's employment, and was he acting within it ? The question as to what was the scope of his employment is not without difficulty. This is a matter on which I think the arbiter should not take a narrow view, but at the same time he cannot grant compensation to a man who is clearly going outside his duty, not merely doing what he was employed to do in a faulty way but doing what he has not been engaged and is not entitled to do.

My Lords, both the arbitrator and the judges have failed to treat the *dicta* of Viscount Dunedin in the cases of *McFerrin* and *McAulay* (2) with the circumspection which was enjoined by Lord Dunedin in the earlier case of *Plumb* v. *Cobden Flour Mills Co., Ltd.* (7), at p. 65, in a well-known passage :

> It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

I may venture to quote two of the later passages, at p. 67, in the same judgment, which appear to me to be applicable to the present case, *viz.* :

> In the cases in which there is no prohibition to deal with, the sphere must be determined upon a general view of the nature of the employment and its duties . . . As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances. One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment ?

I may also refer to Lord Sumner's opinion in *Lancashire and Yorkshire Ry.* v. *Highley* (8), at p. 372. In my opinion, having found what was the nature of the employment and its duties, there being no prohibition to deal with, the arbitrator should have considered whether the risk in this case was reasonably incidental to the employment. Neither he, nor the judges have considered this question, which is clearly one of law, and I will now proceed to consider it in light of the facts found proven, and, in particular, paras. (4), (5), (11) and (18).

It is clear that, while major repairs on the scraper were within the province of the fitters, minor running repairs were within the sphere of the appellant, and that his duty was to deal with a minor repair, so that the progress of his primary duties should proceed with as little delay as possible. For that purpose, it seems equally clear that it was for the appellant to decide on the spot whether the jamming involved merely a running repair ; if he was doubtful or if he came to the conclusion that it involved more than a running repair, his duty was to return with the tractor and scraper to the fitters' shop. So far, I am of opinion that there is only one answer possible to the question whether it arose out of his employment, *viz.*, that it did so arise. If he comes to the conclusion, as he is found to have done in this case, that it was a minor running repair, wrongly as it turned out, why does the risk cease to arise out of the employment ? It is the absence of any instructions by the employers, and their leaving it to the judgment of an unskilled mechanic, that caused the risk to be incurred, and how can they disclaim responsibility ? It is no answer to point to the skilled employees. I am, therefore, clearly of opinion, on the facts found proved, that, as a matter of law, the accident arose out of and in the course of the appellant's employment, and that both the questions of law should be answered in the negative.

Lord Macmillan [read by Lord Wright] : My Lords, the apparently simple question whether an accident to a workman has or has not arisen out of his employment has tended to become obscured rather than illumined by an accumulation of judicial glosses and repeated warnings have been given against allowing attention to be diverted from the statutory text to the paraphrases. In the present instance the arbitrator, in his otherwise admirably stated case, has, in my opinion, shown himself to have been misled into conceiving that he must take as the conclusive test one of the paraphrases, namely, the scope of the workman's employment and to have misinterpreted it. His third inference in fact and in law is that the appellant when he was injured was doing something which:

> . . . was not within the scope of his employment with the respondents and therefore the accident did not arise out of and in the course of his employment.

In drawing this inference the arbitrator in my opinion misdirected himself in law.

It is no doubt most relevant in such cases as the present to ascertain the ordinary scope of the workman's employment, in the sense of the job which he was employed to perform. But in the case of many forms of employment uncontemplated vicissitudes may arise with which the employee must cope as best he can, although in so acting he may not strictly be doing the job he was employed to perform. Thus, to put a quite possible case, suppose that a gust of wind had blown off the appellant's cap while he was driving his tractor and that in getting down from his seat to retrieve it he had slipped and hurt himself; I do not think that the accident could be said not to have arisen out of his employment although it would not be said in ordinary parlance that he was employed to recover his cap should it be blown away. By way of contrast, if the appellant had hurt himself while dismounting from his tractor to chase a rabbit, the accident would not be said to have arisen out of his employment. The case is different where the workman is injured while doing something expressly prohibited. Then he may have to invoke sect. 1 (2) of the Act, if it fits his case. There may be cases where a prohibition is necessarily implied. It rather looks as if the present case was regarded by the arbitrator as one in which it was an implied term of the workman's employment that he should not do what he was doing when the accident befell him. The truth is that the interpretation of the expression "the scope of the employment," if it were used in the Act—as it is not—would itself in turn give rise to its own legal problems. In my view an accident may arise out of a workman's employment not only if it occurs in consequence of his doing the actual job he was employed to do but also if it occurs in consequence of his doing something reasonably incidental to his job although not within the normal scope of his employment. The arbitrator's third inference in fact and in law which I have quoted does not in my view embody a sound legal *sequitur*.

The essential facts of the case with which your Lordships have to deal are very clearly set out in the stated case. The appellant is a tractor-driver. He was placed by his employers in sole charge of a combined apparatus consisting of a tractor and an attached scraper and was sent out to work it by himself in the open. He had both to drive the tractor and to operate the scraper. A hitch occurred owing to the slide of the scraper jamming. He got down from his seat on the tractor and while endeavouring to release the jammed slide he was injured. *Prima facie* the accident would seem to have arisen out of the appellant's employment. But it is said that the appellant was not employed as a mechanician and that he had no business to attempt to release the slide, this being a job for the staff of fitters whom the respondents employed at their quarters to effect any necessary repairs on scrapers. On the facts as found I should characterise the release of the jammed slide as an adjustment rather than a repair. There was nothing requiring repair. Was it then an implied term of the appellant's employment—it is not found to have been an express term—that if any hitch, however insignificant, occurred while the appellant was operating the scraper, he must leave the tractor and scraper and go to the fitters' shop for a mechanic to put it right, and that he must on no account himself investigate what was wrong and see if he could remedy it? On the contrary. The arbitrator finds it proved that on certain occasions:

> . . . the tractor-drivers with the knowledge of their foreman or of fitters had made, without objection, minor running repairs on the scrapers . . . and that keys had been handed to them in order to do this.

He further finds that the appellant "thought it would be a simple operation" to release the jammed slide and "was not awake to the danger" involved. The appellant's sole motive was "to put the scraper into operative condition so that he should continue his work" and what he did "was done for the purpose of and in connection with the respondents' trade or business." These findings of the arbitrator are final but he is not final in his application of the law to the facts so found. It may be that the appellant made an error of judgment in thinking that the release of the jammed slide was a trivial matter of adjustment unattended with danger, but that is just how accidents often occur. It is no doubt true that it was not his job to effect repairs on his scraper, but it is found that a minor adjustment such as the appellant thought, it may be wrongly, was all that was involved, was within his province. What the appellant did was incidental to his employment of driving the tractor and operating the scraper and was not forbidden. The accident which befell him, therefore, in law arose out of his employment.

The judges of the First Division seem to have taken the view that, the arbitrator having found that the appellant's act was not within the scope of his employment, the case was at an end and that they were bound to uphold his finding in law that the accident did not arise out of the appellant's employment. With respect, I do not agree. The arbitrator in inferring from the facts he has found that the appellant's act was not within the scope of his employment is in effect drawing a legal inference in the guise of a finding in fact, for the drawing of that inference is in his opinion equivalent to a finding that the accident did not in law arise out of the appellant's employment. He misdirected himself by misinterpreting and misapplying the test of the scope of employment. It was, therefore, in my opinion, open to the court of review to differ from his conclusion, if it saw fit. As to the province of the appellate court in such cases I need not repeat what I said in the case of *Shotts Iron Co.* v. *Fordyce* (9), at pp. 513-14. I agree with all your Lordships that the appeal should be allowed, that both the questions appended to the stated case should be answered in the negative and that the case should be remitted in order that compensation should be awarded to the appellant.

LORD SIMONDS [read by LORD PORTER]: My Lords, I have had the advantage of reading in print the opinions which your Lordships have delivered in this case. They have resolved the single difficulty which I had felt, *viz.*, whether it was open to this House upon the arbitrator's findings of fact to reverse the decision of the Court of Session. I, therefore, concur in the motion that the appeal should be allowed without troubling your Lordships with a reasoned opinion.

Appeal allowed with costs. Case remitted to the arbitrator for award of compensation.

Solicitors: *S. L. Polak & Co.*, agents for *Herbert Macpherson*, Edinburgh, agent for *W. G. Leechman & Co.*, Glasgow (for the appellant); *Parker, Garrett & Co.*, agents for *Bryson and Davie, S.S.C.*, Edinburgh, agents for *M'Cash & Hunter*, Perth (for the respondents.)

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MULTIPAR SYNDICATE, LTD. *v.* DEVITT (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Wrottesley, J.), **January 24, 1945.**]

Income Tax -Share speculations by company—Contango transactions—Dividends declared during currency of "contango" transaction—Practice of Stock Exchange—Broker crediting dividends, less tax, to company—Actual dividends not collected—Whether dividends income already taxed at source or trading receipts of company—"Discovery"—Income Tax Act, 1918 (c. 40), *s.* 125 (1), *Sched. D, Case I.*

The appellant company were financiers and a large part of their business consisted in speculative operations on the Stock Exchange. Through their broker the company purchased shares which were carried forward from account to account by means of "contango" transactions until ultimately the shares were taken up or sold and the bargains closed. In accordance with Stock Exchange practice, the amounts of any dividends declared on such shares and paid after deduction of tax during the currency of the continuation transactions, were to be credited to the company in the "contango" account next following; the broker's accounts showing normally on the debit side the purchase price of the shares and the "contango" charges, and on the credit side the price of shares on re-sale or when carried over, and the amounts of dividends accrued due. During a number of years these speculations were unsuccessful, and only losses were shown, and the inspector of taxes deducted amounts described as dividends from any profits shown or added the amounts to any losses shown as the case might be. For the financial year 1935-1936 the profits of the company exceeded the losses brought forward from previous years and tax was paid on the balance. In the following two years losses were incurred again, and the company made a claim for repayment of tax under the Income Tax Act, 1918, s. 34. It was then, for the first time, that the inspector discovered that the dividends, treated hitherto as having been received after tax was deducted, were in fact entries in the "contango" accounts of the company's brokers. The respondent, thereupon, refused to treat such sums as dividends, and required additional assessments to be made. It was contended for the appellants (i) that with regard to the dividends received they were in no different position from a purchaser who actually took delivery of the shares, and that the court ought to assume that the credits in the broker's accounts represented actual dividends declared and paid, and collected for them by their broker; (ii) that no "discovery" had been made entitling the respondent to make additional assessments under the provisions of the Income Tax Act, 1918, s. 125 (1):—

Held: (i) the sums in question, though nominally dividends after deduction of income tax, were mere credits which the brokers had to make to their clients, having regard to the nature of their "contango" transactions and to the rules of the Stock Exchange governing such matters. In the circumstances the sums were trading receipts of the company's business and fell to be included as such a receipt in computing the company's profits or losses for income tax purposes.

(ii) on the facts, there was a "discovery" by the respondent entitling him to raise an additional assessment on the appellants under the Income Tax Act, 1918, s. 125 (1).

[**EDITORIAL NOTE.** This is an interesting point in connection with continuation transactions. It is held that although, according to the rules of the Stock Exchange, it is the practice of the broker to credit the purchaser in the contango account with intermediate dividends, these are not in fact dividends, but mere credits equivalent in amount to such dividends. A jobber does not identify the shares he promises to deliver, nor is he to be assumed to have the shares in his possession or at call. The object of continuation transactions being to facilitate a speculation in shares they may substantially exceed the actual shares available, to which a dividend, properly so-called, attaches. These sums, therefore, were profits of the trade and assessable accordingly. The principle on which this case was decided seems to follow that laid down in the converse case of *Holder* v. *Inland Revenue Comrs.* ([1932] A.C. 624; 16 Tax Cas. 540), in which it was held that interest debited on an advance from a bank which was ultimately repaid by a guarantor could not form the subject of a claim for repayment of income tax under the Income Tax Act, 1918, s. 36, by the guarantor.

On the question of discovery, the matter usually arises where, after consideration of material before him, the inspector takes a particular view but at a later date he or his successor seeks to assert a different view upon the same material. The judge finds that this case does not raise that question. Here the duty was to scrutinise for the first time the material put before the inspector in support of the claim for repayment, and he had then discovered that no tax had been suffered on the dividends.

As to Sale and Purchase cum Dividend, see HALSBURY, Hailsham Edn., Vol. 17, pp. 251, 252, paras. 509, 510; and for Cases, see DIGEST, Vol. 28, Nos. 672-674.

As to Additional Assessments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 339, 340, paras. 687-689; and for Cases, see DIGEST, Vol. 28, pp. 98, Nos. 586-588.]

Cases referred to:

(1) *Black* v. *Homersham* (1878), 4 Ex.D. 24; 9 Digest 351, *2224*; 48 L.J.Q.B. 79; 39 L.T. 671.

*(2) *Wigmore* v. *Summerson (Thomas) & Sons, Ltd., Inland Revenue Comrs.* v. *Oakley*, [1926] 1 K.B. 131; 28 Digest 109, *672*; 94 L.J.K.B. 836; 9 Tax Cas. 582.

*(3) *Inland Revenue Comrs.* v. *Hawley*, [1928] 1 K.B. 578 ; Digest Supp. ; 97 L.J.K.B. 191 ; 138 L.T. 710 ; 13 Tax Cas. 327.

*(4) *Spence* v. *Inland Revenue Comrs.* (1943), 24 Tax Cas. 311.

*(5) *Thompson* v. *Trust and Loan Co. of Canada*, [1932] 1 K.B. 517 ; Digest Supp. ; 101 L.J.K.B. 342 ; 146 L.T. 369 ; 16 Tax Cas. 394.

(6) *Anderton & Halstead, Ltd.* v. *Birrell*, [1932] 1 K.B. 271 ; Digest Supp. ; 101 L.J.K.B. 219 ; 146 L.T. 139 ; 16 Tax Cas. 200.

(7) *British Sugar Manufacturers, Ltd.* v. *Harris*, [1938] 2 K.B. 220 ; [1938] 1 All E.R. 149 ; Digest Supp. ; 107 L.J.K.B. 472 ; 159 L.T. 365 ; 21 Tax Cas. 528.

(8) *Inland Revenue Comrs.* v. *MacKinley's Trustees* (1940), 22 Tax Cas. 305.

Case Stated by the Commissioners for the General Purposes of Income Tax for the city of London, pursuant to the provisions of the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division. The facts are sufficiently set out in the judgment.

J. Millard Tucker, K.C., and *N. E. Mustoe*, for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Wrottesley, J. : The facts which have given rise to the question to be resolved in this case are set out in para. 2 of the Case, which I will read :

> The company has carried on the business of financiers since 1912. A considerable part of its business consists in speculative operations upon the Stock Exchange by which share purchases by it through brokers are carried forward from account to account by means of continuation or " contango " transactions until ultimately shares are taken up or sold and the bargains closed. In accordance with the Stock Exchange practice, the amounts of any dividends declared on such shares, and paid after deduction of tax during the currency of continuation transactions, are credited to the company in the " contango " account next following. During the currency of a continuation these accounts normally include the following four items : (i) Debit showing purchase price or price at which shares were taken in by the broker. (ii) Debit showing " contango " charges. (iii) Credit showing price on resale or at which shares were carried over. (iv) Credit showing amounts of dividends accrued due.

I can best set out the question by describing what took place with regard to one of the blocks of shares in which the company speculated, namely, a block of 1,000 Distillers' ordinary shares.

For the assistance of the court counsel for the appellants put in, in the form of a table, the history of this transaction, and I make use of it in my judgment. From the table it will be seen that on July 3, the company bought 1,000 shares at 71*s.* 3*d.* for the account July 13, 1933. If it had not been a continuation or " contango " operation, the jobber with whom the company's broker made the contract would have to produce, on July 13, 1933, a transfer of the shares from a person who in fact owned them ; and this would be achieved by the production of a share certificate in favour of the vendor. But as this was a " contango " transaction, the brokers were not called on or expected to produce such a transfer. All the company wanted was the right to call for these shares during the current account, or during some future account, when, by reason of the rise in price which they anticipated, they could, by a sale of that number of shares, make a profit. On July 11 the company sold the same number of shares as they had bought on July 3, namely, 1,000, at the price to which they had risen meanwhile, which was 77*s.*, and are accordingly debited with the original purchase price, 71*s.* 3*d.*, plus charges, and credited with the sale price, 77*s.*, plus charges. At the same time, in order to carry over to the next account, and so keep the transaction open, the company bought 1,000 shares for the next account, July 27, and this purchase was made on the same day and for the same price as the sale, namely, 77*s.*, plus charges. The net result to date, after debiting against the company the cost of the services rendered by the brokers and stamps, is to be seen in the table. On the original purchase the company owed £3,589 7*s.* 11*d.* As a result of the sale and repurchase for the second period at the same price, the company was credited with £3,850, and debited with the same sum, plus charges, namely, £3,857 13*s.* 8*d.* Once more the company decided to keep open the transaction, this time for the account Aug. 17, and so went through the same process at the end of the second account : namely, on July 24. This time the shares had fallen in value by sixpence, and, accordingly, on balance, some part of the profit credited on the first account was diminished. But this time, before Aug. 17 arrived, a dividend of 2*s.* less tax was declared, representing £75. By the rules of the Stock Exchange, or by the practice of its members, the company was credited in the broker's account with this amount as an additional credit.

Once more the company carried over, this time for an account ending Aug. 31. In the meantime the shares rose to 82*s*., and the company decided to sell and close the transaction, selling for £4,100 shares they had bought for £3,562 in the first place, and making a substantial profit after paying the various "contango" and other charges, which were about £80. In addition they have been credited with, and are either paid or allowed the sum of £75, representing the dividend of 2s. a share, less tax, declared during the third account. I should add that all sales and purchases, after the first one, were not apparently to jobbers, but by the company to or from the brokers. In other words, the brokers took these shares in—I think that is the phrase. It is apparently a common practice, and neither party to the appeal suggests that it makes any difference to the position. This £75 was the sum which the company claims to have treated by the Revenue authorities as a dividend which they have received, less tax. Finally, it is to their advantage so to treat it, and, if they are right, the commissioners have gone wrong in saying it is nothing of the kind but is a trading receipt of the company's business, to be computed as such, and is, therefore, really a trading profit of the company's business which has not borne tax.

There is no doubt that if the company had bought this block of shares in the ordinary way, during the account when the dividend was declared and before the date of declaration, and had taken delivery of the shares, they would have been entitled to receive from the vendor of the shares the dividend declared, for the purchaser becomes the owner at the date of the contract and so is entitled to the dividend declared on them after the contract: see *per* BARON KELLY in *Black* v. *Homersham* (1). In the case of a Stock Exchange transaction, the jobber, who sells to the broker for the purchaser, does not identify the shares he promises to deliver. Nor is it the duty of the broker who buys on behalf of the purchaser to get a contract from the jobber relating to any particular identified shares. It is enough if he gets a promise from the jobber to deliver the number of shares purchased. Thus the jobber fulfills his contract if, at the date fixed by the Stock Exchange authority, he produces transfers and a certificate of the requisite number of shares. Not till then is the purchaser entitled to know which shares he will get in fulfilment of his bargain. But from the vendor he is entitled to receive the dividend declared after he bought the shares, which will have been paid to the vendor, because it was the vendor who appeared in the books of the company as shareholder. So much is common ground between the parties in this case.

The company, the appellants, claim that in respect of the £75 and other dividends received by them in similar circumstances, they were in no different position from the purchaser who took delivery of shares, and that the commissioners and the court ought to assume that the £75 credited, as shown above, represented an actual dividend declared and paid by the distillers company, and collected for the appellants by their brokers from the owners of 1,000 shares in the distillers' company. They are not, of course, in a position to prove anything of the kind. They never in fact took delivery of the 1,000 shares. But they say that the court must presume that the jobber who sold to the brokers on July 3, or the brokers who appear to have been sellers to the appellant company for all accounts after July 13, had in fact in hand, or at their call, 1,000 actual shares in the distillers' company and credited the actual dividend declared on those actual shares.

In ordinary transactions where a purchase is completed by transfer of the shares bought, and a dividend has been declared after the purchase, the Inland Revenue Authorities accept a voucher from the brokers, showing that the purchaser has received a dividend after deduction of the tax. For, owing to the fact that the shares may have been dealt in promiscuously by brokers and jobbers during the account, some cum- and some ex-dividend, the purchaser may receive actual shares sold after deduction and so ex-dividend, and in respect of which, therefore, the seller is not bound to account for the dividend. In such a case the price will have fallen on this account, and the jobber who has bought at this lower price will, I suppose, have to account for the dividend.

For the purchaser before dividend is clearly entitled to receive the dividend: but, so long as he gets his money, he does not, of course, mind whether he gets it from the seller of the shares or from one of the brokers or jobbers through whom the purchase is effected. I refer to this as illustrating the kind of difficulty with which the whole topic is surrounded. But, in the case of continuation transactions such as this it is clear that the whole object was to enable the company to speculate in shares, and to back their opinion as to the likely trend of the market, without having to take up the shares, and so to find the money necessary for that purpose. It is also clear that such transactions are not limited to the amount of shares which are in fact on offer for the account in question. Since transfer is not insisted on, but merely continuation to the next account (as is shown by the brokers' notes) such transactions may exceed very substantially the actual shares available. Nevertheless, by the practice of the Stock Exchange, the amount of any dividends declared by a company at the critical date is automatically credited to the purchaser, less tax. This occurs, although from the nature of the case, the brokers have never in fact received any dividend from anybody.

Those being the facts, I pass to the arguments put forward on behalf of the company to establish their claim and put by counsel for the appellants in the form of questions in the course of his careful argument on behalf of the appellants. (i) Are dividends received by vendors of shares after contract to sell income of the purchaser? The answer is that they are, if the dividend were declared before the contract.

(ii) In the case of a share dealing company, are net dividends received by the company (or to which it is entitled) to be treated as part of a trading transaction, although already taxed at source? The answer to this question is: No, if the company receives them. But, if all that happens is that, as between itself and the broker, on continuation transactions, the company is credited with dividends as though the brokers had collected them from the vendors of shares, then the question is misleading. It may well be that the sum credited by the broker as dividend received is nothing of the kind but is a mere price adjustment made in accordance with Stock Exchange rules.

(iii) Whether, in the case of continuation transactions, intermediate dividends declared are income, from which tax has been deducted, of the purchaser, because the vendor must account for them? The answer to this question is, again, that such credits are made, whether or not the broker who credits them has in fact collected them from the vendor. Thus they may represent merely what may be called a price adjustment in a continuation account as between the broker who "takes in" and his client.

(iv) Is the evidence sufficient to establish that the receipt of the moneys in question were receipts of dividends charged by deduction? The answer is to be found in the Case, and is that:

> . . . in accordance with Stock Exchange practice the amounts of such dividends are credited to the company in the contango account next following.

As has been seen, this credit is made by the broker, although in fact no shares are identified, still less transferred, as the subject of the contract to purchase, which is one of the steps in a continuation transaction.

Those being the answers which I think ought to be given to the questions put by counsel for the appellants, I come to the proposition which lies at the root of his argument, and which would justify different answers from those which I have given. This proposition is that when a broker or a jobber enters into a contract with the broker's principal to sell to him, say, 1,000 shares in a company he must be assumed by a court of law to have those shares to sell, either in his possession or at his call. I find myself quite unable to accept this proposition. A broker or jobber who contracts to sell 1,000 shares in a company to a purchaser on the Stock Exchange promises nothing of the kind. He promises merely to hand over that number of shares on the day fixed for the transfer by the rules of the Stock Exchange, of which he is a member. Indeed, the principal justification for Exchanges of this kind is that they provide a market so free and so active that any man who has shares to sell, or who wishes to buy shares, may find a buyer or seller, as the case may demand, at a moment's notice. Having got a member of the Exchange to buy his shares, or to sell them, he can leave the question of the ultimate buyer or seller to be carried out in the market. In the course of the argument a number of authorities were cited. *Inland Revenue Comrs.* v. *Sir James Oakley* (2), establishes that the vendor of shares upon which, after the sale but before transfer, a dividend is declared, or becomes payable, receives the dividend not for his own benefit but for that of his purchaser. The subject of that decision was an actual interest payment received by the respondent and by him accounted for or paid to the purchaser of real shares in the company identified. In *Inland Revenue Comrs.* v. *Hawley* (3) the respondent got the two years' dividend on shares left to him by his father, which accrued after his death. This lapse of time made no difference, nor the fact that the executors had in the meantime collected and used the dividends for the purposes of the estate. When the dividends reached him they were to be regarded and taxed as dividends. They were real dividends on actual shares which passed by the testator's will to the executors. *Spence* v. *Inland Revenue Comrs.* (4) was a case in which a man, who had been induced by fraud to sell shares to another man, was restored to the ownership of those shares by a decision of the court, and also to the receipt of the dividends or their equivalent in money. These shares were, again, real shares, and the dividends were dividends in fact received by the defendant during the period which elapsed between the sale induced by fraud and the court's decree. *Thompson* v. *Trust and Loan Co. of Canada* (5) was a case of actual treasury bonds, to which coupons were attached for the interest of each half year. The company bought these bonds cum-coupons shortly before the coupons were payable, detached the coupons and cashed them, and sold the bonds ex-coupons back to the brokers. They were real bonds, physically tendered, and the coupons were physically detached by the respondent company. It, therefore, provides no guidance in the case which I have to decide.

In the case before me, no one has ever been able to identify the shares, still less has anyone been able to establish that the amounts of money credited in the brokers' accounts and their description as dividends, ever came from the company which declared a dividend at that moment. Nor does the matter rest there. The more closely the nature of the transactions between the appellants and their brokers is investigated, the more likely does it appear that the credits in question, though nominally dividends after deduction of income tax, are in fact nothing of the kind, but are mere credits which the brokers had to make *ex debito justitiae* to their clients, having regard to the nature of their continuation or "contango" transactions, and to the rules of the Stock Exchange governing such matters. In the result, therefore, I am compelled to find that the very experienced gentlemen who found as they did in this case, came to a right conclusion on the first question.

That leaves the second question to be determined, namely, whether, in the circumstances of this case, the inspector can be said, within the meaning of the Income Tax Act, 1918, s. 125, to have discovered an undercharge so as to be entitled to raise the additional assessment on the transaction, the subject of the case. It was said by ROWLATT, J., in the case of *Anderton & Halstead, Ltd.* v. *Birrell* (6), that a mere change of opinion by an inspector who, with full knowledge of the facts, had honestly held the opinion that tax was not payable, was not a discovery within the meaning of the section. Again, it is clear that in the case of *British Sugar Manufacturers* v. *Harris* (7), as far as the arguments are concerned, the Court of Appeal were prepared to hold that what took place in that case was not discovery within the meaning of the section. On the other hand, there is the case of *Mackinley's Trustees* (8) to the effect that a discovery of a mistake in law in a former assessment is a discovery within the section. Though the decision is that of the Scottish Courts, it is one to which I must pay attention.

But when I come to the facts in this case, it seems to me to be unnecessary to decide this point. The case shows a number of years in which the speculations were unsuccessful, and only losses were shown. Next came a year when a profit was shown, and so tax was paid. Then came another year of loss, with the result that the company was entitled to claim back tax paid in the previous year. But, of course, the company had, for the first time, now to demonstrate that in fact it had paid tax in order to claim its repayment. It was at this point that the authorities were under a duty to scrutinise the material submitted by the company, in order to see if, in fact, the company had paid or, by deduction of tax, had suffered, taxation on its receipts. This is not, therefore, as otherwise might appear, the case of a new inspector taking a different view of the law from that taken by the inspector whose place he had taken. But it was a question of refunding to the taxpayer income tax claimed to have been paid during the last assessment period. There were special obligations to scrutinise figures which had passed muster, and at their face value, in former returns, in view of the answers given by the company's accountants. Vouchers were called for by the company from their brokers. These could not be produced. Then, for the first time, did the inspector discover that the dividends, treated hitherto as having been received after the tax was deducted, were in fact entries in the "contango" accounts of the company's brokers and no more. Therefore, the second question propounded in the case must be answered in the way I have indicated, namely, that there was a discovery by the inspector entitling him to raise an additional assessment on the appellants under the provisions of the Income Tax Act, 1918, s. 125 (1).

Appeal dismissed with costs.

Solicitors: *Bartlett & Gluckstein* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

WILLIAMS (INSPECTOR OF TAXES) *v.* DAVIES.
WILLIAMS (INSPECTOR OF TAXES) *v.* NISBET.

[KING'S BENCH DIVISION (Wrottesley, J.), **January 19, 1945.**]

Income Tax—Annual profits or gain—Isolated transactions—Husband purchasing building site and making unconditional gift of it to wife—Resale of site at profit by wife to husband's nominees—Transaction repeated two years later—Trading negatived by Commissioners—Income Tax Act, 1918 (c. 40), *s.* 237, *Sched. D, rr.* 1 (*a*) (ii), 2, *Cases I, VI, All Schedules Rules, r.* 16 (1).

The two respondents had been concerned for some years in buying and selling or developing building land. In Oct., 1935, they each of them bought one half of three adjoining plots of undeveloped building land at a price of £4,875 per half share. After completion of the purchase each of the respondents gave to his wife as an unconditional gift his share of the sites so acquired. Subsequently the respondents' wives each sold the land to a building company of which the respondents were the only directors and in which each held one half of the issued shares, for £7,375, making by this means a profit each of £2,500. The wives invested the profits so received in securities. Two years later a similar transaction was carried out in the same way, and this time the respondents' wives made a profit of £3,350 each. The Crown claimed that the profits of £2,500 and £3,350 respectively were liable to income tax as profits arising from the carrying on by the respondents' wives of a trade, namely dealing in land or acquisition of land and disposal of it at a profit, chargeable to tax under Case I of Sched. D; alternatively, under Case II. The commissioners found as a fact that the transactions were genuine gifts to the wives of the lands and of the profits which could immediately be realised by selling them to the designated company. Upon that finding the commissioners determined that in effecting sales of the properties the respondents' wives did not carry on a trade or adventure in the nature of a trade. It was contended for the Crown that the commissioners by coming to the conclusion that no trade was carried on, overlooked that the whole plan was contrived by the husbands and the wives fell in with it and that looking at the transactions as a whole it was impossible to say that no trade was carried on:—

HELD: (i) since the gifts were not confined to the amount of profit made in the transaction but extended to the whole site value, and since the wives had accepted the gifts unconditionally and the profits were reaped by them and not by the husbands, there was relevant material on which the commissioners could hold that no trade or adventure in the nature of trade was carried on by the wives.

(ii) it was a question of degree whether the two sales at a profit could be deemed to have provided annual profits or gains so as to be in the nature of income chargeable under Case VI. Of this the commissioners were the proper judges and there was not enough matter to compel them to find that the profits so obtained were income.

[**EDITORIAL NOTE.** Although the transactions here were not "isolated and alone" in the language of Lord Buckmaster in *Jones* v. *Leeming* (1) there are features which distinguish it from ordinary trading. The speculation was organised by the husbands but there was no finding that the wives were party to it. The gifts were made to them unconditionally, and as they consisted of the whole site value the commissioners properly held that the wives were beneficial owners and the court refused to draw any inference of trading. As to the question of profits or gains under Case VI, this is a question of degree, and the court refused to disturb the finding of the commissioners.

As to Casual Profits of a Revenue Nature, see HALSBURY, Hailsham Edn., Vol. 17, pp. 206, 207, para. 423; and for Cases, see DIGEST, Vol. 28, pp. 81, 82, Nos. 451-462.

As to Isolated Transactions, see HALSBURY, Hailsham Edn., Vol. 17, pp. 99, 100, para. 193; and for Cases, see DIGEST, Vol. 28, pp. 22, 23, Nos. 108-122.]

Case referred to:

*(1) *Jones* v. *Leeming*, [1930] A.C. 415; Digest Supp.; 99 L.J.K.B. 318; 143 L.T. 150; *sub nom.*, *Leeming* v. *Jones*, 15 Tax Cas. 333.

Case Stated by the Commissioners for the Special Purposes of Income Tax. The commissioners found as a fact that when they sold their lands, the respondents' wives were beneficial owners, and did not hold them as nominees or trustees for the respective husbands, and on that finding the commissioners determined that the profits did not attract income tax. The facts are fully set out in the judgment.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *Reginald P. Hills* for the appellant (Inspector of Taxes).

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the respondents.

Wrottesley, J.: The respondent Davies for some years has been concerned in buying and selling or developing building land, in association with Nisbet, the respondent in the other case. In Oct., 1935, the two put their heads together and thought out a plan by which they might enable their respective wives to make a good profit by dealing in land. This plan they proceeded to put into effect, acting in concert. There were three plots of undeveloped building land, adjoining one another, at West Tarring, in the county of Sussex, and each of them proceeded, on Oct. 25, 1935, to buy one-half of those adjoining plots for £4,875. About a week after those purchases were completed, namely, on Nov. 4, each of the two respondents gave to his spouse his share of the building land so acquired. Each of these two ladies so became owners of one-half of the total building site. The next step in the pre-arranged plan was that these two ladies should sell the land to a building company, of which their respective husbands were the only directors, and in which each held one-half of the issued shares, for £7,375. This, acting on their respective husband's advice, these two ladies proceeded to do on Nov. 16. By this means each of the the two ladies made a profit over and above the value or cost of the gift in the first place of the difference between £4,875, which the husbands had paid for their shares respectively, and £7,375 the price for which each of the ladies sold her share of the land to the company—say £2,500. This was the plan conceived by the husbands, and the two wives fell in with it, and emerged from it the richer each by the £7,375, of which the Crown claimed that £2,500, or a sum thereabout, was profit arising from the carrying on by these ladies respectively of a trade, namely, dealing in land, or acquisition of land and disposal of it at a profit.

Two years later, the two respondents decided to carry out the same plan again. This time, on Sept. 6, 1937, each respondent, for £4,723 3*s.* 0*d.* bought one-half of some undeveloped building land at Rustington, and on the following day, each gave his spouse what he had purchased. About five weeks later, on Oct. 15, 1937, the wives sold their half-shares in the building site to a company, each for £8,080 5*s.* 0*d.* This time the company was one of which each respondent was director, and in which each owned one-third of the issued shares. Once more the wives fell in with the plan, and this time each wife emerged the richer by £8,080 5*s.* 0*d.*, including profits of the difference between the £4,723 3*s.* 0*d.*

paid for the half-share of the land to the original owner, and the £8,080 5*s.* 0*d.* which it fetched on the sale by the wife in question to the company. Here again the Crown claim that this profit of about £3,350 is liable to tax in the same way as the above sum of about £2,500.

The commissioners have found as a fact :

> (i) that when they sold their lands, the ladies were beneficial owners, and did not hold them as nominees or trustees for the respective husbands ;
>
> (ii) and have determined that the profits do not attract income tax.

I take the first of these findings to mean that they were not colourable transactions, but genuine gifts to the wives of the lands, and of the profits which could immediately be realised by selling them to the designated companies. I am certainly in no position to disturb this finding. As the commissioners go on to determine that no income tax is payable on those profits, the result is that the respondents have been able to kill two birds with one stone—to endow their wives and avoid the income tax which each would have had to pay, if they had made the profit themselves. But that is only true if I am right to regard husband and wife for this purpose as one. I do not think I am, and the true picture is that by this plan each husband has been able to present to his wife a gift, part of which is paid for by the husband, but part, being the tax avoided, indirectly, by the State.

It is only fair to say it can be put in another way, namely, that the husbands not only gave away an asset, but also the profit they could have made out of it, and in this sense avoided tax by forbearing to take a profit. The relative provisions are Sched. D, r. (1) :

> Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere.

And r. 2 :

> Tax under this schedule shall be charged under the following cases respectively ; that is to say—Case I.—Tax in respect of any trade not contained in any other Schedule . . . Case VI.—Tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule ; and subject to and in accordance with the rules applicable to the said Cases respectively.

In sect. 237 there is a definition of " trade," which is as follows :

> " Trade " includes every trade, manufacture, adventure or concern in the nature of trade.

I should also read r. 16 of the General Rules, which is :

> A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried : Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee . . .

It is because of that that in this case, while the Crown allege and claim that these women were carrying on a trade in land dealing, the assessment is made upon their husbands. The finding of fact of which the Crown complain is the second finding, namely :

> That in effecting sales of the properties she had not carried on a trade or adventure in the nature of trade.

The Solicitor-General says that in order to come to this conclusion, the commissioners must have failed to weigh the fact that the whole plan was contrived by the husbands, and the wives fell in with it, and into their proper places in it ; and that looked at as a whole, it is impossible to say that no trade was carried on by the respective wives. The question whether what the wives did here was carrying on of trade, or an adventure in the nature of trade, or not, is only a matter of law, if in coming to that conclusion (i) the commissioners had no material from which to come to their conclusion ; or (ii) they relied on irrelevant matters, or excluded relevant matters ; or (iii) if they have misunderstood or misconstrued the statute.

As to whether there was material, *i.e.*, relevant material, from which the commissioners could come to this conclusion, there is authority as to what constitutes relevant material. Thus, *Leeming* v. *Jones* (1) was the case of an isolated transaction, the purchase of an option, with the sole object of turning it over again at a profit. It was ultimately sold at a profit. So much the commissioners found as a fact, but did not find whether there was an adventure in the nature of trade. This they were told to find, and to do so after considering what had taken place in the way of organising the speculation, maturing the property and disposing of the property. As a result the commissioners found there was not an adventure in the nature of trade and were upheld unanimously in the Court of Appeal and the House of Lords. In the House of Lords, Lord Buckmaster said, at p. 419:

> Were the respondent a company promoter or were his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived; the transaction in this case stands isolated and alone.

He also quoted with approval what Lawrence, L.J., had said, as follows, at p. 421:

> Lawrence, L.J., appears to me to have accurately stated the difficulty in the appellant's way in the following words: "It seems to me in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property."

In addition there must be an element of income, and that appears both from what was said by Lord Buckmaster and also by Lord Dunedin.

In the case under discussion the husbands were almost certainly company promoters, and their businesses were associated with purchase and sale of land. They organised the speculation and advised the disposal of it. But equally certainly the wives were not, as the case shows, anything but willing co-operators in selling, having accepted the gifts unconditionally. Again, as to whether the profits could be described as income, if reaped by the husbands, no doubt they could and would have to be. But they were reaped by the wives, and only twice in three years. It is true that the phrase used by Lord Buckmaster "a transaction isolated and alone," does not apply; nor the language used by Lord Dunedin, at p. 421, that:

> . . . no evidence to show the respondent had done anything like this before, or was likely to do it again.

Here everybody concerned did it twice. There was, therefore, some evidence that the ladies were anyhow engaged in adventures or concerns in the nature of trade. Moreover, Mrs. Davies had had previous experience of selling, parcel by parcel, houses given to her by her husband.

The fact is, there were elements in the evidence pointing to the fact that the ladies were, and also evidence pointing to the fact that they were not, engaged in trade. Thus in the case of Davies, the respondent had on previous occasions given his wife property, meaning landed property and securities, apart from the above-mentioned transactions. The main argument of the Solicitor-General is that the commissioners must have neglected to give weight to the fact that the husbands planned the transaction. I am not satisfied that that fact leads inevitably to the inference that the wives traded. It would assist them to find that the wives, by falling in with the plan, engaged in an adventure in the nature of trade, but would not compel them. If a trader chooses to give part of his stock-in-trade to a person, and to find him a customer for it at a profit, that does not necessarily expose that person to income tax in respect of that profit. And if the gift be genuine, as I must assume here, the mere fact of doing it twice over will not make that inference inevitable, though it may make it more likely.

There is no finding here that the wives were parties to the plan from the beginning, still less that they undertook as their share in it, to sell the land back to the husband's nominees. Nor was the gift confined to the amount of profit made in the transaction, but extended to the whole site value. The gift was not of the crop merely, but of the whole tree. Had it been so confined, the commissioners could not have found, as they did find in para. 8 (i) that the wives were beneficial owners, and might well have come to a different conclusion on the whole case. It has been laid down that the transaction must be judged by ascertaining how far it consists of and is governed by the ordinary incidents of trading. There are obvious features of this case which differ from ordinary trading.

The analogy of a criminal conspiracy was used by the Solicitor-General in which it is not necessary that every conspirator should appreciate the whole design. It is enough, he says, if he carries out the part allotted to him in carrying out that design. But at least the conspirators must agree to forward the criminal object. I am concerned here not with the motives or conduct of the husbands, but only those of the wives who are alleged to be trading. Here the wives accepted each a present from her husband, and at that stage no one can possibly suggest that the receipt of this present constitutes trading. That leaves only the fact that the wives sold the property back to their husbands' nominees and received for it between them the full value, which they proceeded to invest in securities. It is not even as though they reinvested in other lands of a similar kind. I am not to substitute for the inference which the commissioners have drawn from the facts of this case the inference which I should have drawn for myself. I cannot say that there is no material in the case from which the commissioners could hold that what took place here was not the carrying on of a trade or an adventure in the nature of trade by the wives.

That leaves the question whether there were here profits or gains made by the wives under Case VI. Had there been only one such transaction it is clear from *Leeming's* case (1), per Lord Buckmaster and Lord Dunedin, quoting with approval Lawrence, L.J., that if trading is negatived in the case of purchase and sale of land at a profit, it must be capital accretion: there is no halfway house. Here in the case before me there is not even the first step which did exist in *Leeming's* case (1), namely, purchase, but instead a gift. Bearing that in mind, and that there were two isolated transactions, it seems to me that it is a question of degree, whether the two sales at a profit can be said to have provided annual profits or gain so as to be of the nature of income. And of this the commissioners are the proper judges, and there was certainly not enough matter to compel them to find that the profits they got by the sales were income. It is not suggested that the commissioners improperly included or excluded material, or that they misunderstood, or misapplied the law otherwise than in the matter dealt with above, and, therefore, they came to a right conclusion in para. 8 (3).

Both appeals dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Cartwright, Cunningham & Co.* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

ABBOTT (INSPECTOR OF TAXES) *v.* ALBION GREYHOUNDS (SALFORD) LTD.

[King's Bench Division (Wrottesley, J.), **January 29, 1945.**]

Income Tax—Capital or income—Kennel of greyhounds maintained by company operating racing track—Greyhounds purchased only to make up requisite numbers of entries at race meetings—Company not trading in greyhounds—Cost of replacements only chargeable against income—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I, Rules applicable to Cases I and II,* 3 (*f*).

The respondent company operated a greyhound racing track and also maintained a kennel of about 80 trained racing greyhounds which were purchased solely for the purpose of supplying runners at race meetings whenever the entries by private owners of greyhounds were not sufficient. The dogs were not bred by the company and were only kept for the duration of their racing career, and thereafter destroyed or sold as pets. It was contended for the company that in arriving at its profits the kennel should be valued at the beginning and end of each financial year, and that if the kennel was found less valuable the difference should be reckoned as a loss and deducted from its profits. A rise in value should not, however, be reckoned as an addition to revenue for the year, but should merely be subtracted from the cost of maintaining the kennel. The Crown contended that this was not the proper method to approach the question since the company did not trade in greyhounds and the rise and fall in value of the kennel maintained was no criterion of the company's profits or losses during the year of the assessment. The Crown agreed, however, that the cost of purchases of greyhounds might be charged against revenue, and that if the company desired to raise the establishment, they might do so out of capital, and thenceforward deduct replacement costs from profits :—

Held : expenditure on the kennel of greyhounds was in the nature of fixed and not circulating capital. The kennel was not the company's stock-in-trade and the company's contentions therefore failed.

[**EDITORIAL NOTE.** The question here is whether the cost of replacements to this kennel of greyhounds is a capital or a revenue expenditure. It is held that the greyhounds did not constitute the company's stock-in-trade, their value to the company lying in their power to attract to the race track. It is, therefore, a capital expenditure and, accordingly, a valuation of the kennel at the beginning and end of the financial year was not a correct method of arriving at the company's profits. The greyhounds constituted fixed capital, the position being analogous to the making of replacements to a dairy herd. The importance of the case is mainly the agreement by the Revenue as to treatment of purchases of greyhounds.

As to Capital Expenditure, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-161, paras. 325-327 ; and for Cases, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252.]

Cases referred to :

(1) *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266 ; 9 Digest 145, *820* ; 87 L.J.Ch. 193 ; 118 L.T. 48.

(2) *Smith (John) & Son* v. *Moore*, (1920) S.C. 175 ; 12 Tax Cas. 266 ; *on appeal* [1921] 2 A.C. 13.

(3) *Golden Horseshoe (New), Ltd.* v. *Thurgood*, [1934] 1 K.B. 548 ; Digest Supp. ; 103 L.J.K.B. 619 ; 150 L.T. 427 ; 18 Tax Cas. 280.

Appeal by the Crown from a decision of the Commissioners for the General Purposes of Income Tax for the division of Nottingham, allowing an appeal of the company against assessments made on them under the Income Tax Act, 1918, Sched. D, Case I, in respect of the profits of a greyhound racing track, operated by the company, for the year ending Apr. 9, 1940. The facts are sufficiently set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

Frederick Grant, K.C., and *A. L. Macmillan* for the respondents.

Wrottesley, J. : The respondent company acquired and maintained a kennel of racing greyhounds, in order that they might be able to supply runners at the race meetings which they held from time to time at a track (the whereabouts of which is not disclosed in the case, but which may possibly be at Pendleton, in Lancashire). Apparently, there were not sufficient entries by private owners of greyhounds for the race meetings which the company held ; so the company supplied the deficiency by owning, training and running its own dogs. The question at issue is how this kennel is to be treated in the accounts made up for the purpose of income tax. It is a pure question of principle, and the parties to the appeal do not suggest that the proper solution of it will, in the year under discussion, produce an appreciably larger or smaller tax on the company. The commissioners had to deal with a company which does not deal in dogs. It buys only to keep up a kennel of racers. But instead of being cast and destroyed, these dogs may be sold as pets. Such sales are comparable with the sale of scrap by traders who deal in dead stock. The racing career of a greyhound is a short one, from 16 months to 2 years, depending on the amount of racing called for, and also the standard of performance. The company does not breed greyhounds, and, therefore, has to depend on purchase to fill the gaps in its kennel. What may be called the establishment is in the region of eighty.

The question is whether, in arriving at the profits of the company, there should be a valuation of the kennel at the beginning of the financial year and another at the end of it ; and that if, at the end of the year, the kennel is less valuable than at the beginning, this amount should be reckoned as a loss and deducted from any profits of the company. That is the contention of the company. If, on the other hand, the value of the kennel rises during the year whether because the price of greyhounds should rise, or because the kennel is larger, *i.e.*, contains more greyhounds, then the deduction should be abated by the increased value. For, if I rightly understand counsel for the respondents, the increase of value is not, in that case, to be reckoned as an addition to the revenue for the year, but merely to be subtracted from the cost of maintaining the kennel. The contention of the Crown is that valuation is not the proper method of approach to the question. For we are not concerned here with things in which the company deals, and so the rise or fall in the value of the kennel of greyhounds owned and maintained by the company is no criterion of its profits or losses during the year of assessment. It is necessary to say that the Crown agreed in the course of the argument, that in order to arrive at the figure of the company's profits or losses, there may properly be deducted the cost of any actual purchases of greyhounds in order to fill gaps in the establishment. They go further and say that, if the company desires to raise the establishment they may do so out of capital, and thenceforward may charge against revenue the cost of filling up the increased establishment. This is necessary to be said, because this is now the contention of the Crown as to the proper method, and is to be contrasted with the method contended for by the respondent company.

The assessment is under Sched. D, Case I, and there are statutory limitations on what may be deducted from receipts in order to arrive at profits. They are to be found in rule 3 (*f*), which is as follows :

> 3. In computing the amount of the profits or gains to be charged, no sum be deducted in respect of . . . (*f*) any capital withdrawn from, or sum employed or intended to be employed as capital in such trade, profession, employment or vocation.

None of the words are apt to describe the fall in the value of this kennel of greyhounds. It cannot, therefore, be said to be expressly forbidden to make such a deduction. On the other hand, neither can such a deduction be said to be impliedly permitted, if only for the reason that it is not a sum expended. Also, such a deduction does not fall within the description of wear and tear of plant and machinery, nor within the provisions as to obsolescence, for this kennel of greyhounds is not plant or machinery. But it will be observed that the Crown does now agree to a deduction as a result of which, as a practical measure, the company will be as well off as if this kennel of greyhounds were loose tools, or implements which they had to replace from time to time.

In effect it is agreed on both hands that the question is to be resolved by settling whether the expenditure on these greyhounds is in the nature of capital or revenue. The Attorney-General claims that the original outlay was a capital expenditure. Moreover, he claims that it is not what has been called circulating capital, as contrasted with fixed capital. The difference between the two kinds of capital is carefully expounded by SWINFEN EADY, L.J., in *Ammonia Soda Co.* v. *Chamberlain* (1). The same distinction crops up again in *Smith* v. *Moore* (2), where coal contracts to which a man succeeded are contrasted with the coal to be obtained under them. The price of obtaining the former is fixed capital, for what he sold was not the contracts, but the coal obtained by virtue of them. The coal was circulating capital, or, rather the further money expended in buying the coal wholesale. See, too, *Golden Horseshoe, Ltd.* v. *Thurgood* (3), the case being of a company which bought large dumps of tailings in order to extract gold by a new and more searching process. There ROMER, L.J., pointed out that changes in the value of circulating capital are, but changes in the value of fixed capital are not, to be reckoned in order to ascertain a loss or profit under Sched. D, Case I.

If it is relevant to classify the expenditure on the kennel of greyhounds here, I have no doubt of the fact that it was in the nature of fixed and not circulating capital, for the reason that it was at no time any part of the company's policy to sell. It was not their stock-in-trade and the saleable value of the kennel was, therefore, at no time a commercial picture of the company's success or failure. Its value to the company lay in its power to attract by its racing capacity. Even a catastrophic fall in the cost of good racing greyhounds would be no financial catastrophe to a company like this one. For the only result would be that it could replace the gaps in the kennel as they occurred at less cost, and the net result would be more and not less profits, so long as their gate receipts were maintained. And here, the short life of the racing greyhound would lead to a quicker attainment of this desirable state of affairs. Counsel for the respondents suggested that if such a fall were not reflected in the profit and loss account of the company for tax purposes, the result would not be a true picture of the company's activities for the year. In the case of a person who lived by the sale of racing greyhounds which he bred or bought, I should agree : but in the case of a company owning its greyhounds only for performance, I do not. And this appears to me to illustrate the fallacy propounded by Prior [one of the managing directors of the respondent company and a partner in a firm of incorporated accountants] in his evidence, when he said that the valuation system was the only one which would show an accurate picture of the year's trading. In addition counsel for the respondents contended that this was revenue expenditure from the beginning. The commissioners did not so find, and on the facts I am clearly of the opinion that it was not revenue but capital expenditure. Looked at as a kennel, and not as the purchase from time to time of odd greyhounds, it is, I think, comparable with the dairy herd on a farm, the business of which is the sale of milk. Finally, the respondents base themselves on the findings of the commissioners, who refer to the ordinary principles of commercial practice. These principles must conform to logic; and the case put by the Attorney-General and repeated above, as to the fall in value of racing greyhounds, shows that no sound commercial principles can lead to the inference that the fall in the cost of replacing the necessary establishment of greyhounds is, in fact, a commercial loss to a company which has to provide itself with greyhounds from time to time, in order to carry out its programme. The result will be that the appeal ought not to have been allowed by the commissioners.

Appeal allowed. No order as to costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Garland-Wells & Co.* (for the respondent).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

JAMES LALLY *v.* DURHAM COUNTY COUNCIL.

[Court of Appeal (Lord Greene, M.R., MacKinnon, L.J., and Cohen, J.), **January 26, 1945.**]

Emergency Legislation—Local government—Remuneration of officers—Resolution of local authority to pay 75 per cent. of difference between employee's war service pay and civil remuneration—Whether compensation payable for abolition of office to be deducted from amount payable under resolution—"Remuneration"—Local Government Act, 1933 (c. 51), *ss.* 150, 305, *Sched. IV, paras.* 3, 10—*Local Government Staffs* (*War Services*) *Act,* 1939 (*c.* 94), *s.* 1 (1), (2)—*Old Age and Widows' Pensions Act,* 1940 (c. 13), *s.* 17 (1), (3).

The appellant was employed by the respondents, the Durham County Council, as an assistant relieving officer at a salary of £238 a year until Aug. 10, 1940, when his office was abolished as a result of the Old Age and Widows' Pensions Act, 1940. He was, however, immediately re-engaged by the respondents as a temporary clerk at a salary of £198 a year, which would have risen to £262 a year by 1944 if he had continued in the respondents' service. On Jan. 2, 1941, the appellant joined His Majesty's Forces and his war service pay, in 1944, was £95 a year. On Nov. 8, 1939, under powers conferred by the Local Government Staffs (War Service) Act, 1939, s. 1, the respondents passed a resolution providing that, subject to certain conditions, they would pay an employee serving in His Majesty's Forces during the present emergency "a sum equal to 75 per cent. of the difference between his war service pay and the remuneration (if greater than his war service pay) which he would have received from the county council but for his joining the Forces." By para. 3 of the resolution, "remuneration" was defined as "salary wages and emoluments." On the determination of his employment as assistant relieving officer, the appellant became entitled, under the Old Age and Widows' Pensions Act, 1940, s. 17, to recover from the respondents compensation for loss of office in accordance with the provisions laid down in the Local Government Act, 1933, Sched. IV. The pension to which he was thus entitled was originally assessed at £63 per year. The appellant contended that under the resolution of Nov. 8, 1939, he was entitled to be paid £124 (*i.e.*, 75 per cent. of the difference between his war service pay and the salary he would have been receiving) and that he was also entitled to the £63 at which his pension was originally assessed. The respondents contended that (i) the £63 pension payable by them to the appellant was part of the remuneration and must be regarded as liquidating part of their obligation, and, therefore, the amount payable under the resolution should be calculated after deducting the pension; (ii) if, on the true construction of the resolution, the appellant were entitled to the £63 pension as well as 75 per cent. of the difference between his war service pay and his civil remuneration, the resolution would involve a payment *ultra vires* the Local Government Staffs (War Service) Act, 1939, s. 1:—

Held: (i) the pension of £63 receivable by the appellant as compensation under the Old Age and Widows' Pensions Act, 1940, was not remuneration for the purposes of the resolution, and the appellant was entitled to 75 per cent. of the difference between his war service pay and civil remuneration, as provided by the resolution, without taking into account the amount receivable by him as compensation under the 1940 Act.

(ii) the £63 pension was payable under the 1940 Act and was, therefore, not a payment made under the powers given by sect. 1 of the 1939 Act. The payment of this sum could not render the resolution *ultra vires* the 1939 Act.

[**EDITORIAL NOTE.** This is a difficult point of construction of a resolution relating to the pay of local government officers absent on war service. It is held that a pension payable for loss of office is not "remuneration" for the purpose of the resolution, and the payment did not make the resolution *ultra vires* within the Local Government Staffs (War Service) Act, 1939.

As to Compensation for Abolition of Office, see HALSBURY, Hailsham Edn., Vol. 26, pp. 306-310, paras. 634-641; and for Cases, see DIGEST, Vol. 38, pp. 139-143, Nos. 1031-1063, and Supplement, Public Authorities, Pt. VIII.

For the Local Government Staffs (War Service) Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1118].

Appeal by the plaintiff from an order of His Honour Judge Gamon, made at Durham County Court, and dated Oct. 23, 1944. The plaintiff's claim was for an account and a declaration that, under a resolution made by the defendants, the Durham County Council, on Nov. 8, 1939, he was entitled to payment of 75 per cent. of the difference between his service pay and his civil remuneration without deduction of any amounts payable as compensation for loss of office under the Old Age and Widows' Pensions Act, 1940. The county court judge dismissed the action on the ground that the payments would amount to such a sum as would be *ultra vires* the powers conferred by the Local Government Staffs (War Service) Act, 1939. The facts are set out in the judgment of Lord Greene, M.R.

H. J. Astell Burt for the appellant.

J. Charlesworth for the respondents.

Lord Greene, M.R.: This appeal raises a curious and, at first sight at any rate, puzzling point in connection with the payments to be made by the Durham County Council under a resolution passed on Nov. 8, 1939, by virtue of powers conferred by the Local Government Staffs (War Service) Act, 1939. That resolution is set out in the particulars of claim, and, so far as relevant, is in the following words:

> Subject to the conditions mentioned hereafter the county council will pay to an employee serving during the period of the present emergency in any of the naval, military or air forces of the Crown, a sum equal to 75 per cent. of the difference between his war service pay [which is defined] and the remuneration (if greater than his war service pay) which he would have received from the county council but for his joining the forces of the Crown.

Para. 3 of the resolution provides:

> "Remuneration" shall mean salary wages and emoluments and in calculating the remuneration of employees serving with the forces of the Crown there shall be included any bonuses or increments which they would normally have received if they had remained in the service of the county council.

The plaintiff was in the employment of the county council as assistant relieving officer until Aug. 10, 1940, when his office became redundant in consequence of the Old Age and Widows' Pensions Act, 1940. He was immediately re-engaged by the council as a temporary clerk. His remuneration on Aug. 10 as assistant relieving officer had been £238 a year. His commencing salary as temporary clerk was £198 a year, and, if he had continued in the service of the council, by

1944 his salary would have risen to £262. On Jan. 2, 1941, he joined the armed forces of the Crown, and the figure of his war service pay, to adopt the language of the resolution, is at present £95. Accordingly, taking the resolution by itself, it would appear to have this effect. The sum of £95 must be deducted from the sum of £262, which is the remuneration which he would have received from the county council but for his joining the forces. That would leave £166. The resolution provides for payment of 75 per cent. of that difference, that is to say, £124. Taking the resolution by itself, therefore, it would appear clearly to have the effect of entitling the plaintiff to £124. I say " entitling " because the position as between the parties is treated by the council and by the plaintiff himself as being a contractual one. But it must be remembered, looking at the matter from another aspect, that the resolution is an enabling resolution, and according to its terms, empowers the council to make a purely voluntary payment provided it is within the prescribed limits. For the purpose, therefore, of construing the resolution, the fact that in the present case the relationship is regarded as a contractual one does not affect the question ; but the presence of a contract entitling a serving employee to sue, on the question as to whether the council had exceeded the powers under the resolution, would, of course, become a vital matter when the council's accounts came up for audit, and, if they had exceeded their powers, those responsible would be surcharged.

That seems to me to be the *prima facie* obvious meaning of this resolution taken by itself when applied to the actual figures in this case. The complication, however, arises in rather a curious way, and, if the attention of those concerned had been called to the point, it may very well be that the legislature when it passed the Act of 1939, and the council when it passed this resolution, would have made some special provision to meet the case. That, however, was not done. The position is this. The Old Age and Widows' Pensions Act, 1940, s. 17, provides :

> (1) If, in consequence of the passing of this Part of this Act or of anything done in pursuance thereof, any officer or servant of a local authority which is a public assistance authority suffers any direct pecuniary loss by reason of the determination of his appointment or the diminution of his emoluments, he shall be entitled to recover compensation for that loss from that authority.
>
> (3) The provisions of the Local Government Act, 1933, Sched. IV, shall have effect in relation to claims for compensation under this section.

The plaintiff was an officer or servant of the Durham County Council who suffered a direct pecuniary loss by reason of the determination of his appointment as assistant relieving officer, and he accordingly became entitled to receive compensation under that section. The manner in which the compensation was to be assessed and the conditions applying to it are to be found in the Local Government Act, 1933, Sched. IV. Under sect. 150 of that Act provisions are made for a scheme dealing, among other things, with the payment of compensation to officers of local authorities who suffer direct pecuniary loss by reason of loss of employment within the circumstances dealt with in the Act. The scheme is to incorporate the provisions set out in Sched. IV, and it is to Sched. IV that we are directed to turn under the Old Age and Widows' Pensions Act, 1940, s. 17 (3). That sets out a number of directions relating to compensation. Under para. 3 :

> Compensation may be awarded either by way of an annual sum or by way of a lump sum representing the capital value of an annual sum.

I may interpose here to say that, had the compensation which was awarded to this plaintiff been assessed by way of a lump sum, the present argument of the local authority could never have arisen. Para. 10 provides :

> (1) If a person receiving compensation under the scheme or order (*a*) obtains any office or other public appointment . . . he shall not [while holding that office] be entitled to receive any greater sum by way of compensation in respect of the office for which compensation is awarded than would make up the amount, if any, by which the emoluments which he is receiving falls short of the emoluments of the office in respect of which compensation was awarded.

The word " emoluments " is defined in the Local Government Act, 1933, s. 305, as including :

> . . . all salary, wages, fees, poundage and other payments paid or made to an officer as such for his own use . . .

The effect of para. 10, shortly stated, is this. If the person receiving compensation for loss of his office under the Act of 1940 is re-engaged by the local authority at a smaller salary, his pension will not exceed the difference between that smaller salary and the salary that he was receiving when his original office came to an end. Further, if and when the remuneration of his new office rises, the pension will be scaled down accordingly. If the remuneration from the new office reaches the figure of that for the old office, the right to pension disappears entirely so long as he is in receipt of that increased remuneration in his new office. Applying that to the present case, if the plaintiff had never joined the forces but had remained in the employment of the authority, as soon as his commencing salary of £198 as temporary clerk reached the figure of £238, which was what he was receiving as assistant relieving officer, he would have got nothing under the pension, but the pension would have revived if he ceased to hold the office of temporary clerk and left the employment of the local authority. The point was suggested by counsel for the plaintiff that Sched. IV, para. 10, of the Act of 1933 is not imported into the Act of 1940 by sect. 17 (3) of that Act because he suggested that that subsection limits the incorporation of Sched. IV to matters concerned with claims, and para. 10 of Sched. IV, he says, is not concerned with claims. In my judgment, that is too narrow a construction to put on sect. 17 (3), which appears to me to bring in para. 10 just as much as those paragraphs in the Schedule which have a more direct bearing on the actual making of claims.

The contentions of the parties may be summarised in this way, so far as the pecuniary result is concerned. There is a subsidiary point as to whether or not the resolution, if it has the effect contended for by counsel for the plaintiff, would involve in the present case a payment *ultra vires* the Act of 1939. I will deal with that in due course. At the moment, I am stating succinctly the opposing contentions so far as they may affect the figures in the case. The contention of counsel for the plaintiff is quite simple. It is to the effect that what I said a moment ago appeared to me to be the *prima facie* meaning and application of the resolution in the present case, is correct, and that the resolution means: take £262, which he would have been receiving, deduct his service pay £95, leaving £166 and pay him three-quarters of that, that is to say, £124. That, he says, is what he is entitled to under the resolution. He also says that he is entitled to the £63 at which his pension was originally assessed. The authority, on the other hand, says in effect that in applying the resolution you must take into account the fact that £63 is the amount of his pension, and although the resolution read literally would appear to entitle him to £124, you must deduct £63 from that because, in effect, that £63 must be regarded as liquidating part of the council's obligation. Putting it in another way, they say that, on the true construction of the resolution, £63 ought to be regarded as part of the remuneration and the sum payable by the council calculated accordingly.

Before I come to consider that, there is a point which I must mention arising under the Local Government Act, 1933, Sched. IV, para. 10. That paragraph is the one which provides for the scaling-down of the pension in reference to the salary which the officer, who has lost his employment, receives if he is re-engaged or attains an office or other public appointment. In the present case it would appear, if the section is applied literally, that the plaintiff, being no longer in the employment of the county council and not having any office or other public appointment, is entitled to the full pension, £63, because this scaling-down paragraph does not come into operation, but the case appears to have been treated as though the plaintiff were to be still regarded as holding an office or public appointment, making the paragraph applicable to the case, but treating the emoluments of the office which he is regarded as holding as being the amount which he is entitled to receive under the resolution. The effect of so regarding it would, of course, be this. First, ascertain what he is entitled to under the resolution, treat that as the emoluments of the office under para. 10 and treat the £63 pension accordingly. If the amount receivable under the resolution, which is treated as emoluments for the purposes of this paragraph, is less than the plaintiff's £238 which he received as assistant relieving officer by £63 he is entitled to his full £63. I do not find it necessary to express any opinion as to whether strictly speaking para. 10 applies to the plaintiff; that is to say, I do not find it necessary to decide the question as to whether he ought to be regarded as still holding an office for the purpose of this paragraph. I will assume that is right, but, if that be so, the only figure which can represent the emoluments for the purpose of this paragraph must be the figure which he is entitled to receive under the resolution, because that is all that he receives from the council.

That throws us back, therefore, to a consideration of the resolution. It seems to me to be quite impossible that the construction of the resolution can be affected by para. 10. That paragraph does not give to the pension the character of emolument or remuneration. Its amount is fixed by reference to emoluments, but the fact that it is a variable sum, the variations being governed by the amount of the emoluments, does not mean it is an emolument; it is a pension and a pension it remains. It is described in sect. 17 of the Act of 1940 as "compensation" for "direct pecuniary loss by reason of the determination of his appointment." That is the nature of the pension which became payable to the plaintiff. Turning back to the resolution, I can find no justification for regarding that pension, the character of which is quite clearly defined in the Act of 1940, as being in any sense remuneration. It is not; it is something quite different which the local authority is under a quite independent and separate statutory obligation to pay, either the full amount or the scaled-down amount pursuant to Sched. IV, para. 10, of the Act of 1933. It seems to me, therefore, it being impossible to treat that pension as falling within the word "remuneration" in the resolution, the resolution must be construed in what appears to me to be quite clearly its *prima facie* and ordinary and natural meaning.

The matter does not, however, stop there, because the claim of the local authority can be put in two ways. It says first of all: Assume the correctness of that interpretation of the resolution, nevertheless I am entitled to treat the £63 as a payment on account; but that, in my opinion, will not do. There is nothing in the resolution about that, and once it is decided that the word "remuneration" does not include the £63, any right to perform that operation must necessarily be excluded. The other way in which they might put it would be this. They say: If I am bound to pay £124 under the resolution, the effect will be that the plaintiff will be receiving from one source or another more than the £262 he would have been receiving, and, accordingly, the excess payment would not be authorised by the Act of 1939. A convenient illustration of the argument is to be found in document 7, which sets out in parallel columns the figure which he would have received if he had not joined the services, namely, £262, and in the other column his war service pay and allowances, the £124 payable under the resolution construed as I have construed it, £63 pension, and a small sum of £6 11*s.* 1*d.*, employee's superannuation contribution, making a total of £290 12*s.* 3*d.* That, says counsel for the defendants, is more than the £262, and, therefore, exceeds the remuneration which he would have received if he had continued to serve in his civil capacity, after deducting therefrom the amount of his war service pay. In my opinion, that argument is incorrect. The comparison which falls to be made under sect. 1 of the Act of 1939 is with the remuneration which he would have received if he had continued to serve in his civil capacity after deducting therefrom the amount of his war service pay; that is to say, £262 less £95, which leaves £166. That is the figure beyond which a local authority may not go under the powers conferred by this section. Construing the resolution as I have construed it, the only sum which they will be paying will be £124 and the £6 11*s.* 1*d.* superannuation contribution, which is less than £166. The only way in which in this document 7 the resultant figure is made to exceed the pay is by bringing in, as payments made pursuant to the section, the war service pay and the annuity, but the war service pay, of course, is not a payment made under this section at all, nor is the £63 made under this section. This section is directed to legalising payments which otherwise would not be payable, and it covers the case of purely voluntary payments. The £63 is not a payment for which the local authority requires the powers given by this statute. Therefore, in deciding whether the particular sum which the local authority pays out pursuant to the powers of this section is or is not *ultra vires*, the only payment which would have to be considered and dealt with by the district auditor, for instance, would be the actual sum which they pay out under the powers of the section, and, therefore, all he would have to look at would be the £124 and the £6 11*s.* 1*d.*, and that is not *ultra vires* the section at all.

In the result, I am of opinion that the appeal must succeed and the declaration asked for made, at any rate in substance. If the form of it requires modification, we can discuss that later when my Brothers have delivered their judgments.

MACKINNON, L.J.: I agree. Speaking for myself, it seems to me the question before us, and, as I think, the only question we have to decide, is: what are the rights of the plaintiff and the liabilities of the defendants under the A resolution of Nov. 8, 1939. It is conceivable that there may be another question between the parties, namely, whether the defendants, under their liability under sect. 17 of the Act of 1940 and Sched. IV of the Act of 1933, are bound to continue to pay the £63 in full to the plaintiff. I must not be taken as indicating or suggesting any encouragement to the defendants to raise that question. I have formed no opinion about it. I only say that I do not think that question is B involved in the one which is before us.

COHEN, J.: I agree. I would only add that while I entirely agree with MACKINNON, L.J., that the only question before us arises under the resolution, I would wish, if I may, to associate myself with the few observations LORD GREENE, M.R., made on the application of Sched. IV, para. 10, to the facts of the case before us, but, as MACKINNON, L.J., said, that is not a matter which C we can decide to-day.

Appeal allowed.

Solicitors: *Doyle, Devonshire & Co.*, agents for *Molineux, McKeag & Cooper* Durham (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. K. Hope*, Clerk to the County Council, Durham (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] D

AUSTIN *v.* ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon, L J., and Uthwatt, J.), E **February 2, 1945.**]

Insurance—Motor insurance—Permitted driver—Extension clause by insurers of owner—Permitted driver bound by conditions of extension clause without notice thereof.

The appellant was driving A.'s car with A.'s permission when the car was involved in a collision. A. and N. were passengers and A. was killed F and N. injured by reason of the accident. N. and the executors of A. brought actions in respect of the accident against the appellant and these actions were settled. The respondent company were the insurers of A.'s car. The policy contained an extension clause undertaking to indemnify any person driving A.'s car with A.'s permission provided such person should, as though he were the insured, fulfil the conditions of the policy in so far as they could apply. One of these conditions provided that G written notice of any impending prosecution in connection with an accident should be given immediately to the company. The appellant was served with summonses for dangerous and careless driving in respect of the accident, but, being unaware of the condition in A.'s policy, failed to give the company notice of the fact. The appellant claimed that under the extension clause he was entitled to an indemnity from the respondents in respect of the H actions brought against him by N. and the executors of A. which had been settled. It was contended on behalf of the appellant that, as he was unaware of the conditions in the policy, he was not bound by them:—

HELD: the appellant's rights against the respondent company under the policy arose out of the Road Traffic Act, 1930, s. 30, and not by reason of any contract, and the appellant was bound by the conditions of the policy notwithstanding that he had no notice of such conditions.

Decision of TUCKER, J. ([1944] 2 All E.R. 243) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal here affirms the court below, and points out that the right given by the Road Traffic Act, 1930, s. 30, is a statutory right having no connection with contract. Cases of the type of *Richardson* v. *Rowntree* (2) therefore, are to be distinguished.

It should be observed that both MacKinnon, L.J., and Uthwatt, J., indicate that a claim of this kind being in essence a question of contribution should be brought in the names of the underwriters as the parties.

As to Extension of Protection in Motor-Vehicle Insurance, see HALSBURY, Hailsham Edn., Vol. 18, pp. 558, 559, paras. 901-903; and for Cases, see DIGEST, Vol. 29, p. 408, Nos. 3214-3217.]

Cases referred to:

*(1) *Tattersall* v. *Drysdale*, [1935] 2 K.B. 174; Digest Supp.; 104 L.J.K.B. 511; 153 L.T. 75.

*(2) *Richardson, Spence & Co. & Lord Gough S.S. Co.* v. *Rowntree*, [1894] A.C. 217; 8 Digest 103, *689*; 63 L.J.Q.B. 283; 70 L.T. 817.

*(3) *Re Coleman's Depositories, Ltd.* v. *Life & Health Assurance Assocn.*, [1907] 2 K.B. 798; 29 Digest 406, *3200*; 76 L.J.K.B. 865; 97 L.T. 420.

(4) *Digby* v. *General Accident, Fire & Life Assurance Corpn., Ltd.*, [1943] A.C. 121; [1942] 2 All E.R. 319.

Appeal by the plaintiff from a judgment of Tucker, J., dated May 25, 1944, and reported [1944] 2 All E.R., at p. 243. The respondents served upon the appellant notice under R.S.C. Ord. 58, r. 6, that they intended to contend at the hearing of the appeal that the part of the judgment below which ordered the plaintiff to pay the defendants one-third of their taxed costs be varied. The facts are fully set out in the judgments of Tucker, J. ([1944] 2 All E.R. 243) and Lord Greene, M.R.

H. D. Samuels, K.C., and *P. M. O'Connor* for the appellant.

John W. Morris, K.C., and *P. B. Morle* for the respondents.

Lord Greene, M.R.: At the trial of the action, a number of questions arose which were dealt with at length in the careful judgment of Tucker, J. He was in favour of the present appellant, the plaintiff in the action, on all points but one, and on this appeal the appellant seeks to have reversed the judgment which was based upon that decision. That is the only point that has been argued before us, and, accordingly, none of the other points arise because we do not think it necessary to call on counsel for the respondents.

The plaintiff in the action is one Austin. Austin held an insurance with underwriters at Lloyds, the policy being what is called " The Bell " Motor Car Policy. The action is not an action by the underwriters; it is an action by Austin, and the only question that arises in the action is: Has Austin the rights which he claims against the respondents, the Zurich General Accident & Liability Insurance Co., Ltd.? No doubt he is bringing the action because he has been called upon to do so by his own underwriters. But that does not alter the fact that the action is his action and the rights to be ascertained are his rights.

The only facts that it is necessary to state are these: The accident took place while Austin was driving a car belonging to Aldridge. Austin's own policy covered him while he was driving somebody's else's car. Aldridge had a policy with the respondents, and that policy covered drivers other than Aldridge who might drive his car with his authority. Austin drove Aldridge's car and Aldridge was killed unfortunately and a passenger was injured. Aldridge's executors and the passenger sued Austin and recovered substantial sums which were paid by Austin's underwriters. Austin now sues the Zurich company and claims that they are liable to him under that clause in Aldridge's policy which extends to indemnify persons driving Aldridge's car with Aldridge's authority.

The question which arises on the point which we have to consider is whether or not Tucker, J., was right in holding that a condition in Aldridge's policy, which had not been complied with, was a fatal bar to Austin's claim.

Aldridge's policy contained this provision with regard to authorised drivers. It is contained in a section called " Sect. 1. Liability to Third Parties," and the relevant passage is this:

> In terms of and subject to the limitations of and for the purposes of this section: 1. The company will indemnify any person who is driving such motor car on the insured's order or with his permission provided: (*a*) That such person is not entitled to indemnity under any other Policy [that is not relevant on this question] (*b*) That

such person shall as though he were the insured observe fulfil and be subject to the terms exceptions and conditions of this Policy in so far as they can apply.

The conditions headed " General Conditions " contain this condition :

> 1. The insured or his legal personal representatives shall give notice in writing to the London or any branch office of the company as soon as possible after the occurrence of any accident and/or loss and/or damage with full particulars thereof. Every letter claim writ summons and/or process shall be notified or forwarded to the company immediately on receipt. Notice shall also be given in writing to the company immediately the insured or his legal personal representatives shall have knowledge of any impending prosecution or inquest in connection with any accident for which there may be liability under this Policy. .... 7. The due observance and fulfilment of the terms provisions and conditions of this policy and of any endorsement herein in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy.

Austin had been served with summonses for dangerous and careless driving. He did not give notice to Zurich of the service of those summonses and, accordingly, looking at the mere language of condition 1, that condition was not complied with. One would have thought it pretty obvious that that must be an end of the present claim, because one of the terms upon which the Zurich company agreed to indemnify an authorised driver was that he should, as though he were the insured, " observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply." There was nothing to prevent Austin giving the notice required by that condition, and I cannot see why it could be said that that particular condition could not apply. One reason why Austin did not give notice to Zurich was that he did not know of the existence of such a condition in Aldridge's policy, and also, having his own policy, he was not interested in anything else. He had his own underwriters and he does not appear to have troubled his head about the possibility of Aldridge having a policy, or the possibility of that policy extending to drivers authorised by Aldridge to drive Aldridge's car.

It is said that as Austin did not know of that condition in Aldridge's policy, he is not bound by it. I have done my best to understand the grounds upon which that proposition can be put forward. It is no fault of counsel for the plaintiff that I have not understood it ; his argument was perfectly clear. What I do not understand is how it can support the proposition for which he contended. Here is a case where Austin, a stranger to the policy altogether, paying no part of the premium and not being a party in contractual relations with Zurich at all, seeks to take the benefit of a clause in Aldridge's policy which he can only obtain by reason of a certain statutory provision. I do not think it can be suggested at this day that, apart from statute, any contract could be spelt out in circumstances such as this between Austin and Zurich. But, by reason of the Road Traffic Act, 1930, s. 36 (4), Austin had a right to sue Zurich.

It is sufficient to refer to a passage in the judgment of Goddard, J., as he then was, in *Tattersall* v. *Drysdale* (1). The passage is at p. 181 and starts with a quotation from Greer, L.J., in an earlier case :

> But Greer, L.J., says : " I think it is quite clear that the section was intended to meet the difficulty that was patent ; first, that nobody who was not a party to a contract could bring an action on the contract ; and, secondly, by reason of the statutory and well known law that a person who has no interest in the subject-matter of an insurance cannot claim the benefit of that insurance." I read that passage as meaning that in his opinion the section was not only intended to effect but has effected a change in the law and gives a cause of action which hitherto did not exist to a person indicated in the policy but not a party to it, and I respectfully agree with that view.

Here, then, is Austin endeavouring to take advantage of the indemnity which Aldridge's policy purports to give to him and he is claiming the benefit under a document to which he is not a party. I should have thought myself that it was scarcely arguable to suggest that a person who claims the benefit of a document in that way is not bound to take it as he finds it. He must take it with all its disadvantages from his point of view, together with its advantages, and he cannot claim the benefit of anything which the document gives him without complying with its terms. I should have thought that that was not merely common sense, but a perfectly clear matter of principle.

In the present case this clause in terms obliges the authorised driver to "observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply." There is nothing in those terms which cannot apply. There is nothing which is inconsistent in those terms with the case of the authorised driver.

The real weight of the argument of counsel for the plaintiff was to this effect: Austin cannot be bound by a condition of which he did not know. It is perfectly true that there are numbers of well-known cases in which a party to a contract has been held not to be bound by a condition which was not properly brought to his notice at the time that the contract was made. The ordinary case which one remembers from reading it in the elementary text books on contract is *Richardson* v. *Rowntree* (2). The question there was: What were the terms of the contract between the parties? In the circumstances, did the condition in question form part of the contract, or did it not, and in the circumstances it was held that it did not form part of the contract because you cannot put on a person a condition which you have carefully concealed, over which, so to speak, you have put a piece of paper while he is signing his name. That is no part of the contract. In the present case, there is no question of that kind. There is no question of contract. It is a question of a document which, by virtue of a statute, confers a benefit on a third party. How that third party can pick and choose and pick out that part of the document which suits him and omit that part of the document which does not suit him, I am at a loss to understand. He must take it or leave it as he finds it, and, if he claims the benefit, he must suffer the burden.

There is one case that was relied upon, upon which I must say a word. That is *Re Coleman's Depositories, Ltd.* v. *The Life & Health Assurance Assocn.* (3). That was a case where an employer was minded to effect an employers' liability and workmen's compensation insurance. He signed a proposal form and received a covering note which made no mention of any conditions which the underwriters would require to be contained in the policy. Before he received the policy, a workman was injured and the employer became under liability in respect of that injury. He did not give notice of the injury because at the time it was not thought to be of any seriousness. The policy was then delivered to him and it contained a condition with regard to giving notice within a proper time of injuries which might occur to the assured's workmen. The question there was whether that condition bound the assured, and the question that had to be decided was simply this: At the relevant time when this accident took place, what was the contract of insurance existing between the assured and the underwriters? Did that condition form part of that contractual relationship or did it not? The answer of the majority of this court was that it did not.

The ground of the decision appears perfectly plainly from the judgment of VAUGHAN WILLIAMS, L.J., on p. 805. He says:

> It could not have been in the contemplation of the parties that this condition as to immediate notice should apply until the contents of the policy had been communicated to the employer. I hold that on the face of the award there is no evidence that the employer knew, or had the opportunity of knowing, the conditions of the policy, and that the onus is on the association; and in my opinion the risk undertaken by the association for the period prior to the delivery of the policy did not impose upon the employer the obligation to give immediate notice of the accident to Corrin on Jan. 2, 1905, prior to the receipt by the employer of the policy or of information of its containing such a condition or obligation.

The question was: What was the risk undertaken by the association and what were the conditions under which it took that risk? The court held that that particular condition was not embodied in the contract. That seems to me to have no application to the present case at all. It is very like the other class, *Richardson* v. *Rowntree* (2), and cases of that description. It is a question of: What is the contract between the two contracting parties? Does it, or does it not, contain a particular term?

As I have pointed out, no such contract arises here. There is no contract, but there is a document and the plaintiff, the authorised driver, must take it as he finds it. If that be not right, the authorised driver would be exempt from all these conditions. I can see no ground for excluding any of them, and he would be in an extremely fortunate position and the underwriters in an extremely unfortunate position, because the result would be, as Uthwatt, J., has pointed out, that the benefits conferred on the authorised driver would be far better than the benefits conferred on the actual policy-holder himself; and it is not to be supposed for one moment that where the policy-holder authorises somebody else to drive his car that the underwriters are in a position to tell that other person what the terms are upon which he is going to be indemnified if he does drive the car. It is obviously not business and could never be effectively done.

It is worth calling attention to the fact, I think, that, although this particular point was not before the House in *Digby* v. *General Accident Fire & Life Assurance Corpn., Ltd.* (4), at p. 121, Lord Wright, in discussing a similar clause to this (p. 140), went through the conditions one by one and pointed out those which would affect and bind in their nature the authorised driver. It is perfectly true that the point was not before him, but if it had occurred to him that an authorised driver would not be bound by these conditions unless he knew of them, it is quite impossible that he could have used the language that he did. He treats these conditions as being absolutely binding.

In my opinion, that is the right answer and in the result the appeal must be dismissed.

MacKinnon, L.J.: I agree. The judgment of Tucker, J., seems to me a masterly and admirable one and one in which no possible error can be found. I would only add one thing: This apparently was treated below as a claim by "The Bell" underwriters against the Zurich Insurance Co., put forward by virtue of their right of subrogation. If it was a claim in subrogation, it would be rightly pursued in the name of Austin. But, as it seems to me, in truth the claim of "The Bell" underwriters was one of contribution against the Zurich company on the principle of double insurance, and such a claim ought to be brought in the name of the underwriters and the defendant underwriters and could not be pursued in the name of the assured under the guise of a claim by way of subrogation. However, that is a very technical matter. It does not really concern the merits of this case or of this appeal.

Uthwatt, J.: I agree. Austin's rights in this case arose only by reason of the fact that Aldridge made a bargain. That being so, Austin can only claim upon the terms of the bargain which Aldridge in fact made. He is bound by all those terms, whatever they may be. His assent or dissent from any of those terms adds nothing, and, for that reason, it appears to me the railway cases are absolutely irrelevant.

As regards the question of parties, I agree with what has fallen from MacKinnon, L.J., that the plaintiff, having been completely indemnified by one set of insurers, it seems difficult to be in a position to ask for an indemnity against something already fully indemnified by another set. The matter between the two sets of insurers ought to be worked out in proceedings differently constituted.

Appeal dismissed with costs. Cross-appeal dismissed with costs. The respondents to pay the appellants' costs in so far as they had been increased by the issue of the respondents' notice to apply for a variation of order as to costs of the court below. Leave to appeal to the House of Lords refused.

Solicitors: *R. I. Lewis & Co.* (for the appellant); *A. E. Wyeth & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re SAFFELL.

[KING'S BENCH DIVISION (Tucker, J.), **January 11, 1945.**]

Emergency Legislation—Compensation—Merchant seaman—Aggravation of organic disease by service at sea—Exceptional war-time conditions aboard ship—Disablement not a war injury—Injury attributable to abnormal conditions—Substantial increase of "risk of peril"—Whether abnormal conditions as such sufficient to qualify injury as a war risk injury Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939 (c. 83), *ss.* 3, 10—*Pensions (Mercantile Marine) Act,* 1942 (c. 26), *ss.* 1 (2) (*d*), (3), 5.

The appellant, a seaman, who served in the Merchant Navy from Nov., 1940, to June, 1943, was suffering from an organic disease, *i.e.*, chest trouble, which was aggravated by his service at sea. It was found as a fact that disablement was caused by hard work with increased effort in combating the enemy and by closer atmospheres in the engine-room due to the use of fuel oil in increased quantities. The appellant claimed compensation under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10, alternatively, under the Pensions (Mercantile Marine) Act, 1942, s. 1. The questions for the determination of the court were: (i) whether the appellant had suffered a war injury within the meaning of the 1939 Act, s. 10; (ii) whether the injury was a war injury within the meaning of the 1942 Act, s. 1 (2) (*d*), (3), since the abnormal conditions aboard ship during the war, which had operated injuriously, did not increase the risk of any peril occurring which caused the injury, because there was no such peril:—

HELD: (i) the disablement, though a physical injury, was not caused by "the doing of any other injurious act . . . in combating the enemy" within the meaning of the 1939 Act, s. 10.

(ii) in dealing with a case of disease, the Pensions (Mercantile Marine) Act, 1942, s. 1 (3) must be interpreted as meaning "if, and only if, the existence on board ship of any other conditions which would be abnormal in time of peace have substantially increased the risk of the injury which occurred." Where, therefore, the existence of the conditions themselves was the peril and that caused the injury, such injury was a war injury entitling the appellant to an award under s. 1 (1).

[**EDITORIAL NOTE.** In order to justify a claim to a pension under the Pensions (Mercantile Marine) Act, 1942, it is generally necessary to prove the following sequence of events: (i) The existence of one of the matters specified in sect. 1 (2) of the Act. (ii) Consequential substantial increase of risk of peril. (iii) Occurrence of the peril. (iv) Resultant injury, loss or damage within the meaning of the Act. In the case under consideration (iii) in the chain of causation was missing, but the court holds that in the application to matters set out in subsect. (2) (*d*) substantial increase of "risk of peril" may be construed as "risk of injury," especially having regard to the inclusion of organic disease under the head of physical injury. It is to be observed that the words of subsect. (3) are not very apt when applied to matters in subsect. (2) (*d*), but the court adopts a broad construction of the section as a whole.

AS TO PENSIONS (NAVY, ARMY, AIR FORCE AND MERCANTILE MARINE) ACT, 1939, ss. 3, 10, and PENSIONS (MERCANTILE MARINE) ACT. 1942, ss. 1, 5, see HALSBURY'S STATUTES, Vol. 32, p. 1067 and Vol. 35, p. 316.]

APPEAL of the applicant by way of case stated from a decision of No. 1 Pensions Appeal Tribunal. The tribunal disallowed the applicant's appeal from the rejection by the Minister of Pensions of his claim for compensation under the provisions of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, ss. 3, 10, and the Pensions (Mercantile Marine) Act, 1942, s. 1. The facts are sufficiently set out in the judgment.

N. B. Goldie, K.C., and *G. H. Crispin* for the appellant.
Valentine Holmes for the respondent.

TUCKER, J.: This appeal by way of case stated concerns the case of a man called James Henry Saffell, who was a merchant seaman. He served in the Merchant Navy from Nov., 1940, to June, 1943. The tribunal have found as a fact that he suffered a disablement, namely, chest trouble, which was either tuberculosis or chronic bronchitis, and that that condition was aggravated by his service. Those diseases are organic diseases and consequently come within the definition of "physical injury" in the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10, by reason of the Pensions (Mercantile Marine) Act, 1942, s. 5, which clarifies the meaning of "physical injuries" by including "tuberculosis and any other organic disease, and the aggravation thereof." There is a further finding that the aggravation occurred to this seaman while he was at sea, serving on a British ship. The case further finds that this aggravation was caused by exceptional war-time conditions on board ship, that is to say, by closer atmospheres in the engine room due to the use of fuel oil in increased quantities.

On those findings of fact it is contended that as a matter of law the appellant is entitled to an award under the scheme made by the Ministry of Pensions under the powers conferred by the 1939 Act. Firstly, it is said that the appellant is entitled to an award under the 1939 Act, ss. 3, 10, as having suffered a war injury. A war injury is defined in that Act as being a "physical injury" which as I have already indicated, includes "organic disease, and the aggravation thereof," but it must have been caused by one of the specific matters there enumerated. Those specific matters are:

> . . . (i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or other noxious thing; or (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; . . .

It is argued in this case that this injury, a chest condition, was caused by the doing of some injurious act in combating the enemy. It is said that the tribunal found as a fact that this man was working hard, with increased effort, in combating the enemy; and that the use of an abnormal amount of fuel oil was also due to measures taken with a view to combating the enemy and, therefore, that those matters came within "the doing of any injurious act . . . in combating the enemy." The tribunal have found against the appellant on that ground and have held that this is not a war injury. I think that the tribunal have come to a correct decision on that part of the case. In my view the fact that the ship was using fuel oil in increased quantities and that this produced an atmosphere harmful to the appellant in his then condition is not "the doing of any other injurious act . . . in combating the enemy," within the meaning of the 1939 Act, s. 10. But there was an alternative claim made before the tribunal that the facts brought the appellant's claim within the provisions of the Pensions (Mercantile Marine) Act, 1942. Sect. 1 of that Act empowers the Minister to make schemes:

> . . . in relation to injuries falling within this section which are not war injuries as defined by sect. 10 of the principal Act as they apply in relation to war injuries as so defined;

Then this section goes on to indicate the injuries as to which the Minister is so empowered. It provides in subsect. (2):

> The injuries falling within this section are physical injuries sustained on or after Sept. 3, 1939, at sea or in any other tidal water or in the waters of any harbour, and attributable to [certain matters set out in (*a*), (*b*), (*c*), and then (*d*)] the existence on board ship of any other conditions arising out of any such war as aforesaid which would be abnormal in time of peace, . . .

It must be remembered that having regard to sect. 5 of this Act to which I have already referred, the injuries in question included tuberculosis or the aggravation thereof. Therefore, the Minister is empowered to make a scheme providing for disablement in the case of the aggravation of tuberculosis or chronic bronchitis sustained on or after Sept. 3, 1939, at sea attributable to:

> . . . the existence on board ship of any other conditions arising out of any such war as aforesaid which would be abnormal in time of peace, . . .

The finding of the tribunal as to the existence of this atmosphere, due to the use of fuel oil is, it is said, an existence of other conditions arising out of the war which would be abnormal in time of peace. This has brought about the aggravation of the bronchitis or tuberculosis, it is said, and the appellant is accordingly entitled to an award under the extended powers conferred upon the Minister by the 1942 Act. The tribunal have held adversely to the appellant on this part of the claim as well as on the other, but the Minister of Pensions, appearing here by counsel, does not seek to support the finding of law of the tribunal under that head. He concedes that on the facts as found by the tribunal—by which, of course, he is bound—which were different from the facts which he had found when the application was originally made to him for a pension, the applicant is entitled as a matter of law to an award. Counsel for the appellant, argues that if he is not entitled under the 1939 Act he is entitled under the 1942 Act. With that part of his argument counsel for the respondent is in agreement.

Before giving any judgment on the matter I have to be satisfied that the line taken by the Minister of Pensions is in fact the legally correct one because my decision in this case will be binding upon other tribunals and the matters involved are of considerable importance. The reason why the tribunal have found adversely to the appellant on this part of the case is because of the proviso to subsect. (3) of sect. 1 of the 1942 Act, to which I have not yet referred. The proviso is in these words :

> For the purposes of this section an injury or any loss or damage shall be treated as being attributable to the matters specified in para. (*a*), in para. (*b*), in para. (*c*), or in para. (*d*) of the last preceding subsection if, but only if, they substantially increased the risk of the peril occurring which caused the injury, loss or damage.

The view the tribunal have taken of that proviso is that it becomes incumbent upon them to find some peril other than the mere existence of the enumerated matters which are required to exist and increase the risk of the peril. The tribunal says that read literally it is necessary to find some peril, the risk of which has been increased over and above the actual injury which has occurred, because the wording of the proviso is not " substantially increased the risk of the injury," but " substantially increased the risk of the peril occurring which caused the injury." Therefore, they say there must be a peril which causes the injury over and above the injury itself. This difficulty only arises under this section in dealing with the matters set out under the heading of (*d*). With regard to (*a*), (*b*) and (*c*) it is probably true that there would of necessity always be some occurrence which would happen and be brought about by the matters there enumerated which would constitute a peril which would cause the damage. But under (*d*) the position is different. In this case the finding is that the abnormal condition which existed caused the injury. The tribunal say : " Where is the peril, the risk of which was increased ? " I think the tribunal have taken too narrow a view of the meaning of this proviso. It is easy to see that the words used are not very apt when applied to the matters set out in para. (*d*), but looking at the section as a whole and the framework of the Act and bearing in mind the inclusion of organic disease under the head of " physical injury," I think that in applying this proviso it is not right to give it the very literal and narrow interpretation that has been placed upon it by the tribunal. I think that, dealing with the case of disease, this proviso must be interpreted as meaning and as saying " if, and only if, the existence on board ship of any other conditions arising out of any such war as aforesaid which would be abnormal in time of peace have substantially increased the risk of the injury which occurred." I am aware of the fact that that involves ignoring the word " peril," but none the less I think that is the real meaning of the section as a whole and that where the existence of the conditions themselves is the peril and that caused the damage the case is brought within this section.

The tribunal have set out at length a most carefully prepared judgment in which these matters are explained—and I think the section is not altogether free from difficulty—but I think the result would be to put an interpretation on this Act which I cannot believe was intended by the legislature and I do not think there is anything in the Act to force me to come to the conclusion that language has been used which has had the effect of producing results very different from those intended by the draftsman or the legislature.

I, therefore, think that the view taken by the Minister of Pensions in this case, a view which he has adopted I am told in other similar cases, is the correct one and that it is not necessary to look for the existence of some peril over and above the conditions referred to in para. (*d*). For these reasons this appeal succeeds and will be allowed.

Appeal allowed.

Solicitors : *Culross & Co.* (for the appellant) ; *Treasury Solicitor* (for the respondent.)

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

GREAT WESTERN RAILWAY CO. *v.* ROYAL NORWEGIAN GOVERNMENT.

[King's Bench Division (Atkinson, J.), **January 15, 1945.**]

Shipping—Contract of towage—Construction—Hirer's liability for loss of life of member of crew of tug whilst towing—United Kingdom Standard Towage Conditions, cll. 1, 3, 4.

Under a contract which incorporated the United Kingdom Standard Towage Conditions, the plaintiff supplied the defendants with tugs to transport their ship from one part of a dock to another. During the operation a member of the crew of one of the tugs lost his life and the plaintiffs had to pay a sum of money to his dependants. Under the terms of the contract the plaintiffs sought to recover from the defendants the sum so paid. It was agreed that the accident happened " whilst towing " within the meaning of the definition in cl. 1 of the Conditions. By cl. 3 of the Conditions, the tugowner, whilst towing, is not liable for " loss of life arising from any cause " and it is further provided that " the hirer shall pay for loss of life." It was, however, contended by the defendants that, by cl. 4 of the Conditions, the hirer was not liable for loss of life or injury to the crew of the tug. Cl. 4 provides : " The hirer shall not bear or be liable for any loss or damage done by or to the tug otherwise than whilst towing, or for loss of life or injury to the crew of the tug " :—

Held : on the true construction of the Conditions, the words in cl. 4, " otherwise than whilst towing," must govern the whole sentence, and the defendants were, therefore, liable under the contract for the loss of life of a member of the crew of the tug whilst towing.

[**EDITORIAL NOTE.** The court holds here that only on a very technical construction of cl. 4 of the United Kingdom Standard Towage Conditions could the hirer of the tug be held not liable for the loss of life of the member of the crew whilst towing. Hill, J., in *The Riverman* ([1928] P. 33), cited in argument, said, " It is for the defendants to prove a contract and to show that, in clear and unambiguous terms, it shifts on to the other contracting party a liability which otherwise would rest upon the defendants alone." No such proof is present here.

As to Contract of Towage, see HALSBURY, Hailsham Edn., Vol. 30, pp. 658-661, paras. 838-841 ; and for Cases, see DIGEST, Vol. 41, pp. 674-685, Nos. 5048-5147.]

Action by the tugowners to recover from the hirers, under the terms of a contract, a sum of money paid to the dependants of a member of the crew of the tug who lost his life while the hirer's ship was being towed. It was agreed by the parties that the contract incorporated the United Kingdom Standard Towage Conditions. The facts and the relevant clauses of the Towage Conditions are fully set out in the judgement..

John W. Morris, K.C., and *P. A. Devlin* for the plaintiffs.

A. W. Roskill for the defendants.

Atkinson, J. : The Great Western Ry. Co., who rent or occupy some of the docks at Cardiff, were requested by the defendants, the Royal Norwegian Government, to supply two tugs for the purpose of transporting their ship, the Ledaal, from a jetty in the Roth Dock to a coaling berth in another part of the dock. The request was made on a form signed by the chief officer of the ship, but the form which was used was an old and out of date one which was used by mistake. Both parties thought that the form which had been in operation for at least 4 years and which incorporated conditions known as " United Kingdom Standard Towage Conditions," was in fact being used. Everybody agrees in this case that I am to deal with it as if the form in actual every day use had in fact been used.

The claim is in respect of the sum of £126 odd which has been paid by the plaintiffs to the dependants of a boy named Dwyer, who lost his life during the operation while this ship was being towed. The plaintiffs have had to pay that sum to Dwyer's dependants and they seek to recover it by virtue of the terms of the contract between the parties. There are only three clauses of the Towage Conditions to which I need refer. The first is :

1. For the purpose of these conditions the phrase " whilst towing " shall be deemed to cover [a certain period].

I need not seek further to define the period because it is agreed here that this accident happened "whilst towing" within the meaning of that definition. Cl. 3 is:

> The tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the hirer's vessel, or for loss of or damage to anything on board the hirer's vessel, or for loss of the tug or the hirer's vessel or for any personal injury or loss of life arising from any cause.

The next three or four lines I need not read; they contain a list of conditions or circumstances in which the tugowner shall not be liable, including negligence and so on. It has been pointed out that there is a very clear statement as to what the tugowner is not to be liable for, and it includes loss of life arising from any cause. Those words are plainly wide enough, it is said, to cover this accident.

Cl. 3 goes on:

> . . . and the hirer shall pay for all loss or damage, and personal injury or loss of life. . .

So that, in addition to the negative words disclaiming the plaintiffs' liability, there is language again wide enough to cover this accident: "the hirer shall pay for . . . personal injury or loss of life." Again, for the third time, you have words which cover this case:

> . . . and shall also indemnify the tugowner against all consequences thereof.

In not one of those three terms is there any exception relating to the crew of the tug. The man who was killed was a member of the tug's crew. The words, repeated three times, are wide enough to include this accident. You could not have wider language; the phrase "loss of life" comes again and again.

Cl. 3 proceeds to deal with the position when the tugowner is rendering service, but not a service covered by the phrase "whilst towing":

> . . . and the tugowner shall not, whilst at the request expressed or implied of the hirer rendering any service other than towing, be held responsible for any damage done to the hirer's vessel and the hirer shall indemnify the tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life.

I think those words are perfectly clear. Whilst rendering a service not covered by towing, two things are contemplated. (i) The tugowner disclaims liability for damage done to the hirer's vessel; he is relieved of liability for that. (ii) The hirer says: "I indemnify you now in a more limited way. I indemnify you against third party claims for personal injury or loss of life, but excepting claims by a member of the crew of the tug." So far the position is clear and it is perfectly plain what the words mean and what the parties must have understood. There is a wide liability on the defendants whilst the tugs are engaged in towing but a very modified liability whilst other services are being rendered: They give up any claim for damage done to their own ship the hirer's vessel, and they accept responsibility for third party claims for loss of life except in the case of the crew.

There would be nothing to be said against the plaintiff's contention, if it were not for cl. 4, which says:

> The hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug.

The argument of counsel for the defendants, put with his usual lucidity, is this: if you take those words and construe them in the natural way they mean the hirer is not to be liable for loss of life or injury to the crew of the tug. There is no justification, he argues, for saying that those words must be cut down by the prior words "otherwise than whilst towing," and, on that construction, liability for loss of life or injury to the crew would be excluded. I do not think I can adopt his argument. I think it is perfectly plain that cl. 4 is there to reiterate or clarify beyond dispute what the position is when services other than towing are being rendered. In truth, the first two lines are quite unnecessary. There are no words anywhere which could have imposed upon the hirer a liability for the loss or damage done by the tug, or to the tug, otherwise than whilst towing. There are plenty of words imposing the liability whilst towing, but not imposing that liability when engaged otherwise than in towing, and although it has been already stated that there was to be no liability for loss of life or injury to the crew of the tug, it is stated over again to make it quite clear. I think the words " otherwise than whilst towing " must govern the whole of the sentence. I am quite sure that that is what was meant. I think the words might have been in a better position, but I think it is impossible for me to construe it as if the words " loss of life or injury to the crew of the tug " applied to something the clause is not dealing with at all, *i.e.*, the position of the parties whilst the tug was engaged in towing.

I, therefore, accept the interpretation claimed by the plaintiffs, an interpretation which would be given by anyone reading the clauses together, without A being too technical. It would be very technical indeed to say: " Those words ' otherwise than whilst towing ' are in the wrong place, and because they are not in the right place that changes the interpretation of the whole contract." I do not think I can go so far as that, and my interpretation is that contended for by the plaintiffs, and there will be judgment for the plaintiffs for the sum claimed.

Judgment for the plaintiffs with costs. B

Solicitors: *P. W. Pine* (for the plaintiffs); *Sinclair, Roche & Temperley* (for the defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

COLFAR *v.* COGGINS AND GRIFFITH (LIVERPOOL) LTD C

[House of Lords (Viscount Simon, L.C., Lord Macmillan, Lord Porter and Lord Simonds), **Febr**

Dictum of Viscount Simon, at p. 328, *explained by* Lord SEY *and referred to by* Lord Tu General Cleaning Cons., Lt Christmas. [1952] 2 All E.R.

Master and Servant—Duty of master—Provision of safe s Loading of cargo—Use of married gear—Guy-rope not securely fastened—Negligence of fellow-workman—Common employment. D

The appellant, a dock labourer, was employed by the respondents in loading bags of salt into the hold of a ship lying in dock from a barge alongside the ship. The bags were lifted from the barge by means of 2 derricks working on the ship in married gear, a method commonly employed in such operations. Before the work was completed, the dock authority ordered the barge to be removed from alongside to allow the passage E of another ship. In order to finish unloading the barge before removing it, the remaining bags of salt, instead of being transferred directly into the hold, were placed on the ship's deck to be lowered into the hold later. To make room for the incoming ship the starboard derrick arm had to be brought inboard and, on being fixed in its new position, the guy-rope was either not securely fastened or was released by someone after being secured. As a result of this negligence, when the use of the derrick was resumed, the F arm swung in causing some bags of salt to fall out of the sling and the appellant was thereby seriously injured. The appellant brought an action against the respondents claiming damages for negligence, but the judge held that, although the individual responsible for the negligent act had not been identified, he must have been a fellow-workman of the appellant and in common employment with him, so that the respondents were not liable for damages. On appeal, it was contended by the appellant that the G accident was caused by overloading the sling and that it was, therefore, due to the negligence of the respondents in failing to establish and maintain a safe system of working:—

Held: (i) there was no finding by the judge that there had been negligence in overloading the sling or that the accident was due to disregard of a safe system of working, and it would be wrong to draw this conclusion on the evidence. H

(ii) the effective cause of the accident was the act of negligence committed by an unidentified fellow-workman in reference to the guy-rope, and the respondents were not, therefore, liable.

[**EDITORIAL NOTE.** The principles applicable to cases of this kind were most recently laid down in *Speed v. Thomas Swift & Co.* (8), but the difficulty lies in their application. It was not shown here that the injury was in any way due to the failure to provide a safe system of working and the accident is, therefore, held to be due to the negligent act of a fellow servant.

As to Provision of Safe System of Working, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-190, paras. 314-317 ; and for Cases, see DIGEST, Vol. 34, pp. 194-199, Nos. 1580-1626.

As to Common Employment, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328 ; and for Cases, see DIGEST, Vol. 34, pp. 207-210, Nos. 1697-1729.]

Cases referred to :

*(1) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57 ; [1937] 3 All E.R. 628 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406 ; *affg.* [1936] S.C. 883.

(2) *Radcliffe* v. *Ribble Motor Services, Ltd.*, [1939] A.C. 215 ; [1939] 1 All E.R. 637 ; Digest Supp. ; 108 L.J.K.B. 320 ; 160 L.T. 420.

(3) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266 ; 34 Digest 126, *971* ; 31 L.T.O.S. 255.

(4) *Sword* v. *Cameron* (1839), 1 Dunl. (Ct. of Sess.) 493 ; 34 Digest 199, *1624 vii.*

(5) *Bartonshill Coal Co.* v. *McGuire* (1858), 3 Macq. 300 ; 34 Digest 126, *972* ; 31 L.T.O.S. 258.

(6) *Weems* v. *Mathieson* (1861), 4 Macq. 215 ; 34 Digest 196, *1604*.

(7) *Smith* v. *Baker & Sons*, [1891] A.C. 325 ; 34 Digest 202, *1657* ; 60 L.J.Q.B. 683 ; 65 L.T. 467.

*(8) *Speed* v. *Thomas Swift & Co., Ltd.*, [1943] 1 K.B. 557 ; [1943] 1 All E.R. 539 ; 112 L.J.K.B. 487 ; 169 L.T. 67.

Appeal by the workman from a decision of the Court of Appeal (Scott, Luxmoore and Goddard, L.JJ.), affirming a decision of Stable, J., whereby he dismissed an action by the workman against his employers for damages for personal injuries. The facts are fully set out in the judgment of Viscount Simon, L.C.

M. Turner-Samuels and *A. D. Pappworth* for the appellant.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the respondents.

Viscount Simon, L.C. : My Lords, the appellant is an experienced dock labourer who, on Mar. 9, 1942, was one of a number of working stevedores employed by the respondents in the process of lifting bags of salt from a barge and stowing them in No. 4 hold of the S.S. Empire Hope, which was lying in the Sandon Basin of Liverpool Docks. The bags, each of which weighed about one cwt., were being transferred from the barge, which was lying alongside the ship, by means of two derricks working on the ship in what is called "married gear." This method is commonly employed in such operations, and it is not disputed that it normally provides a safe and proper system of work. The method involves fixing one derrick-arm (in this case the starboard one) by means of a guy-rope in an outward position so that it cannot swing inboard, and joining the falls of the starboard and port winches so that when a sling containing a load of bags has been raised vertically from the barge, by means of the starboard winch, to a sufficient height, it may, by using both winches together, be moved laterally to hang over the open hatchway and may then be let down till it reaches what is called the "stool" at the bottom of the hold. Thereupon the sling is opened and each man working in the hold takes a bag on his back and carries it to the proper position for stowage, until the "stool" is cleared ready to receive the next sling. The appellant was one of those so working in the hold. All went well until, just before the work was finished, the dock authority notified that the barge would have to be moved from alongside to allow for the passage of an arriving ship into the dock. The respondents' foreman requested the dock authority to allow a further ten minutes in order to complete the unloading of the barge before moving it, and, upon this being granted, the remaining bags of salt, of which there were only five or six sling-loads left in the barge, were lifted in slings which, instead of being transferred directly into the ship's hold, were put down on the deck of the ship to save time with a view to the lowering of them into the hold taking place later on. The emptied barge was then removed and, in order to make a clear passage for the incoming ship, the starboard derrick-arm was brought inboard. This involved releasing the guy-rope, which, however, should have been again securely fastened in order to fix the derrick-arm in its new position. Either the resecuring of the rope never took place, or someone released it after it had been secured. The result of this negligence was that when the use of the derrick was resumed, its arm swung further inboard, dragging one of the loaded slings with it and banging it against the hatch-coamings, so that five or six bags of salt fell out of the sling down the open hatchway and one of them struck the appellant in the hold below and seriously injured him.

The individual who, in breach of his duty, either failed to fasten, or negligently unfastened, the rope was not identified, but the judge was abundantly justified in drawing the conclusion that he must have been a fellow-workman of the appellant and in " common employment " with him within the meaning of that expression when it provides the employer with a defence, notwithstanding his employee's negligence. Some of the limitations of this defence have recently been explained by this House in *Wilsons and Clyde Co.* v. *English* (1), and in *Radcliffe* v. *Ribble Motor Services, Ltd.* (2), but if the accident in the present case is due to faulty treatment of the guy-rope it is an obvious example of injury to a workman by the causal act of carelessness of a fellow-employee when both are engaged in a common service. According to a doctrine which has been established in our law for more than 100 years, and which nothing short of an Act of Parliament can alter, the sufferer in such a case must be regarded as having entered into a contract with his employer that he will not hold him liable for the other workman's fault.

This defence of common employment, however, in cases where the work involves, or ought to involve, a proper system of work in order to minimise danger, does not avail to prevent the application of the rule that, if the injury to the workman is caused by the employer failing to take reasonable care to establish and maintain such a system, he is liable to his injured workman. And this liability of an employer for failure to take reasonable care to establish and maintain a proper system of work continues to attach to the employer whether he has delegated the establishment and maintenance of such a system to a subordinate or not. This proposition is affirmed in many cases decided in this House. Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (3), after expounding the doctrine of common employment, said at p. 288 :

> . . . when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.

I doubt whether the limitation of the rule to employment " in a work of danger " is necessary ; work may be safe if the system is good, but become dangerous if the system is faulty. Lord Cranworth cited *Sword* v. *Cameron* (4) ; Lord Chelmsford, L.C., expressed the same view in *Bartonshill Coal Co.* v. *McGuire* (5) ; and Lord Wensleydale in *Weems* v. *Mathieson* (6), indicated that an employer is responsible not only for want of care in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used. All the cases to which I have referred came from Scotland, but the proposition is part of the law of England also. Indeed, so far as the employer's liability for negligence " by reason of any defect in the condition of the ways, works, machinery, or plant " is concerned, this is now expressly stated in the Employers' Liability Act, 1880 ; but the common law liability extends to a failure to provide and maintain " a proper system of work " even though the case is not covered by the statute. The whole matter is expounded by Lord Watson in *Smith* v. *Baker* (7), at p. 353, and is most clearly explained in the recent case of *Wilsons and Clyde Coal Co.* (1) in this House. The Court of Appeal has recently had occasion in *Speed* v. *Thomas Swift & Co.* (8), to consider the meaning and application of the employer's duty " to provide a safe system of working "—as it happens, in connection with the working of married gear—and the judgments of Lord Greene, M.R., MacKinnon and Goddard, L.JJ., appear to me to carry the analysis of " system of working " to the furthest point that can be reached. I agree with the propositions there laid down, but, as long as the doctrine of common employment continues to apply, do not think that the employer's liability at common law arising from this duty can be further extended.

Such being the state of the law, the advisers of the appellant realised that his claim (independently of the Workmen's Compensation Act) was bound to fail unless it could be established that the accident was due to the respondents' failure to provide and maintain a proper system of work. To raise this issue, the statement of claim ought to set out, so far as relevant, what the proper system of work was, and in what relevant respects it is alleged that it was not observed. Instead of this, there is merely an allegation that the bag of salt fell on the plaintiff " owing to the negligence of the defendants " followed by particulars many of which cannot be regarded as alleging defects of "system" at all. However, counsel for the appellant made it plain to us that what he relied on was the alleged overloading of the last few slings by the picking up of too many bags at the same time. I do not think that the evidence established that this took place, or that it was due to negligence. Still less was it proved to be due to disregard of a safe system of working. The sling was in no danger of breaking under its load. The limit to the number of bags taken at a time was A primarily aimed at securing that the men in the hold should not be set too heavy a task in dealing with the contents of a single sling before the next one arrived. The effective cause of the accident was the act of negligence committed by some unidentified fellow-workman in reference to the guy-rope. There is no finding by the judge that it was negligent to put so many bags in one sling and I agree with the Court of Appeal that it would be wrong to draw this conclusion on the evidence. The right view is that the cause of the appel- B lant's injury was not what Lord Justice-Clerk, Lord Aitchison (in the Court of Session, in *Wilsons and Clyde Coal Co.* v. *English* (1), at p. 904), called "the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against," but must be classed amongst those "isolated or day to day acts of the servant of which the master is not presumed to be aware and which he C cannot guard against."

The appeal, therefore, fails, but the appellant is not thereby deprived of his claim under the Workmen's Compensation Acts.

Lord Thankerton: My Lords, I am of the same opinion.

Lord Simonds: My Lords, I concur. Lord Porter has asked me to say that he concurs also.

D Viscount Simon, L.C.: I am able to add, my Lords, that Lord Macmillan also concurs in the opinion which has been delivered.

Appeal dismissed.

Solicitors: *J. H. Milner & Son*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *P. F. Walker*, agents for *Weightman, Pedder & Co.*, Liverpool (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law*.]

E

LARRINAGA STEAMSHIP CO., LTD. *v.* R.

[House of Lords (Viscount Simon, L.C., Lord Thankerton, Lord Wright, F Lord Porter and Lord Goddard), **November 15, 16, 17, 20, 1944, February 9, 1945.**]

Insurance—Marine insurance—War risks—Warlike operations—Ship returning home in ballast after discharging cargo at war-base.

Shipping—Charterparty—Master to obey order of charterer "as regards employment"—Ship stranded while returning home in ballast after discharging G *cargo at war-base—Ship ordered to leave port by charterer's representative—Chief officer's request to postpone sailing owing to bad weather refused by sea transport officer—Stranding of ship not consequence of order—Charterer not liable for naval orders.*

A ship was requisitioned by the Government on Sept. 3, 1939, under the conditions of the charterparty T.99A. The charterparty provided that certain risks of war including "consequences of warlike operations" H should be taken by the Crown, and that the master was to be under the order and directions of the charterer as regards employment, agency or other arrangements, the charterer agreeing to indemnify the owners for all consequences and liabilities which might arise from the master or officers complying with such orders. The ship had carried a cargo of mechanical transport for military use to a war-base and on returning from that voyage she was to be released from Government service. She finished the discharge of her cargo on Oct. 13, and on the same day the chief officer who was in command owing to the master's illness, received written orders from the charterer's agent and the sea transport officer to leave the port as soon as discharge was completed. The sea transport officer subsequently refused the chief officer's request that the sailing should be deferred until the following morning owing to bad weather, because the berth was wanted for another vessel, and the ship set sail the same night. In consequence of the storm she stranded and sustained serious damage. It was contended for the appellant owners (i) that the damage was sustained while the ship was engaged on a warlike operation ; or, alternatively, (ii) that the order to leave the port was an order as regards employment, and that though generally a marine loss following on such an order would not be its consequence, yet where, as here, the order was to proceed in the face of the danger of a storm and against the protests of the master, the damage suffered was a consequence of the order :—

Held : (i) on the discharge of the cargo the warlike operation came to an end and the subsequent stranding was not a consequence of it.

(ii) though an order to proceed to a specified port might be deemed an order as to employment within the meaning of cl. 9, the stranding of the ship was not a consequence of such order, but only an incident arising in the course of carrying the order out. The subsequent oral order of the sea transport officer was not a charterer's but a naval order and, therefore, not one for which the charterer was responsible.

Decision of Atkinson, J. ([1943] 1 All E.R. 450) *and of the Court of Appeal* ([1943] 2 All E.R. 736) *affirmed as to* (i).

Decision of the Court of Appeal ([1943] 2 All E.R. 736) *reversing* Atkinson, J. ([1943] 1 All E.R. 450) *as to* (ii), *affirmed on other grounds.*

[**EDITORIAL NOTE.** This case contains an interesting analysis of the word "employment" in a charterparty. The Court of Appeal held that this meant employment of persons. The House of Lords hold that it means employment of the ship, but in a limited sense, drawing an important distinction between an order directing how a ship shall be employed, and an order directing how she shall act in the course of that employment. It is held, therefore, that an order to sail at once is an order relating to navigation and not to employment.

As to Conditions of Time Charter, see HALSBURY, Hailsham Edn., Vol. 30, p. 299, para. 492 ; and for Cases, see DIGEST, Vol. 41, pp. 356, 357, Nos. 2051-2059.]

Cases referred to :

*(1) *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A.C. 691 ; [1942] 2 All E.R. 6 ; Digest Supp. ; 111 L.J.K.B. 512 ; 167 L.T. 349.

*(2) *Weir* v. *Union S.S. Co., Ltd.*, [1900] A.C. 525 ; 41 Digest 317, *1763* ; 69 L.J.Q.B. 809 ; 83 L.T. 91.

(3) *Lensen Shipping Co., Ltd.* v. *Anglo-Soviet Shipping Co., Ltd.* (1935), 40 Com. Cas. 320 ; Digest Supp.

(4) *Portsmouth S.S. Co., Ltd.* v. *Liverpool and Glasgow Salvage Assocn.* (1929), 34 Ll.L.R. 459.

(5) *Board of Trade* v. *Hain S.S. Co.*, [1929] A.C. 534 ; Digest Supp. ; 98 L.J.K.B. 625 ; 141 L.T. 435.

(6) *J. Wharton* (*Shipping*), *Ltd.* v. *Mortleman*, [1941] 2 K.B. 283 ; [1941] 2 All E.R. 261 ; Digest Supp. ; 165 L.T. 342.

Appeal by the shipowners from a decision of the Court of Appeal (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), dated Nov. 22, 1943, reported [1943] 2 All E.R. 736, reversing a decision of Atkinson, J., dated Feb. 15, 1943, reported [1943] 1 All E.R. 450. The facts are fully set out in the opinion of Lord Porter.

F. A. Sellers, K.C., and *Owen L. Bateson* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Patrick Devlin* for the respondent.

Viscount Simon, L.C. : My Lords, the S.S. Ramon de Larrinaga, which belonged to the appellants, was on requisition to the Crown on the terms contained in a time charterparty in the well-known form T.99A. The charterparty provided that certain risks of war, including "consequences of warlike operations," should be taken by the Crown and, further, cl. 9 of the charterparty provided :

> The master . . . shall be under the orders and directions of the charterer as regards employment, agency or other arrangements ; and the charterer hereby agrees to indemnify the owners for all consequences and liabilities which may arise from the

master or officers signing bills of lading or other documents or complying with such orders . . .

On Oct. 14, 1939, the ship, while on service under the charterparty, grounded on the Petit Charpentier Bank, which is off the coast of France between St. Nazaire and Quiberon Bay. She thereby sustained severe damage, and the appellants, in their petition of right, claim that the cost of repair should be borne by the Crown on two grounds, first, because they allege that the grounding A and damage were a consequence of a warlike operation, and, secondly, because they resulted from the master complying with the instructions and orders of the charterer. ATKINSON, J., before whom the trial took place, decided the first point in favour of the Crown, holding that the vessel was not at the material time engaged on a warlike operation. But he decided the second point in favour of the suppliants, holding that the order given to the ship at St. Nazaire, under which she proceeded to Quiberon Bay, was an order relating to " employ-B ment " within the meaning of cl. 9 of the charterparty. The Crown appealed to the Court of Appeal (LORD GREENE, M.R., MACKINNON and DU PARCQ, L.JJ.), and MACKINNON, L.J., delivered the unanimous judgment of that court that the present appellants failed on both points. Hence the appeal of the shipowners to this House.

On the first question, I agree entirely with the conclusion unanimously reached C in both courts below that the proximate cause of the stranding of the ship was not " warlike operations." While loading her last cargo of military equipment at Newport, Monmouthshire, and preparing to carry it to St. Nazaire, then a British war-base, her owners, the present appellants, were on Oct. 7, 1939, informed by the charterers that after that service she would return to Newport (later changed to Cardiff) for a joint survey, as she was being released from Government service. She reached St. Nazaire on Oct. 11, and her discharge D was completed at 4 p.m. on Oct. 13. Thereupon the sea transport officer at St. Nazaire gave to the ship orders in writing that she should sail for Quiberon Bay with a view to forming part of a convoy about to be escorted to the Bristol Channel. The acting master, in view of the bad weather and other conditions, would have preferred to stay in harbour that night, and said so, but he was informed that he must sail at once, as the berth was wanted for another ship. Accordingly, the ship left about 6 p.m. and proceeded down the channel in charge E of a pilot. At about 1 a.m., the weather having got worse and visibility being poor, it was decided to anchor. Later, it was thought wiser to go back to St. Nazaire, and in endeavouring to do so the vessel grounded on a bank and was most seriously damaged.

There is nothing in the large body of decisions applying the relevant paragraph in charterparty T.99 or T.99A to particular instances of damage to requisitioned ships which would justify the view that this stranding was the " consequence F of warlike operations." In the case of the *Coxwold* (*Yorkshire Dale S.S. Co.* v. *Minister of War Transport* (1)), which is the most recent case in this House on the subject, the Coxwold was admittedly engaged in warlike operations (carrying from one war-base to another military stores for the use of British forces in the field) and the question was whether her stranding was proximately caused by warlike operations. Here the Ramon de Larrinaga was not engaged in warlike G operations at all. Counsel for the appellants frankly admitted that his case would be the same if the ship had stranded off the Welsh coast while approaching Cardiff. She was attempting to make a voyage without cargo from St. Nazaire to Cardiff and suffered from a marine peril while doing so. The fact that she was ordered by the sea transport officer to leave port sooner than her acting master thought wise cannot turn her disaster into the consequence of a warlike operation. The " proximate " or " determining " cause was a misfortune in navigation, H not attributable to any warlike operation at all.

On the second question which arises under cl. 9 of the charterparty, I agree with the conclusion reached in the Court of Appeal, though not with the course of reasoning by which it was reached. MACKINNON, L.J., in giving the judgment of the court, held that the word " employment " in the part of cl. 9 which speaks of " employment, agency or other arrangements," did not refer to " the employment of the ship " pursuant to cl. 1 and cl. 11. He held that " employment " in cl. 9 meant employment of persons. The Lord Justice speaks with such a width of experience and knowledge on the construction of this sort of document that I greatly hesitate to differ from him, but it seems to me very difficult to accept this interpretation, in view of the use of the word " employment " in the earlier clause. Indeed, before this House, the respondent conceded that " employment " in cl. 9 did mean employment of the ship, but argued that, having regard to the charterparty as a whole, it referred only to a limited kind of employment. I have had the advantage of studying the opinion of Lord Porter, in which he discusses this question in detail, and I agree with his view of the matter. Even if it were conceded that the order to proceed from St. Nazaire to Cardiff is within the words " orders and direction of the charterer as regards employment," it still remains true that the stranding of the vessel was not a consequence arising from such an order. It was only an incident which arose in the course of carrying the order out. The appellants argue that the oral order to leave the port as soon as the discharge was finished is more closely connected as a cause with the result of the stranding. Even so, the connection does not seem to me sufficiently close, and, in any event, that order was not the charterer's order, but an order given by the sea transport officer at St. Nazaire.

I move that this appeal be dismissed.

Lord Thankerton : My Lords, I agree with the opinion of Viscount Simon, L.C. I also have had the opportunity of considering the opinion about to be delivered by Lord Porter, and, as I agree with it in every particular, I am content to express my complete concurrence in it.

Lord Wright : My Lords, I have had the advantage of reading in print the opinions prepared by Viscount Simon, L.C., and Lord Porter. As I agree with them, I merely add a few observations on the important question of principle which is raised by the appellants' claim to an indemnity under cl. 9 of the charterparty. I find myself with all deference unable to take the same view as in the Court of Appeal MacKinnon, L.J., did, and out of respect to his authority, I think I ought to state briefly in my own words my reasons for differing from him.

The central point of contest is what is meant by the words " employment, agency and other arrangements " occurring as they do in cl. 9. The opposed views are, on the one hand, that they mean " employment of the ship " or, on the other hand, that they mean " employment of persons, stevedores, agents, pilots, tug owners or other persons."

To my mind, the former is the sense in which the " employment " is used in this context. It couples up with the words " to be employed in such lawful trades " in cl. 1. It also fits in with the words " agency or other arrangements " with which it is directly associated. All three words have a reference to the general management of the ship's business and affairs under the charterparty. " Employment " means employment of the ship to carry out the purposes for which the charterers wish to use her ; " agency " deals with another aspect of the conduct of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent. The selection is here left to the charterers. That is an important matter because of the multifarious duties and responsibilities which may fall to be discharged according to mercantile law by the ship's agents. " Arrangements " is a wider term. It is also used in this charterparty in cl. 3. There it refers to disbursements which have to be made for services in connection with operating the ship, and I think it has a similar scope in cl. 9. In this way the three words in question have a kindred significance and are used as referring to the general conduct of the business of the ship under the charterparty, while the " employment of persons " would introduce a different and incongruous element. It is true that lower down in cl. 9, in a separate paragraph, there are the words " other qualified persons " employed by the charterers. But there the ambit of the word " employed " is clearly limited and defined by the word " persons." It is a different matter when it is used *simpliciter* in the first paragraph of the clause, in a context in which *prima facie* the employment of persons is alien.

Such authority as there is goes to support the view that " employment " means " of the ship." In *Weir* v. *Union S.S. Co.* (2), Lord Davey has some observations on a somewhat similar clause in the charterparty there in question, but he seems to assume that the words referred to the vessel's employment, which he distinguished from any incident of navigation; the other Law Lords do not refer to the clause which in that charterparty was numbered cl. 4. Since then two very experienced commercial judges have accepted the construction that "employment" meant employment of the ship, GREER, L.J., in *Lensen Shipping Co.* v. *Anglo-Soviet Co.* (3), and ROCHE, J., in *Portsmouth S.S. Co.* v. *Liverpool, etc., Salvage Assocn.* (4). What they say does at least indicate how it A struck them that they thought that the word in the context should be construed.

In my opinion, the "employment" referred to is "employment of the ship." This opinion, based on the words, seems to me to be confirmed by looking at the structure and scheme of the charterparty as a whole. But I can best consider that when I have indicated what is, I think, meant by orders and direction of the charterer as regards employment of the ship. ATKINSON, J., seems to have thought that it included what he described as:

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> . . . sailing orders to Quiberon Bay to be obeyed forthwith in the dark and in bad weather with a falling glass, and insisted upon after protest.

He accordingly gave an enlarged scope to the indemnity. But I think the word "employment" in cl. 9 has the same meaning as in cl. 1, and means the services which the ship is ordered to perform, such as the voyages to or from C particular ports, with particular cargoes or in ballast. In this particular case the order as to employment was the order to go to Cardiff for the off-survey. The order to go to Cardiff for the off-survey was, in my opinion, an order as to employment within cl. 9 of the charterparty. No point is made in regard to the directions in writing given under cl. 11. They were at once properly destroyed and their exact tenor is not clear. The view of the judge was that what he described as the sailing orders to Quiberon Bay to be obeyed forthwith (I have D already quoted his words), were orders as to employment within cl. 9. With the greatest respect, I cannot agree with that view. These sailing orders which the judge found were given were, in my opinion, merely dealing with matters of navigation, in regard to carrying out the orders to proceed to Cardiff. It was the duty of the master to exercise his judgment in such matters of navigation. The master was the servant of the shipowner. LORD DAVEY in *Weir's* case (2), was of opinion that the clause he was considering had nothing to do with naviga-E tion or any incident of navigation. That is even more obvious when the general scheme of the charterparty now in question is considered. Not only is the charterparty not a demise, but the shipowner is expressly made liable *inter alia* for all services in connection with the navigation of the ship. Under the later paragraphs of cl. 9 the charterers are not to be held responsible for damage caused by the negligence of masters, officers or crews, and the owners are not F relieved from responsibility for safe and proper stowage. The whole scheme of the charterparty was to place liability for sea perils on the shipowners, who were to be responsible for insurance, other than that for war risks. The appellants did not, in fact, insure against marine risks, but the position must be considered as if they had, and if they had, the judgment of ATKINSON, J., would have had the result that the marine underwriters, on paying the loss caused by the stranding, would have been entitled by subrogation to pass the loss on to the G charterers, who would thus have been compelled to bear a marine loss of a type which was never intended, according to the plain meaning of the contract, to fall on them. Further, if the indemnity in cl. 9 applies in this case, it must be because the loss was a consequence of the ship complying with an order or direction as to the employment of the ship. It would follow on that view that generally every marine casualty which affects the ship when sailing under charterers' orders would be a consequence of her employment and of the orders H or directions of the charterers under cl. 9. I cannot accept this conclusion. In this aspect the peculiar features of the case, such as the objections of the master, are not material. These strange results would follow from the decision of ATKINSON, J. They would, it is true, be avoided by the construction adopted by the Court of Appeal, but I am unable to adopt that construction. The construction which I do adopt gives, I think, a natural meaning to the words of the charterparty and does not involve a departure from its business scheme.

I have not thought it necessary to consider whether the orders on which the judge based his judgment were or were not given by the sea transport officer in his capacity as harbour master or port official. Indeed, the evidence on this point is insufficient.

I concur in the motion proposed.

Lord Porter (read by Lord Simonds) : My Lords, this appeal calls for a decision upon two separate questions, the first involving a reconsideration of the many cases dealing with the difference between war and marine risks, and the second requiring the consideration of a well-known clause in time charterparties by the terms of which the master is placed under the orders and directions of the charterers, as regards employment, agency or other arrangements, and the charterers give the owners an indemnity against the consequences of complying with those orders.

The material facts of the case are not many and the history of the claim can be shortly stated. Upon the outbreak of war the S.S. Ramon de Larrinaga was requisitioned by the Crown on the terms of charterparty T.99A, and on Sept. 5, 1939, her owners were notified that she would be loaded with war stores. On Sept. 14, she was ordered to Newport, where she took on board mechanical transport for military use and proceeded with that cargo to Nantes, which was then an English war-base. After discharging her cargo, she returned to Quiberon Bay and thence to Newport, where she loaded a similar cargo, but this time was ordered to St. Nazaire, also an English war-base. Whilst loading, her owners were notified on Oct. 7 that after that voyage she would return to Cardiff for a joint survey, as she was being released from Government service. She reached St. Nazaire on Oct. 11, and completed her discharge on Oct. 13. On the latter date the master was taken ill and the first officer assumed his duties, and on that same day received written orders from the sea transport officer that he was to proceed to Quiberon Bay under French naval guidance after discharge was completed. Later on, about 5 o'clock, he had a personal interview with the sea transport officer. When this interview took place the weather was bad, it was raining, with a blustering wind, and the glass was falling. In these circumstances, the chief officer thought it dangerous to proceed, especially as he knew that it would be very dark, that the approach to St. Nazaire is difficult, that there are many dangerous banks and poor anchorages, and the leading lights of the port were not in use. He accordingly protested against the order and said that he wished to stay in port that night and to sail next morning. His objections, however, were overridden by the sea transport officer, who told him that he must leave as soon as discharge was complete, since the berth was wanted for another ship. As a result of these instructions, as soon as discharge was completed the vessel started on her voyage in charge of a pilot, pilotage being compulsory down the channel and outside. At 1.10 a.m. on Oct. 14, it was blowing a gale and very squally, and the pilot advised anchoring. The ship was, accordingly, anchored at a place advised by him. Whilst she was there the weather got worse, great strain was put upon the cable and the main engine was started to relieve it.

The pilot then advised that she should put back to St. Nazaire, and the anchor was heaved ; but the cable broke in the process and the ship drifted on to a sand bank and pounded heavily until about 3 or 4 o'clock, when she got clear with the help of the rising tide. Eventually she reached her original berth, but had received serious damage, which it is now agreed required an expenditure of £41,978 3*s*. 4*d*.

On these facts Atkinson, J., and the Court of Appeal alike held the loss to have been incurred by marine risk, and I understand all your Lordships agree with this finding.

No question of general principle is at stake. There is abundance of authority in your Lordships' House that a ship engaged in carrying war stores from one war base to another, or, indeed, in carrying war stores to a war base, is engaged on the warlike operation of proceeding through the water to her appointed discharging port. For this proposition it is sufficient to cite the authorities referred to in the *Coxwold* (1).

Whilst, then, the Ramon de Larrinaga was proceeding to Nantes or to St. Nazaire laden with war stores she was engaged in a warlike operation and a loss consequent upon so proceeding would be a war loss. But that is not the position in which the damage occurred. The vessel had completed her discharge and was on her way to undergo her off-survey with a view to terminating the requisition and charter.

None of the decided cases has gone so far as to declare such a voyage a warlike operation, nor do the principles upon which they were decided require any such result. It was sought to support the appellant's argument by speaking of a round voyage or a voyage out and home as being part of the same operation, and contending that the whole voyage must be included amongst warlike operations if part was of that character. Further, it was said that, if the argument were rejected the curious result would follow that a voyage out to Dunkirk to fetch home surviving combatants would be a warlike operation, not on the outward voyage, but only after the homeward voyage was begun, and not even then if it was found that there were no further troops to evacuate.

My Lords, the error in the general argument consists, I think, in looking upon a round voyage or a voyage out and home as necessarily partaking of the same character throughout. This is not so ; indeed, the appellants were constrained to admit that, if the Ramon de Larrinaga, instead of being sent home in ballast, had been sent on a commercial voyage she would have ceased to be carrying out a warlike operation, yet in being so occupied she might be proceeding on some portion of the round voyage or on the homeward part of a voyage out and home. For the purpose of the contractual relations between owners and charterers an agreement to perform a round voyage or a voyage out and home differs from an agreement to perform a single voyage, but for the purpose of ascertaining whether on a particular portion of the voyage the adventure upon which the ship is engaged is warlike or peaceful, the difference is immaterial. A voyage in ballast to a home port for the purpose of an off-survey is clearly not a warlike operation, and none the more so though the vessel engaged was performing a warlike operation on her voyage out. Nor does the example of *Board of Trade* v. *Hain S.S. Co., Ltd.* (5), assist the appellants. In that case it is true that the Roanoke was held to be engaged on a warlike operation though she was proceeding from England to the United States of America. She was, however, not only a warship of the United States Navy, but was carrying mines back from Europe to America, and the war had not ended though the armistice was already in being.

My Lords, for the purposes of this case it is not necessary to determine whether a vessel sent to a port for the purpose of performing a warlike operation and for that purpose only is engaged on such an operation on her outward voyage. The *Alderpool* (6), which touched upon this topic, was not free from complications, and I prefer not to express any opinion upon it. So, too, even if it were conceded that a voyage to Dunkirk for the purpose of bringing back troops was a warlike operation throughout and continued to be so though the transporting ship arrived too late to bring back any survivors, it would not affect the present case. The Ramon de Larrinaga was travelling not for a warlike purpose, but for a peaceful one ; she had completed her war services and was sailing home to be released. I agree with the result and reasoning of both courts below.

The second question at issue depends on the construction of a clause frequently found in time charterparties. In T.99A it takes the following form :

> (9) The master shall prosecute his voyages with the utmost dispatch and shall render all possible assistance with ship's officers and crew and boats, cranes, derricks and winches on board, and although appointed by the owners, he shall be under the orders and direction of the charterer as regards employment, agency or other arrangements : and the charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the master or officers signing bills of lading or other documents or complying with such orders as well as from any irregularity consequent thereon in the ship's papers.
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> The charterers shall not be held responsible for loss or damage sustained by the owners through the negligence of pilots, masters, officers or crews of tug-boats, stevedores or other qualified persons employed by the charterer in the loading, stowage or discharge of the cargo.

The argument, as I understood it, derived from this wording was that the order to leave St. Nazaire and to proceed to Cardiff was an order as regards employment, and that though generally a marine loss following on such an order would not be its consequence, yet where, as here, the order was to proceed in the face of the danger of a storm and against the protests of the master, the damage which the ship suffered was a consequence of the order. Had he not been compelled to leave port the master would not have sailed, and it was, it is said, the natural and a contemplated result of obeying that order that the ship might suffer marine damage: the respondent was, therefore, under a duty to indemnify the appellants for their loss. ATKINSON, J., accepted the appellants' argument and found in their favour; the Court of Appeal reversed his decision, holding that "employment" in cl. 9 meant employment of persons and not employment of the ship. Before your Lordships' House and throughout the hearing of the case the respondent conceded and, indeed, maintained that "employment" in cl. 9 did mean employment of the ship, but a limited employment, not any employment whatsoever. My Lords, I cannot but think that the word employment in cl. 9 does include at any rate certain employments of the ship. It is so used in cl. 1 of the charterparty and this use does not seem to be qualified by the collocation in which the word is found in the second part of cl. 9. But though some employment is covered not every kind of employment is comprehended; the word is coupled with agency and other arrangements and must be construed with the limitation which its society imposes and having regard to the terms of the charterparty as a whole.

The clause is to be found at least as early as the first edition of CARVER ON CARRIAGE BY SEA (1885) when it took this form:

> . . . the master (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangements: and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the master signing bills of lading by their orders or those of their agents . . .

The modern clause obviously gives a wider indemnity but under it the limitation to be put upon "employment" of the ship has still to be determined. In its natural sense it includes orders to proceed from one port to another or to undertake a voyage or series of voyages, and, therefore, the original notification of Oct. 7, and the written order of Oct. 13, in so far as it reiterated and confirmed that order, was authorised and covered by the clause. But this order did not in a legal sense, and I doubt if such an order ever could, cause such a loss. Even the order of Oct. 13 specified no exact moment of departure except that the ship was to sail after the discharge was complete. This wording left it to the master's discretion to sail at a reasonable time thereafter, and in determining what is a reasonable time all such matters as the state of the weather and the exhaustion of the crew would properly be taken into consideration. In these circumstances it cannot be said that either of these orders caused the damage which the ship suffered. A loss is not, under English law, caused by orders to make or by making a voyage because it occurs in the course of it. Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time, and in no legal sense caused by the charterers' choice of port to which the ship is directed or their instructions to her master to proceed to it. But it was said that the ship sailed not by reason of the written order to proceed, but by the subsequent oral order, and that such an order did cause the loss, since it was the probable and contemplated result of sailing in unfavourable weather that the ship might suffer damage which, had the master been free to choose his own time, would probably have been avoided.

Three answers to this argument have been made by the respondent.

(i) That though an order specifying the voyage to be performed is an order as to employment, yet an order as to the time of sailing is not. That order, it is contended, is one as to navigation, or, at any rate, not as to employment.

My Lords, this distinction seems to me to be justified: an order to sail from port A to port B is in common parlance an order as to employment, but an order that a ship shall sail at a particular time is not an order as to employment because its object is not to direct how the ship shall be employed, but how she shall act in the course of that employment. If the word were held to include every order which affected not the employment itself but any incident arising in the course of it almost every other liability undertaken by the charterer would be otiose, since the owners would be indemnified against almost all losses which the ship would incur in prosecuting her voyages. In particular war and marine risk insurance would be unnecessary, because the charterers would be liable for the losses which were so covered, since the ship would be proceeding on their orders and entitled to an indemnity for all losses caused by following them. This result would be the more remarkable since by cl. 4 of the charterparty coupled with Pt. III (iii) of Form T.755 (tramp ships), the charterer is in effect to pay the premium for marine risks as part of the hire. Yet according to the appellants' argument the insurers after paying the loss would be subrogated to the rights of the owners and could sue the charterers upon the indemnity under cl. 9 and the charterers must pay that claim to the insurers in addition to finding the premiums upon their policies. It would be a further strange consequence of the wide interpretation contended for, that the first half of cl. 9 should impose a liability for (say) stevedores' acts in cases where the charterers directed the owner what stevedoring firm to employ, whereas the second half should exempt them from liability provided they employed the stevedores direct. The contention that the word bears a limited meaning derives some support from the observations of LORD DAVEY in *Weir* v. *Union S.S. Co.* (2), a case in which it was suggested that the charterers were under an obligation to provide any ballast necessitated by their order to the chartered vessel to proceed unladen to the loading port. As part of their argument the owners relied upon a clause in the charterparty similar to cl. 9, T.99A. LORD DAVEY rejected this on the ground that the wording, it is true, put the captain under the orders and directions of the charterers as regards employment, agency and other arrangements, but it did not do so as regards navigation. In that case, providing ballast was incidental to the employment, not part of it, as in this sailing at a particular time was only indirectly connected with the employment. It was suggested on behalf of the respondent that a loss or claim due to deviation or change of voyage upon the instructions of the charterers after bills of lading have been signed was the class of order which the clause contemplated and that in any case the charterer cannot be called upon to indemnify the owner in respect of losses for which provision is otherwise made in the charterparty. My Lords, in the present case, I do not think it necessary to determine the exact limitation to be placed on the meaning of the word. It is, I think, enough to say that an order to sail at once, whether wisely or unwisely given, is not within the clause as properly construed.

(ii) But even if it were conceded that orders to sail in a storm were orders in respect of which an indemnity is due, they must still be orders of the charterers as charterers and such as under this charterparty they are entitled to give. The mere instruction to sail may be such an order, but such an instruction leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and opportunity for starting on his voyage. I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port. The naval authorities, however, have this power and, whatever the risk, their orders must be obeyed. The first officer, indeed, recognised the order as that of the naval authorities, when he said in answer to the question "why did you leave?" "naval orders." In my view, the respondent is right in his contention that the order to put to sea on the night of Oct. 13 was not a charterer's but a naval order, none the less though the Crown is both charterer and the source from which naval authority is derived. The written order to sail which did not specify any time for compliance except the finish of discharge left it to the master to choose his time and opportunity but did not cause the loss: the oral order which followed it was not a charterer's but a naval order and, therefore, not one for which the charterers are responsible.

(iii) Finally, it was urged that neither the order nor sailing in obedience to it caused the loss. In *Portsmouth S.S. Co., Ltd.* v. *Liverpool and Glasgow Salvage Assocn.* (4), ROCHE, J., points out that the clause where it applies covers only losses arising directly from charterer's instructions. He says, at p. 462:

> . . . if some act of negligence intervenes or some marine casualty intervenes then, I think, the chain of causation is broken and the indemnity does not operate.

I do not think your Lordships are called upon to determine the soundness of this argument in the present case. It might be urged that a loss following upon an order to sail into danger which is complied with and results in damage due to the contemplated risk is a consequence of that order, but to decide it in this case is unnecessary and I prefer to express no opinion upon it either in favour or against. For the reasons given above, however, I would dismiss the appeal and confirm the order of the Court of Appeal and order the appellants to pay the costs incurred in your Lordships' House.

Lord Goddard: My Lords, I have had the opportunity of reading the opinion of Lord Porter, in which I concur.

Appeal dismissed with costs.

Solicitors: *Lightbounds, Jones & Co.* (for the appellants); *Treasury Solicitor* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Distinguished. R. *v.* Winchester Area Ass. Com. *Ex parte* Wright. [1948] 2 All E.R. 552.

THE UPPER AGBRIGG ASSESSMENT COMMITTEE, THE RATING AUTHORITY FOR THE URBAN DISTRICT OF SADDLEWORTH AND THE COUNTY VALUATION COMMITTEE OF THE WEST RIDING OF YORKSHIRE *v.* GARTSIDES (BROOKSIDE BREWERY), LTD., AND BENTS BREWERY CO., LTD.

[Court of Appeal (Lord Greene, M.R., MacKinnon, L.J., and Uthwatt, J.), **February 1, 1945.**]

Rates and Rating—Valuation list—Proposed amendment to valuation list—Notice of proposal served on owner of premises and also on occupier of premises—Attendance of owner at hearing before the assessment committee—Whether owner had locus standi in the matter—Appeal to quarter sessions by owner from the committee's decision—Whether quarter sessions had jurisdiction to entertain appeal—Rating and Valuation Act, 1925 (c. 90), *s.* 37 (1), (2), (3), (4), (5), (7), (8).

The appellant rating authority made a proposal under the Rating and Valuation Act, 1925, s. 37, for an amendment of the current valuation list for a certain area in respect of a hereditament, a licensed house, owned but not occupied by one of the respondents, Bents Brewery Co. The appellant rating authority served a notice of the proposal upon the occupier in accordance with sect. 37 (3), and also a notice upon the respondent brewery company; but in the latter case the notice was addressed to Bents Brewery Co., care of Gartsides, Ltd., a subsidiary of Bents Brewery Co. The document described one Jenkinson as "the occupier" and Bents Brewery Co., as "the owners" and contained the warning that notice of objection was required before objections to the proposal could be heard. The respondents, Bents and Gartsides companies, acting upon the notice, duly appeared, without there being any objection to their *locus standi*, at a hearing before the appellant assessment committee who decided the matter against them. From that decision the respondents appealed to quarter sessions; the appellants objected on the ground that the respondents had no right of appeal under the section inasmuch as they ought never to have been served with notice of the proposal and, therefore, there was no jurisdiction of quarter sessions to entertain the appeal and determine the proposal. Quarter sessions held that they had no jurisdiction. On a further appeal by way of case stated, the Divisional Court took the view that under sect. 37 (8) the owners in this particular case had been lawfully brought before the assessment committee as being persons aggrieved by the committee's decision and accordingly reversed the decision of quarter sessions. The rating authority appealed:—

Held: on a true construction of the Rating and Valuation Act, 1925, s. 37 (3), the person to whom the notice of the proposal should have been transmitted was the occupier, and not the owner, of the premises. Sect. 37 did not confer any right to appear on a person who had wrongly received a notice and, that being so, he could gain no assistance from the earlier sections of the Act, because those sections could not be imported into s. 37 in such a way as to increase the range of persons entitled to take part in the proceedings. Quarter sessions had, therefore, no jurisdiction to hear the appeal.

Decision of the Divisional Court ([1944] 2 All E.R. 37) *reversed and decision of the Court of Quarter Sessions restored.*

[**EDITORIAL NOTE.** The Court of Appeal here reverse the Divisional Court, holding that in proceedings on a proposal under the Rating and Valuation Act, 1925, s. 37, for amendment of the valuation list, an owner has no *locus standi* where there is an occupier. The fact that a person other than the occupier has been served with a copy of the proposal does not give the court jurisdiction to hear him. The Divisional Court decision was apparently based upon the view that the rating authority having served notice upon the wrong person, the authority was precluded, by some process analogous to estoppel, from raising an objection to a state of things brought about by its own invitation, but the court holds that it is impossible for the parties to give a tribunal jurisdiction which the legislature has not given.

FOR THE RATING AND VALUATION ACT, 1925, see HALSBURY'S STATUTES OF ENGLAND, Vol. 14, p. 617.]

APPEAL by a rating authority from a decision of the Divisional Court, dated Apr. 27, 1944, on a case stated by the Court of Quarter Sessions for the county of the West Riding of Yorkshire and reported in [1944] 2 All E.R. 37. The facts are fully set out in the judgment of LORD GREENE, M.R.

G. H. B. Streatfeild, K.C., and *Myles Archibald*, for the appellants.

A. S. Comyns Carr, K.C., and *Harold B. Williams*, for the respondents.

LORD GREENE, M.R.: The appellants in this appeal are the Upper Agbrigg Assessment Committee, the rating authority for the Urban District of Saddleworth, and the County Valuation Committee of the West Riding of Yorkshire. The respondents are two brewery companies which, for short, I will call Gartsides and Bents.

Gartsides, who are loosely described as a subsidiary of Bents, have, so far as I can see, nothing to do with these proceedings on any ground, but they come into it in this way. The hereditament in question is a licensed house owned by Bents and occupied by one Jenkinson. The rating authority made a proposal under the Rating and Valuation Act, 1925, s. 37, for an amendment of the current valuation list, and they served a copy upon Jenkinson, the occupier. They also served a copy on Bents. It was addressed to Bents, care of Gartsides at the brewery address, "or occupier." In the body of the document Alfred Jenkinson is correctly stated to be "the occupier" and Bents are correctly stated to be "the owners." Therefore, the document is quite unambiguous and does not on its face carry any suggestion that an allegation is going to be put forward that Bents are the occupiers. There is the usual instruction as to notice of objection being given, and the usual warning that, unless you object, you will not be entitled to be heard at the meeting "in opposition thereto," that is, to the proposal.

The proposal in due course came before the assessment committee for consideration. Jenkinson, the occupier, did not appear. He had served no notice of objection. But Bents and, apparently, Gartsides, both appeared. The ostensible justification for their appearance was that a notice of objection had been served, that is document B, exhibited to the special case, addressed to the clerk to the rating authority and signed by Bents. It begins with these words:

> On behalf of Gartsides (Brookside Brewery), Ltd. (which is a subsidiary of this company) we give you notice of objection to the proposals.

There were certain other proposals in relation to other licensed premises in which these breweries, or one of them, were interested; this particular house appears in that list. Then it sets out the ground of objection, and it ends up by saying:

> If the hearing of these proposals should take place on Feb. 23, 1943, this company will enter an appearance, with a view to preserving its rights to proceed to court.

Then comes the signature. That document appears to show some confusion of thought. Bents were the owners. The notices were given on behalf of Gartsides, whose only connection with the premises lay in the fact that they were a subsidiary company of Bents. The concluding paragraph, on one reading, might be construed as meaning that "We, Bents, will appear with a view to preserving our rights." But, having regard to the fact that the letter was written on its face on behalf of Gartsides, saying:

> This company will enter an appearance with a view to preserving its right . . .

I should have thought that the words referred to Gartsides. However, I do not think it matters very much.

The two companies appeared before the assessment committee. The matter was argued and was decided against them. Nobody at that stage raised the objection that neither of these companies had any *locus standi* in the matter at all. The next step was an appeal by the two companies to quarter sessions. It was then that the objection to the jurisdiction was taken on the ground that neither of the two companies had any *locus standi* in connection with this proposal. The first question which quarter sessions had to decide was whether that objection was good or not. Quarter sessions decided that it was a good objection and that they had no jurisdiction. A case was stated which raised that point. That is the only part of the case with which we are concerned. The divisional court took a different view and held that quarter sessions had jurisdiction. The ground of the decision of the divisional court, unless I have misunderstood it, was of this nature. The companies, or, at any rate, one of them, Bents, had been served with a notice of the proposal. They had appeared without objection from anybody before the assessment committee. In view of that, the divisional court said, at p. 40 ([1944] 2 All E.R. 37), that, in their opinion :

> . . . the respondents to this appeal [the present appellants] could not be heard to say at quarter sessions that the very state of things which they had brought about by their own invitation was a state of things which made the assessment committee have no jurisdiction at all and made the appellants persons who had no right to be there. The document which was served transmitting the proposal was a document which I think this court should regard as being in accordance with the law, at all events so far as the persons who sent that document forward were concerned. The law presumes legality.

Then, later on, it is said that it does not lie :

> . . . in the mouth of these respondents to object to the consequences of their own act before quarter sessions, . . .

I do not think I am misconstruing that judgment if I say that, fundamentally, it is based on the conception that the present appellants had somehow, by their conduct, conferred jurisdiction on the assessment committee, and thereby on quarter sessions on appeal, which, by law, they did not have. With great respect, it is impossible for one or both of the parties to confer upon a tribunal a jurisdiction which the legislature has not chosen to give to it. No question of estoppel or anything of that kind can possibly come into the matter. A matter heard by a tribunal in excess of its jurisdiction is heard *coram non judice*.

This is, perhaps, an extreme case in this sense. The point of jurisdiction could have been taken before the assessment committee, but it was only taken when the matter reached quarter sessions. In my opinion, that is quite immaterial. If the assessment committee had no jurisdiction, quarter sessions had no jurisdiction. The sole question for quarter sessions was whether or not they had jurisdiction, and they had to decide for themselves whether they had or had not jurisdiction. No action of the parties at the hearing before the assessment committee could possibly have conferred upon quarter sessions jurisdiction to hear something which they had no jurisdiction to hear. I think that is all I need say on that aspect of the matter, except this. An objection to the jurisdiction of the court is one which the court itself is bound to take, providing its attention is called to it. As soon as the court sees that the matter which it is being asked to entertain is something in excess of its jurisdiction, it is bound to take the point. No conduct and no consent can possibly take away from it that duty. It is right to say that counsel for the respondents in his argument did not seek to support his case on the grounds which appear in the judgment of the divisional court. His argument was different.

I now turn to the substantial question, which is whether or not jurisdiction existed. The proposal was made under the Rating and Valuation Act, 1925, s. 37, subsect. (3) of which requires the rating authority, if it is that authority which makes the proposal, as it was in this case, to transmit a copy to the occupier of the hereditament, or, where there is no occupier, "to the owner thereof." In the present case, a copy was sent to the occupier Jenkinson. It is only where there is no occupier that a copy is to be sent to the owner. Therefore, the sending of the copy to Bents in the present case was something which the subsection does not require. Subsect. (4) provides :

> Any person to whom a copy of a proposal is transmitted as aforesaid may, if he thinks fit, give to the rating authority notice in writing of objection to the proposal, and

unless he gives such notice he shall not be entitled to be heard at the meeting in opposition to the proposal.

One thing which seems to me perfectly clear on this subsection is that only a person who has given notice of objection is entitled to be heard. The next point (and this is the really controversial point on this branch of the argument) is: Do the words " any person to whom a copy of a proposal is transmitted as aforesaid " mean " any person to whom a copy of a proposal is transmitted in fact," or does it mean " any person entitled to a copy who has such copy transmitted to him " ? The words " as aforesaid " must refer back to the directions in subsect. (3) as to the serving of copies. Those directions are to serve a copy on the occupier. If there is an occupier, there is an end of it. If there is not an occupier, then a copy must be served on the owner. Therefore, subsect. (4) appears to me to refer only to the case of the person who has properly been served with a copy of the proposal pursuant to subsect. (3). Where there is an occupier, that excludes the owner. Then subsect. (7) provides that the assessment committee is to hear and determine:

> . . . any proposal as if it were an objection to a draft list, and all the foregoing provisions of this Part of this Act relating to the hearing and determining of such an objection shall apply accordingly.

The point arising on that is a separate point with which I shall have to deal later. Subsect. (8) provides:

> If the person by whom any proposal is made under this section, or a person who objects to any such proposal, or the rating authority, is aggrieved by the decision of the assessment committee [he may appeal] . . . and subject to the express provisions of this section all the provisions of this Part of this Act with respect to appeals against such a decision shall apply accordingly.

Something turns on the meaning of the words " a person who objects to any such proposal." Those words in this context appear to me not to extend to any person not already mentioned the right of objection to the proposal: they refer only to persons who, pursuant to the other provisions in the section, are entitled to object to a proposal. If you find a section giving a right of objection to specified persons, you cannot extend that by words such as these in a later subsection. The words must be read so as to harmonise with the governing part of the section which sets out quite clearly the persons who are entitled to object. They must be read, therefore, as " a person who, being entitled to object pursuant to the provisions of this section, in fact objects." There is a phrase in subsect. (10) which seems to me to confirm what I have just said. I do not read the subsection, but it uses a phrase:

> . . . where notice of the proposal was given to the occupier or owner, as the case may be, of the hereditament affected . . .

quite clearly confirming the view that, if there is an occupier, the owner does not come into the picture at all.

Counsel for the respondent, on this part of his argument, maintained that, providing a person is in fact served with a notice, he is entitled to put in an objection: he is entitled to appear and argue his objection: and if he so pleases he may appeal to quarter sessions, though he was served by mistake. In my opinion, it is quite impossible to get that construction out of this language. If the rating authority by mistake serves a person who is not an occupier, then the proceedings before it are abortive, because the necessary preliminary of serving the occupier has not been fulfilled. In the present case everything was done in order. Jenkinson, the occupier, was served. There was no question of mistake. They knew Jenkinson was the occupier and they served him. They also served the owner. The fact that they served the owner cannot make the owner a person " to whom a copy of a proposal is transmitted as aforesaid," for the very simple reason that, where there is an occupier, there is no question of serving a notice on the owner. In my opinion, that is the short answer to the argument on that part of the case.

The main argument of counsel for the respondents, if I followed him rightly—at any rate it is the one he put forward first—was that certain provisions of earlier sections are imported into sect. 37 by reason of what is said in subsect. (7). That is the section that I read relating to the procedure of the assessment committee. Counsel for the respondents refers to sect. 27 and the proviso to it.

I will refer to that in a moment. But the substance of his argument—I hope I am not doing him an injustice—is this. These earlier sections relate to the proceedings in the case of the ordinary quinquennial valuation, the first step in which is the draft valuation list. The procedure with which we are concerned is what I may describe as the intermediate procedure for making corrections or alterations in the list during the five year period during which the quinquennial list is current. In present circumstances, the quinquennial valuation has, of course, been suspended, with the result that alterations made by means of this procedure under sect. 37 have a permanency, which, in ordinary times, they would not have had. In ordinary times, the whole matter would have come up again, and anybody concerned could have objected when the new draft quinquennial list had been prepared. Counsel for the respondents says that all the procedure which is relevant and appropriate to the case of objections in respect of the draft valuation list—that is the quinquennial list—applies to the procedure under sect. 37 of revision by means of a proposal, and that, in the case of the latter, there is superimposed (in addition to the normal procedure for the quinquennial valuation) the additional procedure for the purposes of sect. 37. He says the result of that is that any person so minded can refrain from observing the special procedure laid down by sect. 37 and can rely upon the procedure laid down for the quinquennial valuation. The consequence, he said, is that an occupier who has been served with a proposal need not trouble to give notice of objection because he would be entitled, on a quinquennial valuation, to appear, whether he had given notice of objection or not. He said that he need do nothing, that he need only appear at the hearing. In other words, he could refrain from using the special procedure laid down in sect. 37 and rely on the general procedure, upon which, according to counsel for the respondents, that special procedure is superimposed.

I find it impossible to construe the language in that way. It seems to me that sect. 37 lays down a special code for the case of revision by a proposal in the circumstances with which it deals. It lays down a special code, one of the express terms of which is that a person to whom a copy of a proposal is transmitted, unless he gives notice of objection, shall not be entitled to be heard. It is quite impossible, by referential words, importing for certain procedural purposes the procedure in the case of draft lists, to override the clear and specific prohibition which the legislature has laid down in subsect. (4). Under the provisions with regard to the quinquennial valuation, the proceedings are open to all the world in the sense that all the world is given an opportunity, if it is interested, of examining the draft and taking objection to it if it likes. There are very liberal provisions for enabling all sorts of people to come in and take objection. In sect. 37 it seems to me the legislature is dealing with what is really in essence an interim matter which will be open to further discussion at the end of the quinquennial period. It has limited the persons who are to be entitled to take part in the proceedings to the specific persons mentioned in the section. Having done that, and having only given a right of objection of a very limited kind, it then proceeds to provide for the procedure which is to be adopted; and it does that by using the phrase which I have mentioned in subsect. (7), importing the provisions of the earlier sections relating to the "hearing and determining" of an objection to the draft list. The proposal is to be treated for that purpose as if it were an objection to the draft list. It seems to me that that has nothing in the world to do with parties. If I am right in thinking that the only proper party to the proceedings in the present case was the occupier, it is quite impossible to spell out of these words an extension so as to include the owner. It is the provisions relating to hearing and determining which are imported and nothing else.

There is one more general criticism of the argument of counsel for the respondents, and that is this. If the legislature has done what he says it has done, namely, given to a wider class of person the right to object to a proposal, it can only be on the ground that the legislature thought that it would be just that those persons should have a right to object. It seems to me quite impossible that the legislature should regard a person as having a title to object, without at the same time providing for his receiving notice of the thing to which he is entitled to object. In the case of the draft list for the quinquennial valuation, anybody, if he takes the trouble, can find out what it is that is proposed to be done which may affect him. But under this procedure under sect. 37 nobody but the occupier, or, if there be no occupier, the owner, ever hears of a proposal by the rating authority. There are no provisions for publicity or for serving notice save on that one person. According to counsel for the respondents, the legislature seriously said to itself that, if somebody by accident happened to hear of a proposal which he thought concerned him, he would have a *locus standi* to appear and object: whereas his next door neighbour, who had an equally good ground to object and did not have the good luck to have heard of the proposal, would be shut out. It would require the clearest and most explicit language to produce such a result. Subsect. (7) certainly does not do so.

It is suggested that the result is produced by the proviso to the subsection of sect. 27. Subsect. (1) provides that:

> . . . the assessment committee shall hold meetings for considering any objections made to the draft list . . .

The proviso is:

> Provided that the assessment committee may at any such meeting consider any objection, although notice thereof has not been given in accordance with this Act, if the persons to whom copies of the notice of objection are required by this Act to be given consent to the consideration of the objection.

It seems to me either that proviso cannot be imported by subsect. (7) of sect. 37, or, if it is to be imported, it does not assist the argument at all, because, if it is to be imported, it can only be imported by re-writing it with the appropriate words, substituting "proposal" for "objection." If that alteration is to be made all the other necessary alterations in the language of the proviso which are consequential upon it must also be made. If that is done, it seems to me that the result quite clearly affords no support to the argument.

In my opinion, summing it up, sect. 37 does not confer any right to appear on a person who has wrongly received a notice. A person who has wrongly received a notice gains no assistance from the earlier sections of the Act, because those sections are not imported in such a way as to increase the range of persons entitled to take part in the proceedings under sect. 37. In the result, in my opinion, the decision of quarter sessions was right, and it had no jurisdiction to hear the appeal.

MACKINNON, L.J.: I agree. Seeing that this appeal arises because a clerk or two clerks on different occasions wrote the wrong name on a piece of paper, the question involved is one of extreme technicality, and the extremity is more apparent because one can have very little doubt, if they had written the right names on the pieces of paper, the same individuals who did appear and took part in the proceedings in court would have appeared and taken the parts they did. But the question of jurisdiction is necessarily a matter of technicality, and, upon the provisions of this Act, I am satisfied that the brewery company were not proper parties to take part in those proceedings, or, indeed, to appear at quarter sessions. Therefore, quarter sessions had no jurisdiction to decide upon the appeal raised before them. Therefore, this appeal must succeed.

UTHWATT, J.: I agree.

Appeal allowed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Warwick Williams & Marchant,* agents for *Bernard Kenyon,* Wakefield (for the appellants); *Godden, Holme & Ward,* agents for *Edwin Berry & Co.,* Liverpool (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

COMMISSIONERS FOR LORD HIGH ADMIRAL OF THE UNITED KINGDOM AND OTHERS *v.* OWNERS OF M. V. JOSEFINA THORDEN AND HER CARGO.

THE JOSEFINA THORDEN.

[KING'S BENCH DIVISION (Atkinson, J.), **January 19, 1945.**]

Shipping—Salvage—Finnish tanker set on fire by German aircraft and abandoned by crew—Rescued and brought to Britain by British tugs—Salvage work done by Admiralty Salvage Department—Security given for salvage claim—Ship seized in prize—Salvors' rights against security.

On May 19, 1941, while on her way to Finland with a cargo of petrol, the Finnish tanker Josefina Thorden was bombed and set on fire by German aircraft and was thereupon abandoned by her officers and crew. Although in a dangerous condition, she was rescued and brought to Kirkwall by 5 of His Majesty's tugs, and the Admiralty Salvage Department carried out salvage work to put her into a seaworthy condition for towage. On June 11, the Treasury Solicitor notified the ship's agents in England of a salvage claim, requesting security and suggesting that the claim should be referred to arbitration; on the same day, the Admiralty gave instructions that the ship should be held at Kirkwall until satisfactory guarantees had been given. The agents for the ship and cargo agreed to arbitration and, with the consent of the Treasury Solicitor, the cargo owners arranged for the sale of the cargo of petrol. On the arbitration agreement being signed on July 11, the agents received the money for the petrol and gave a banker's guarantee as security for the salvage claim, the salvors releasing their lien on the ship. On the same day, the shipowners' agents discussed with the Ministry of War Transport the chartering of the ship, and also asked for a guarantee that she would not be seized in prize as there was already a possibility that that might happen. On July 18 the guarantee was refused. On Aug. 2, the Government announced that Finland must be regarded as territory in enemy occupation; the ship was seized in prize and was later released to the Ministry of War Transport by the Prize Court. In the arbitration the value of the salvage services was assessed at £30,000, of which £20,000 was awarded to the Admiralty and the remainder to the officers and crews of the tugs involved. The cargo owners admitted their liability on the guarantee. The shipowners contended that (i) nothing was due from them since they had acquired no benefit from the services rendered, or (ii) alternatively, they were not liable for the amount awarded to the Admiralty since the Crown had appropriated the entire benefit and it would be inequitable to pay one agent of the Crown for services the benefit of which was appropriated by another agent of the Crown:—

HELD : (i) upon the security being given on July 11 the salvors released their lien on the ship and there was nothing to prevent the owners taking possession of her; they were free to negotiate, as they did, for future charters or requisition, and all risks attaching to the ship were theirs.

(ii) the fact that the vessel might be seized in prize was present to the minds of the owners' agents when the guarantee was given and the guarantee contained no clause whereby liability was excepted in case of seizure of the ship in prize. The salvors' rights against the ship were exchanged for their rights against the security and there was no good equitable ground for holding that their rights against the security were prejudiced because the ship was later seized by the Crown, in exercise of other rights.

[**EDITORIAL NOTE.** To support a claim *in rem* by a salvor it is necessary to prove a benefit to the ship or cargo. Here there was a benefit to the ship which is not affected by the subsequent seizure in prize, and the owner having given security to release the ship from arrest, the salvor's rights against the guarantee are held to be preserved, notwithstanding the seizure in prize. An interesting aspect of the case is that the Crown acting in two different capacities is both the salvor and the source of the seizure in prize.

AS TO RECOVERY OF SALVAGE REWARD, see HALSBURY, Vol. 30, pp. 905, 906, paras. 1222-1224; and FOR CASES, see DIGEST, Vol. 41, pp. 883, 884, Nos. 7665-7676.]

Cases referred to:

(1) *The Dictator*, [1892] P. 64, 304; 1 Digest 224, *1499*; 61 L.J.P. 73; 67 L.T. 563.
(2) *The Gemma*, [1899] P. 285; 1 Digest 224, *1500*; 68 L.J.P. 110; 81 L.T. 379.
(3) *The Chieftain* (1846), 2 Wm. Rob. 450; 1 Digest 153, *612*; 4 Notes of Cases, 459; 8 L.T. 440.
(4) *The Renpor* (1883), 8 P.D. 115; 41 Digest 854, *7199*; 52 L.J.P. 49; 48 L.T. 887.
(5) *The Tarbert*, [1921] P. 372; 41 Digest 831, *6906*; 90 L.J.P. 353; 125 L.T. 800.
*(6) *France, Fenwick Tyne & Wear Co., Ltd.* v. *H.M. Procurator-General, The Prins Knud*, [1942] A.C. 667; [1942] 2 All E.R. 453; 111 L.J.P.C. 126; 167 L.T. 278.
(7) *The Veritas*, [1901] P. 304; 41 Digest 929, *8188*; 70 L.J.P. 75; 85 L.T. 136.
(8) *The Kalamazoo* (1851), 18 L.T.O.S. 66; 1 Digest 170, *808*.

SPECIAL CASE stated by an arbitrator in an arbitration between the Commissioners for the Lord High Admiral of the United Kingdom and the Masters Officers and Crews of 5 of His Majesty's tugs and trawlers and the Owners of the Finnish ship, the Josefina Thorden, and her cargo, in which the claimants claimed and, subject to the opinion of the court, were awarded remuneration for salvage services. The facts are fully stated in the judgment.

R. F. Hayward, K.C., and *Patrick Devlin* for the appellants, the shipowners.

Owen Bateson and *S. Knox Cunningham* for the respondents, the salvors.

ATKINSON, J.: The Josefina Thorden was a Finnish tanker, and on May 19, 1941, while on her way from Galveston to Petsamo with a cargo of petrol, was bombed by a German aircraft and set on fire. Thereupon her officers and crew abandoned her. She was in a dangerous condition. She was rescued by five of His Majesty's tugs and trawlers and taken to Kirkwall. Nobody was allowed on board except with the permission of the salvage officer until the petrol had been discharged into the tanker British Fortune. This discharge was completed on June 29. On June 11 the Treasury Solicitor notified the ship's agents in this country of a salvage claim, with a request for £50,000 security, and suggested that the claim should be referred to arbitration. On the same date the Admiralty gave instructions that the ship should be held at Kirkwall until satisfactory guarantees had been given. Counsel for the respondents agrees that this indicated and, indeed, was consistent only with a claim to a possessory lien. Until Aug. 8 there was nobody on board except salvage workers in the employment of the Admiralty Salvage Department. On June 22 instructions were issued by the British Government that all Finnish ships intercepted at sea were to be sent to British ports and should not be permitted to sail until further orders. In June the agents for the cargo owners arranged a sale of the cargo of petrol to the Petroleum Board for £51,929 7*s*. 8*d*. The Treasury Solicitor consented to the sale if security to the sum of £51,925 was given for the claim against ship and cargo. The agents for the ship and cargo notified the Treasury Solicitor that they were ready to agree to the claim going to arbitration and on July 11 an arbitration agreement was signed. The agents received the £51,929 7*s*. 8*d*. from the Petroleum Board with the consent of the Treasury Solicitor and handed to the Treasury Solicitor a guarantee by Barclay's Bank to the effect that, in consideration of the salvors abstaining from arresting the vessel and her cargo in respect of their said salvage services, the bank guaranteed that, if the owners of the vessel and her cargo did not pay what might be adjudged or awarded by arbitration or agreed to be due by them for salvage, interest and costs, the bank would pay up to a limit of £51,925. There was then nothing to prevent the owners taking possession of the vessel, but in fact they did not take any steps in that direction and the Admiralty salvage work was continued until July 15, that work consisting of putting the vessel into a seaworthy condition for towage. On July 11 Petersen, a member of the firm of Lange, Bell & Co., the English agents for the owners of the ship, discussed with the Ministry of War Transport the chartering by the Ministry of the ship and asked if the Ministry could arrange for the ship to be sent to the east coast for repairs, debiting the cost against freight to be paid under the charter. It was eventually agreed on July 18 that this should be done, but no precise terms were agreed, except that the Ministry did agree to have the vessel towed to the north-east coast for repairs. It was present to Petersen's mind on July 11 that events might so move that the British Government would be entitled to and would seize all Finnish ships as prize, and on that date he asked for a guarantee that the vessel would not be seized in prize. He was told that the matter would be considered and on July 18 he was told that it was impossible to give any such guarantee. On July 23 the vessel was requisitioned by the Ministry of War Transport. On Aug. 2 the Secretary of State for Foreign Affairs issued a notification that Finland must be regarded as territory in enemy occupation, and on the same day instructions were given to customs officers to seize all Finnish ships in United Kingdom ports as prize. The vessel was then released from requisition and on Aug. 8 she left Kirkwall in tow of Admiralty tugs. She arrived in the Tyne on Aug. 10, and on Aug. 12 she was seized in prize. Thereafter repairs were effected by the Ministry of War Transport. On Sept. 12 a writ was issued in prize and on Sept. 24 the vessel was released to the Ministry of War Transport by order of the Prize Court. All these facts have been taken from the case stated. Amongst the further facts found by the arbitrator are these :

> (p. 10, C) : The said bank guarantee was intended to and did take the place of the salved property so as to form a fund out of which the said salvage services could be remunerated. . . . (E) : Save that the claimants had actual possession of the vessel and her cargo as salvors of a derelict, the claimants never asserted possession thereof adverse to the respondents.

That seems to me to be inconsistent with the arbitrator's finding at the bottom of p. 3, namely, that on June 11 instructions were given that the ship should be held until satisfactory guarantees had been given. Nor do I understand :

> (F) : The respondents at all material times had legal possession and the right to actual possession of the ship and of the cargo up to the date of its sale.

Until July 11 the respondents were not in fact in possession lawfully or at all nor had they any right to possession in view of the possessory lien of the salvors. After July 11 they certainly had a right to possession and the vessel could properly be considered as having come into their hands in that it was being held on their behalf and was brought to the Tyne on their behalf in pursuance of their request.

The findings as to values and remuneration are these. The value of the total services was assessed at £30,000, £20,000 being awarded to the Commissioners for executing the office of Lord High Admiral—in other words, to the Admiralty—and the remainder was divided up between the commanding officers and officers and crews of the five tugs involved. The cargo owners now admit that there is recoverable on the guarantee the proportion of the £30,000 attributable to the cargo. The owners of the ship dispute that anything is due in respect of the ship on the ground that they have acquired no benefit whatever from the services rendered to the ship. Alternatively, they deny liability for the £20,000 awarded to the Admiralty on the ground that the Admiralty appropriated to themselves the benefit of the services rendered to the ship and that it is inequitable that they should be paid for their services to the ship when they have appropriated the entire benefit of those services to themselves, or, to be more accurate, they representing the Crown, to the Crown—because it was one agent of the Crown making the claim while another agent of the Crown has appropriated for the Crown the benefit of the services.

Successful salvage services confer upon the salvors a lien upon the salved property for a fair reward. It accrues immediately upon the successful performance of the salvage services. The lien does not depend upon possession, nor in general does it carry a right of detention. Unnecessary detention of the salved property is viewed with disfavour by the Admiralty Court, with one exception : the salvor has a possessory lien where he has salved a derelict vessel, *i.e.*, a vessel which has been abandoned and deserted at sea by those who were in charge of it without hope of recovering it and without intention of returning to it. A vessel found at sea in a position of danger without any crew on board is *prima facie* a derelict. I think in this case the salvors had a possessory lien. The salvors certainly claimed one and retained one—I think, quite properly—until July 11. The lien is enforced by proceedings *in rem*, *i.e.*, by a proceeding against the property which has been salved. That is the salvors' usual and most effective remedy. But salvors also have a right of action *in personam* against the owner of a vessel or property which has been saved or against one who has an interest in the property saved. But no personal action lies unless some property or interest has been saved to the person sued. It was at one time considered that the owners' liability in a personal action was limited to the value of the property saved (see, for example, KENNEDY, THE LAW OF CIVIL SALVAGE, at. p. 16), but the decisions in *The Dictator* (1) and *The Gemma* (2) throw doubt upon that limitation. At any rate, there must be some benefit accruing to the owner to create a personal liability. For example, it was said in *The Chieftain* (3) that it is " only in cases where the property has been allowed to go into the hands of the owners instead of the parties attaching the property itself " that the claim lies. Again, in *The Renpor* (4) which was an action *in personam*, it was said, by BRETT, M.R., at p. 118 :

> . . . there must be something . . . saved . . . neither owners nor master are liable in this action because no *res* has been saved.

On this principle it is said that there can be no liability *in personam* where there has been no benefit. The appellants' case is based on that proposition. The owners of the cargo admit liability, because they did benefit. The owners of the ship deny liability, because they say that in fact they derived no benefit from the services rendered. So far as they are concerned, they say that the ship might just as well have been allowed to become a total loss and have gone to the bottom. I think the appellants' contention is based upon a confusion of the two remedies. To support a claim *in rem* the material consideration is benefit to the ship or cargo. Has the property been saved ? If so, a salvor is entitled to something out of it. In *The Tarbert* (5) when this point was being argued, HILL, J., during the course of the argument, interposed and said :

> May it not be a benefit to the property and not to the owner ?

During the course of his judgment HILL, J., said, at pp. 375, 376 :

> It is for the plaintiffs to make out that they have rendered services which entitle them to a salvage award. The main question, and I am not sure it is not the only question, is whether any actual benefit was conferred on the cargo by what the tug did. The question may be expressed in this form : Was the cargo when the tug left it worth more than it would have been if the tug had done nothing ?

That seems to be a clear expression of opinion that in considering a claim *in rem* it is the benefit to the cargo or the ship which is the relevant consideration. A salvor can at once issue a writ *in rem* against a vessel and her owners, and procure the arrest of the vessel. If he is entitled to a possessory lien he can do this without any prior return of the property to the owners. The question of benefit to the owners or others interested arises only in connection with a claim *in personam*, and it seems to me that once the salved ship comes into the possession of the owners benefit has accrued and liability has attached. If while under arrest a ship is destroyed, as, for example, by a bomb, or is seized in prize the claim *in rem* is inevitably lost. Seizure as prize overrides all previous liens. But the claim *in personam* would, I apprehend, remain if the ship had before the issue of the writ come to the hands of the owners. The liability would attach then and would not be affected by a later loss of the ship by a war risk. In *France Fenwick Tyne & Wear Co., Ltd.* v. *H.M. Procurator-General, The Prins Knud* (6) the ship had been arrested in Admiralty proceedings and pending those proceedings was seized in prize by the Crown, and proceedings in prize were started. Notwithstanding this, the Admiralty proceedings were continued and judgment was obtained, but stayed pending the proceedings in prize. That must have been a judgment against the owners *in personam*. The salvors then claimed against the Crown in the prize proceedings and were held entitled to recover against the Crown on equitable principles. In his opinion LORD WRIGHT said, at p. 685 ([1942] 2 All E.R., at p. 461) :

> The lien for salvage is a maritime lien of the highest rank and priority, postponed to other liens only in rare cases as, for instance, to liens for subsequent salvage or subsequent damage and a few others. It is a lien based on the benefit conferred on the owner of the property, but " salvage is not governed merely by a regard to benefit received, but also on grounds of public policy by a due regard to the interests of commerce and humanity," to quote LORD GORELL in *The Veritas* (7). It does not follow that, because capture overrides all liens, the Prize Court has no jurisdiction to reward salvors. The Prize Court is a court exercising an equitable jurisdiction.

If the salvors claim and exercise their right to a possessory lien and issue a writ in Admiralty and obtain the arrest of the vessel which is then seized in prize, it may be that judgment could not be obtained against the owners *in personam*, because the ship would never have come into their hands. But, normally, an owner is not content that his ship shall remain under arrest and procures its release by giving security sufficient to meet the claim—security which may be in the form of a banker's guarantee—and when this is done the lien is at an end; the ship is then free of all claims and leaves the stage the unfettered property of its owner. As was said by Dr. Lushington in *The Kalamazoo* (8)

> The bail represents the ship, and when a ship is once released upon bail, she is altogether released from that action.

If she is lost, whether by marine or war risks, the salvors' rights are unaffected. The owner cannot be heard to say either that the claim *in rem* or the claim *in personam* has been defeated. If the salvors were other than the Admiralty I can see no difference between seizure in prize and loss by any other war risk. In this case it is not suggested that the fact that the claim for salvage was the subject of arbitration instead of proceedings in Admiralty has strengthened the appellants' case; indeed, the respondents say it has worsened it. On July 11 three things happened; there was an arbitration agreement, the security was given and the salvors gave up their lien. The repairs were not yet sufficiently advanced to enable the vessel to be moved, but they were being effected for the benefit of the owners in pursuance of the promise to tow the vessel to the Tyne. The owners were then free to negotiate for future charters, or requisition, and in fact they did so negotiate. They had a ship which they could insure against marine and war risks. If the ship had been lost on the voyage to the Tyne the salvage claim would have remained beyond all question. Two days after reaching the Tyne the ship was seized in prize and proceedings for condemnation were started. I have no doubt that this had no effect upon the claim of the officers and crews of the tugs. The only point that has worried me is the identity of the other salvors and the authority seizing, both acting on behalf of the Crown. The benefit which had accrued to the ship was taken by the salvors. Can they both take back the benefit and claim payment for that benefit? They permitted the cargo owner to retain the benefit conferred on the cargo. Therefore, the cargo owners are ready to pay. They did not permit the shipowners to retain the benefit conferred upon them and on the ship, but appropriated it entirely to themselves. I think the answer is this. If a shipowner gets his ship released by paying security to meet a claim for salvage services, all risks attaching to the ship are his. The salvors' rights against the ship are exchanged for their rights against the security. This was a known risk. The owners' agent had asked for an undertaking that the ship would not be seized, and that undertaking had been refused. Knowing of the possibility of seizure the owners nevertheless preferred to prevent the arrest of their ship and to obtain the chance of making profitable arrangements for the future of their ship by securing for the salvors a banker's guarantee to pay whatever might be awarded for the salvage services rendered. There was no saving clause excepting liability in case of seizure of the ship in prize.

It was argued that I ought to give effect to the principle stated in Kennedy, Law of Civil Salvage, at p. 16:

> . . . it cannot be doubted that the court, which is bound by its commission and constitution to determine the cases submitted to its cognisance upon equitable principles, and according to the rules of natural justice, would find a way to prevent the misuse of its procedure.

It is said, and probably truly, that that principle applies to an arbitrator as well. But I can see no good equitable ground for holding that the salvors' rights against the security—their rights on the plain promise contained in the guarantee—are prejudiced because the Crown in the exercise of other rights recognised by international law—rights which were present to the minds of the owners' agents when the guarantee was given—seized the ship which had ceased to be of any concern in the arbitration proceedings agreed upon. I am satisfied that the claim against the security remains, and that is all that need be said. Therefore, the award stands.

Award upheld.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *The Treasury Solicitor* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

Re HAINES.

[KING'S BENCH DIVISION (Tucker, J.), **January 11, 1945.**]

Emergency Legislation—Compensation—Civil defence volunteer suffering from nervous debility—" War injury "—" War service injury "—" Physical injuries " excluding purely mental injuries—Physical injury, not being an organic disease, need not be traumatic in origin—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 1, 2, 8—*Pensions (Mercantile Marine) Act,* 1942 (*c.* 26), *s.* 5—*Personal Injuries (Civilians) Scheme,* 1944 (*S.R. & O., No.* 369), *Pt. IV, para.* 12 (2) (*a*).

The appellant was a fireman in the National Fire Service. In Jan., 1941, he was sent to Gosport as a member of a relief crew to deal with fires during enemy air raids. In Sept., 1941, he was certified to be suffering from nervous debility, and claimed compensation in respect of that disablement. His claim was rejected by the Minister of Pensions. The tribunal found as facts that the appellant was not injured by any missile, falling debris or blast, and that he was not knocked over, cut, nor had he received any abrasions; that he was of a nervous disposition before he joined the National Fire Service, and that his nervous debility was due to, or aggravated by, his service at Gosport. The tribunal found further that the appellant's nervous debility was a functional disorder and not an organic disease, and was not caused by trauma. They held, accordingly, that the appellant's disability was not caused by a war injury or a war service injury within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, as amended by the Pensions (Mercantile Marine) Act, 1942, s. 5, so that the Personal Injuries (Civilians) Scheme, 1944, Pt. IV, para. 12 (2) (*a*) did not apply. On appeal it was contended on behalf of the Minister of Pensions that the injury must be traumatic in origin or an organic disease to justify a disablement award, and that the words " physical injury " had been deliberately used so as to exclude " mental injury " and that physical injury, other than organic disease, connoted something traumatic in origin :—

HELD : the legislature by deliberately rejecting the phrase " personal injury " and using the words " physical injuries " had purposely excluded injuries which were purely mental. Since there was some doubt whether the tribunal had found that the injury which caused the disablement was purely mental or whether it was wholly or partly physical due to some such cause as strain, exposure or shock, the case must be remitted for the further consideration of the tribunal.

[**EDITORIAL NOTE.** Two points emerge from this decision. In the Personal Injuries (Emergency Provisions) Act, 1939, the expression " physical injuries " (*a*) does not include injuries which are purely mental; and (*b*) should not be limited to injuries having a traumatic origin. As to (*a*) this distinction, however sound from the point of view of construction, is contrary to modern scientific and legal thought. As LORD MACMILLAN said in *Bourhill* v. *Young* (1), " the distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system." Accordingly, the last fifty years has seen a development of the law relating to the recovery of damages for shock extending even to the granting of damages for the mental shock due to apprehended injury to a dead body (*Owens* v. *Liverpool Corpn.*, [1938] 4 All E.R. 727). So far as this war legislation is concerned, however, it was held in *Young* v. *Minister of Pensions*, [1944] 2 All E.R. 308, that mental disturbance brought about by the sight of bombed property was too remote a cause to constitute physical injury, and in the case under consideration the court holds that the legislature purposely used the expression " physical injuries " in order to avoid the construction placed on the phrase " personal injuries " in Royal Warrants and the Workmen's Compensation Acts as including mental injuries.

As regards the second point, the court holds that physical injury may result from strain, exposure or shock, without any trauma and that it would, therefore, be an unjustifiable narrowing of the definition to limit the phrase to cases of trauma.

FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1061.]

Cases referred to :

(1) *Hay or Bourhill* v. *Young*, [1943] A.C. 92 ; [1942] 2 All E.R. 396 ; 111 L.J.P.C. 97 ; 167 L.T. 261.

(2) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230 ; 34 Digest 464, *3799* ; 74 L.J.K.B. 474 ; 92 L.T. 578 ; 7 B.W.C.C. 1.

(3) *M'Clory* v. *Donaldson Atlantic Line, Ltd.* (1943), 36 B.W.C.C. Supp. 60.

APPEAL by way of case stated from a decision of No. 6 Pensions Appeal Tribunal, dated June 8, 1944. The tribunal disallowed the applicant's appeal from the rejection by the Minister of Pensions of his claim to compensation under the Personal Injuries (Emergency Provisions) Act, 1939. The facts are fully set out in the judgment.

R. Marven Everett for the appellant.

Valentine Holmes for the respondent.

TUCKER, J. : The appellant was a fireman in the National Fire Service stationed at Hove. In Jan., 1941, he was sent to Gosport as a member of a relief crew to deal with fires during enemy air raids. He was on duty at Gosport from one Friday night until the following Monday morning. In Sept., 1941, he was certified to be suffering from nervous debility. In addition to the above, the tribunal has found the following facts : (i) that the appellant's work at Gosport was arduous and trying, that bombs were falling and that he was unable to change his wet clothing during the period in question ; (ii) that he was not injured by the discharge of any missile, was not struck by any part of a missile or falling debris, was not struck by blast from an exploding bomb, was not knocked over, or cut, and did not receive any abrasions ; (iii) that he was of a nervous disposition before he joined the National Fire Service and that his disability, nervous debility, was due to or aggravated by his experiences at Gosport while on service in the National Fire Service ; (iv) that his disability, nervous debility, is a functional or emotional disorder and not an organic disease, nor was it caused by trauma.

The appellant has contended that he was entitled to an award in respect of disablement, caused by a war injury or, alternatively, a war service injury under Pt. IV of the Personal Injuries (Civilians) Scheme made by the Minister of Pensions under the Personal Injuries (Emergency Provisions) Act, 1939, ss. 1, 2. " War injuries " is defined in the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, as " physical injuries " caused by certain specific matters therein enumerated. The tribunal has stated in the case that it finds that the appellant's injury was not the result of any of the matters set out in that definition. This finding disposes of the appellant's claim for an award in respect of disablement caused by a war injury, and I do not refer further to this aspect of the case. The tribunal also disallowed the appellant's appeal in respect of the Ministry's rejection of his claim for an award for disablement caused by " war service injury." The Personal Injuries (Civilians) Scheme, Pt. IV, para. 12, cl. 2, is, so far as material, as follows :

> In this part of this scheme the following expressions have, unless the context otherwise requires, the meanings hereby respectively assigned to them, that is to say,—(*a*) " disablement " in relation to . . . a civil defence volunteer who has sustained a war service injury means physical or mental injury or damage or loss of physical or mental capacity caused by that injury and " disabled " shall be construed accordingly.

The Personal Injuries (Emergency Provisions) Act, 1939, s. 8, provides that " war service injury " in relation to a civil defence volunteer means :

> . . . any physical injury which the Minister certifies to have been shown to his satisfaction to have arisen out of and in the course of the performance by the volunteer of his duties as a member of the civil defence organisation to which he belonged at the time when the injury was sustained and (except in the case of a war injury) not to have arisen out of and in the course of his employment in any other capacity.

The Pensions Appeal Tribunal Act, 1943, s. 3 (2), substitutes the decision of the tribunal for the Minister's certificate in cases of appeal in which the Minister has refused to give the required certificate. The Pensions (Mercantile Marine) Act, 1942, s. 5, is as follows :

> For the removal of doubt it is hereby declared that the expression " physical injury," in the principal Act, and in this Act and in the Personal Injuries (Emergency Provisions) Act, 1939, includes tuberculosis and any other organic disease, and the aggravation thereof.

Returning to the definition of " disablement " in the " scheme," it will be observed that the physical or mental injury or damage or loss of physical or mental capacity must have been caused by a "war service injury." Under the relevant section of the Act a "war service injury" must be a physical injury. It is accordingly contended by the Minister, and the tribunal has so held, that the injury must be traumatic in origin or an organic disease to justify a disablement award. In this case it is found that the disability is a functional or emotional disorder not caused by trauma. The question of law for my determination is whether the tribunal has correctly interpreted the words "physical injury" in the Act.

Counsel on behalf of the Minister submits that the words "physical injuries" have been deliberately used so as to exclude "mental injury" and that physical injury, other than organic disease, connotes something traumatic in origin. Counsel for the appellant contends that there is no scientific distinction between mental and physical, and that in any event there may be physical injury without any originating trauma. In considering these contentions it is, I think, proper to look at the circumstances in which the Act was passed and its place in the general pensions framework. The title of the Act contains the words "personal injuries" and the preamble describes it as an Act to make provision as respects "certain personal injuries." In the body of the Act itself we find that the "certain personal injuries" are "physical injuries" arising in certain specified circumstances which are called "war injuries" and "war service injuries." This language may, I think, be contrasted with that used in the royal warrants, orders in council and orders dealing with the Armed Forces where the words "disablement due to a wound, injury or disease attributable to war service" occur. Then again the definition of "war service injury" is obviously framed in language taken from the Workmen's Compensation Acts with certain significant alterations. This is natural having regard to the special provisions in the Personal Injuries (Emergency Provisions) Act, 1939, whereby persons who have suffered war service injuries are deprived of their right to claim workmen's compensation. The explanation of the words "physical injuries" in the Pensions (Mercantile Marine) Act, 1942, s. 5, whereby those words must be read as including tuberculosis or other organic disease and the aggravation thereof, indicates, in my view, that the draughtsman had in mind the problems that had arisen in the early days of the Workmen's Compensation Act in construing the words "personal injury by accident." Further, I think it is permissible to bear in mind that at the date of the passing of the Pensions (Mercantile Marine) Act, 1942, there was in existence a "scheme" made by the Minister under the powers conferred on him by the Personal Injuries (Emergency Provisions) Act, 1939, in which he had used language drawing a clear distinction between mental and physical injuries.

I find, therefore, that the legislature, which must be taken to have been aware of the matters referred to above, has deliberately rejected the phrase "personal injury" used in the Workmen's Compensation Acts and in the preamble to the Act of 1939, and has also refrained from adopting the language of the royal warrants and orders and has instead used the words "physical injuries." By so doing it has, I think, purposely excluded injuries which are purely mental. This distinction may not be entirely in accordance with the most modern scientific views, but it is one which has been very generally recognised in medical and legal language, though it has not escaped criticism. For a recent legal example of the recognition of the distinction see the speeches of their Lordships in *Hay or Bourhill* v. *Young* (1). I have arrived at the conclusion that the words "physical injuries" do not include injuries which are purely mental. The distinction in each case is, of course, one of fact and the decision may often be difficult.

This does not, however, conclude this appeal, because the tribunal has not, as I understand its decision, based itself on a finding that the appellant's injury is purely mental. The appeal has been rejected on the ground that the injury, admittedly not being an organic disease, had no traumatic origin. This appears to me to be importing something into the words "physical injury" which is not to be found in the Act or in the explanation contained in the Pensions (Mercantile Marine) Act, 1942, s. 5. I apprehend that a man may suffer serious physical harm or injury, for example, from strain, exposure or shock, without any trauma. To adopt the language of LORD HALSBURY in one of the Workmen's Compensation Act cases [*Brintons, Ltd.* v. *Turvey* (2), at p. 233], which seems to me to be applicable here, any "injurious affection of the physical frame" is a physical injury within the meaning of a war service injury in this Act, provided it has arisen out of and in the course of the performance by the volunteer of his duties as a member of a civil defence organisation. I hope and believe the views I have expressed above are not at variance with the *dicta* of Lord Moncrieff in the case of *M'Clory* v. *Donaldson Atlantic Line, Ltd.* (3), in which case, however, there was on the facts a clear trauma and the court had not had the benefit of any argument on behalf of the Minister of Pensions. On the facts set out in this case I am in some doubt whether the tribunal has found that the injury which caused the disablement was purely mental or whether it was wholly or partly physical due to some such cause as strain, exposure or shock. I think, therefore, the better course is to remit the case for the further consideration of the tribunal in the light of this judgment.

Case remitted to the tribunal.

Solicitors: *W. H. Thompson* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

NORMAN *v.* GOLDER (INSPECTOR OF TAXES).

[Court of Appeal (Lord Greene, M.R., Finlay and Morton, L.JJ.), **November 1, 1944.**]

Income Tax—Deductions—Professional shorthand writer—Medical expenses incurred due to illness caused by working in unfavourable conditions—Expenses not laid out for the purposes of profession—Wear and tear clauses not applicable—Income Tax Act, 1918 (c. 40), *Sched. D, Cases I, II, r.* 3 (*a*), (*b*).

Income Tax—Practice—Appeal against assessment—Appeal heard by two Special Commissioners—Case stated signed by one commissioner only owing to death of the other—Whether appeal competent.

The appellant was a professional shorthand writer practising mainly in the High Court of Justice. As a result of working in unfavourable conditions in the courts the appellant fell ill and was away from his work for a fortnight. He incurred medical expenses amounting to about £61. He appealed against an assessment to income tax made upon him under Sched. D for the year 1942-43, contending, *inter alia* (i) that the medical expenses incurred by him were permissible deductions either on general grounds or under the wear and tear clauses; (ii) that the case stated by the Special Commissioners did not comply with the provisions of the Income Tax Act, 1918, s. 149, since it was signed by only one of the commissioners, the other having in the meanwhile died:—

Held: (i) the medical expenses incurred were not permissible deductions since they were not wholly and exclusively laid out or expended for the purposes of the appellant's profession. Neither was the taxpayer entitled to deduct such expenses under the wear and tear clauses, since those clauses referred to wear and tear of plant and machinery only.

(ii) since the appellant had accepted the stated case as valid and had, on that basis, conducted his appeal, he could not now be heard to say that the appeal was incompetent.

Decision of Macnaghten, J. ([1944] 1 All E.R. 632) *as to* (ii) *affirmed on other grounds.*

[**EDITORIAL NOTE.** In *Yarmouth* v. *France* (1887), 19 Q.B.D. 647, Lord Esher declined to limit "plant" for the purpose of the Employers Liability Act to inanimate objects, but the court here refuses to extend the term to include the human body for the purpose of the wear and tear provisions of the Income Tax Act. Nor is the relationship of the body to the daily work such that medical expenses can properly be said to be money wholly and exclusively laid out for the purposes of the trade or profession carried on.

On the competence of a surviving commissioner to state and sign a case the Court of Appeal gives no decision since the appellant cannot approbate and reprobate, and having conducted his appeal on the basis of the stated case, he cannot attack its validity.

As to Expenses Wholly or Exclusively Laid Out, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152-156, paras. 312-320; and for Cases, see DIGEST, Vol. 28, pp. 42-44, Nos. 215-226.

AS TO CASES STATED BY INCOME TAX COMMISSIONERS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 360-362, paras. 738-742; and FOR CASES, see DIGEST, Vol. 28, p. 102, Nos. 631, 632.]

Case referred to:

*(1) *Haythornthwaite & Sons, Ltd.* v. *Kelly* (1927), 11 Tax Cas. 657.

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., dated Mar. 28, 1944, reported in part [1944] 1 All E.R. 632. The facts are sufficiently set out A in the judgment of LORD GREENE, M.R.

The appellant appeared in person.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondent.

LORD GREENE, M.R.: The substantial point of the appellant's complaint appears to be the disallowance of a deduction in respect of medical expenses incurred by reason of the fact that he had to exercise his profession at a certain B period in very uncomfortable conditions, and, in fact, as unfortunately it turned out, dangerous to his health, and he feels that he ought to be entitled to have his medical expenses treated as a proper deductible expense. I think it is not untrue to say that the incidence of the Income Tax Acts on professional men in respect of expenses is not always, perhaps, quite as fair as one would wish it to be, as compared with their incidence on persons carrying on trades or businesses; C but unfortunately we all have to live under it. All we have to do is to administer the law. I merely say that because I do appreciate the appellant's feelings on the matter. I am only sorry that he has persisted in his contentions as far as this court, because I am afraid that may involve him in expense which might have been avoided. I say that, because, quite frankly, the various points which the appellant has put forward appear to me, as they appeared to MACNAGHTEN, J., to be entirely lacking in substance.

D The first point taken is that in this appeal against an assessment by additional commissioners the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. The very short answer to that lies in the language of the relevant section, sect. 137, subsect. (4), which makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the commissioners that it is wrong. If it were necessary to find authority for E the point, it has in fact been so stated in terms in this court by LORD HANWORTH, M.R., in *Haythornthwaite & Sons, Ltd.* v. *Kelly* (1), to which FINLAY, L.J., calls my attention. The point really is not arguable.

The next point was that the assessment was invalid as not having been made by the commissioners but by an inspector of taxes. The fact that it was duly made by the commissioners is found by the special commissioners in the case F stated, and unless there was no evidence upon which they could so find the point is not open to the appellant. But when one looks at the facts the evidence is perfectly convincing: The assessment book was produced, and there it is, properly signed. I cannot help thinking that that point, and another point, were raised by the appellant owing to a confusion in his mind between the assessment and the notice of assessment. He has said (and though I have not examined the document I accept what he says as correct) that the notice of G assessment does not agree with the assessment. But what he has failed to realise is that what he is appealing against is not the notice of assessment but the assessment. The other point to which that is relevant is mentioned in para. 8 of the case, which states this:

> The appellant then contended that the assessment was bad and should be discharged in that it did not set out the statute under which it was made, nor the person by whom it was made.

H As to that, the commissioners held that the assessment was not for those reasons invalid. The appellant before us has said that that is a mis-statement of his point; the point was not that the assessment was bad for those reasons, but that the notice of assessment was bad. But that is not the point with which we have to deal on an appeal. The appeal is against the assessment and not against the notice of assessment, and incidentally I may say that his objection to the notice of assessment on the ground that it was not signed by a commissioner is one with no substance at all. I am not sure whether it is signed, because it is a printed form with a printed signature, the name of which has been altered. But there is nothing in the legislation to say that a notice of assessment must be signed by commissioners. It is quite a wrong idea, if the appellant will forgive my saying so, that he has got into his mind, that a notice of assessment requires such a signature. It does not. Arguing from that he in some way seems to suggest that the notice of assessment is bad for that reason, and that the badness of the notice of assessment in some way affects the assessment. I am afraid that is quite a wrong conception. What he has to attack in these proceedings is the assessment. The notice of assessment has nothing to do with it.

The next point relates to the deduction of his doctor's bills. It is much to be regretted that he had to incur those bills, and I may perhaps be permitted to say that I am glad to see that the trouble from which he suffered is now apparently passed and that he is restored to health, but his argument there is that they are permissible deductions on one of two grounds—one on general grounds; the other under the wear and tear clauses. I hope I may be forgiven if I say that so far as the wear and tear argument is concerned, it is quite impossible to say that the taxpayer's own body is a thing which is subject to wear and tear, and that the taxpayer is entitled to deduct medical expenses because they relate to wear and tear. It is wear and tear of plant or machinery. Your own body is not plant. Your horse conceivably may be. I do not know what it is under the Income Tax Acts. It certainly has, under the Employers Liability Acts, been held to be plant in a suitable case, but I have never heard it suggested by anybody that the taxpayer's own body could be regarded as plant. In fact the point has only, I think, to be stated. The appellant says that the medical expenses are deductible on general grounds. The answer there, to my mind, is quite conclusive. The rules about deductions are to be found in r. 3 of the rules applicable to Sched. D, cases I, II, in which deduction is prohibited in respect of:

> . . . any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.

It is quite impossible to argue that a doctor's bills represent money wholly and exclusively laid out for the purposes of the trade, profession, employment or vocation of the patient. True it is that if you do not get yourself well and so incur expenses to doctors you cannot carry on your trade or profession, and if you do not carry on your trade or profession you will not earn an income, and if you do not earn an income the Revenue will not get any tax. The same thing applies to the food you eat and the clothes you wear. But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being. Para. (*b*) of the rule equally would exclude doctor's bills, because they are, in my opinion, expenses of maintenance of the party, his family, or a sum expended for a domestic or private purpose, distinct from the purpose of the trade or profession.

The appellant finally raised the point as to the case stated, which is signed by only one of the special commissioners who heard it, the other having, unfortunately, in the meanwhile died. He suggested that it was an interesting matter for discussion as to whether a surviving commissioner could validly sign a case, and whether a case so signed was a compliance with the provisions of the legislation, which requires the commissioners to state and sign a case. Whatever the answer to that question may be, it is not, in the present case, a practical question which calls for an answer, for the very simple reason that the appellant himself has accepted the case as a valid case, and has, on the basis of that case, launched and conducted his appeal as far as this court. He cannot in the same voice assert that the case stated is valid for the purpose of conducting his appeal and that it is invalid, in which case no appeal will be competent. However interesting the question may be as an academic one, it is not a question which falls for decision in this case, and, therefore, I say nothing about it.

In the result the appeal must be dismissed.

FINLAY, L.J.: I agree.

MORTON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CHARLES HENRY PALMER *v.* EDWIN JOHN LARK AND EDITH MAY LARK.

[Chancery Division (Vaisey, J.), **February 9, 1945.**]

Specific Performance—Vendor's action—Judgment in default of appearance—Terms of order—Interest—Conveyance and purchase money to be handed over simultaneously.

In an action by the vendor for the specific performance of a contract for the sale of land, the defendants did not enter an appearance and the plaintiff filed a notice of motion for judgment in default of appearance. The minutes of the proposed judgment contained (i) provision for interest at the rate of 5 per cent. per annum, although the statement of claim did not mention interest, and (ii) an unconditional order for payment of the amount due:—

Held: (i) the plaintiff was only entitled to the relief which the pleading justified upon the face of it; he was not, therefore, entitled to payment of interest at the rate of 5 per cent. per annum since the statement of claim did not mention interest. Interest would be allowed at the rate of 4 per cent. per annum, that being the usual rate allowed by the court apart from special agreement.

Smith v. *Buchan* (1) *and Young* v. *Thomas* (2) *followed.*

(ii) the directions given by the court after a decree for specific performance being based on the assumption that both parties will carry it out, the minutes should provide for the conveyance duly executed with the documents of title to be delivered to the defendants at a time and place appointed by the judge and for the defendants at the same time and place to pay to the plaintiff the certified balance of the purchase money.

Cooper v. *Morgan* (6) *followed.*

[**EDITORIAL NOTE**. This is a useful practice point in relation to the form of order in judgments for specific performance in default of appearance. Vaisey, J., expresses his disapproval of orders in the *Robinson* v. *Galland* (3) form and makes an order based upon the decision in *Cooper* v. *Morgan* (6). On the question of interest on the unpaid balance of purchase money, this is allowed at the usual rate of 4 per cent., the court declining to allow the contract rate, since this was not mentioned in the statement of claim.

As to Judgment for Specific Performance, see HALSBURY, Hailsham Edn., Vol. 31, p. 423, para. 508; and for Cases, see DIGEST, Vol. 42, pp. 548, 549, Nos. 1084-1092.]

Cases referred to:

*(1) *Smith* v. *Buchan* (1888), 58 L.T. 710; Digest, Practice 95, *804*.
*(2) *Young* v. *Thomas*, [1892] 2 Ch. 134; Digest, Practice 761, *3279*; 61 L.J.Ch. 496; 66 L.T. 575.
*(3) *Robinson* v. *Galland* (1889), 60 L.T. 697; Digest, Practice 629, *2633*.
(4) *Morgan* v. *Brisco* (1886), 32 Ch.D. 192; 42 Digest 584, *1496*; 54 L.T. 230.
(5) *Anspach* (*Margravine*) v. *Noel* (1816), 1 Madd. 310; 40 Digest 173, *1418*.
*(6) *Cooper* v. *Morgan*, [1909] 1 Ch., 261; Digest, Practice 159, *1416*; 78 L.J.Ch. 195; 99 L.T. 911.
(7) *Austins of East Ham, Ltd.* v. *Macey*, [1941] Ch. 338; 165 L.T. 47.

Action by the vendor for the specific performance of a contract for the sale of land. The defendants failed to enter an appearance and the plaintiff filed a notice of motion for judgment in default of appearance. The judgment deals with the terms of the order to be made.

E. M. Winterbotham for the plaintiff.

Vaisey, J.: This is a vendor's action for the specific performance of a contract for the sale of land. The writ was issued on May 31, 1944. Neither of the two defendants entered an appearance. The statement of claim was filed on Nov. 30, 1944. The plaintiff in due course filed a notice of motion for judgment in default of appearance, the terms of the proposed judgment being set out in the schedule to such notice, which asks in proper form for an order either in those terms or in such other terms as the court may consider the plaintiff to be entitled to on his statement of claim. It appears from the statement of claim that the contract was in writing, made in Dec., 1943; that thereby the plaintiff agreed to sell and the defendants agreed to buy the property described in the pleading; that the price was £300 and that the usual 10 per cent. deposit had been paid. It further appears that the purchase was to be completed on Dec. 30, 1943; that the defendants had accepted the title and had also taken possession of the property, notwithstanding which they have refused or neglected to complete the purchase, which the plaintiff is and always has been ready and willing to do. The plaintiff asks for specific performance with all necessary accounts and inquiries; for costs; and for such further or other relief as may be necessary.

The case is, therefore, of an ordinary character, but two points arose at the hearing which, in my judgment, called for more consideration than they had then received. First, the minutes provided for interest on the unpaid balance of the purchase money at the rate of 5 per cent. per annum. There is, however, no mention of interest in the statement of claim, and though the contract does no doubt stipulate for 5 per cent., I am precluded from acting upon that, which involves a reference (which I am not entitled to make) to the contract itself, the rule being that I can only give the relief which the pleading justifies upon the face of it; nothing else may be looked at: see *Smith* v. *Buchan* (1), and *Young* v. *Thomas* (2). I was invited by counsel to allow the order to say that interest should be computed "at the rate provided by the said contract," but that easy way out would evidently transgress the principle laid down in the cases cited, which rest, I suppose, upon the fact that the defendants cannot be taken to have admitted a contract containing any provision beyond those actually pleaded. I am prepared in the present case to direct interest to be taken at the rate of 4 per cent. per annum, as being the usual rate allowed by the court apart from special agreement.

The second point is the more important. It is that the minutes, following the order made in *Robinson* v. *Galland* (3), contain an unconditional order upon the defendants for payment of the amount found due from them. I have made inquiries of the registrars, and I am satisfied that the more approved modern practice in a case such as this is to make the order in a different form, that is to say, one which neither allows, nor appears to allow, of execution issuing until a subsequent order has been made, which is usually done after the vendor has lodged the deeds (including the executed conveyance) in court: see *Morgan* v. *Brisco* (4). This seems to me to be in accordance with the proper principle. I was pressed by counsel for the plaintiff to consider the defendant in such a case as this as a party already in default who ought not to be placed, as it were, on a level with the plaintiff who has not done but has suffered the wrong which has necessitated the action. I think that this is based on a misconception. The court, as I understand the matter, follows up its decree for the specific performance of the contract with directions framed on the assumption that both parties are going to carry it out. The directions are given impartially, each party is told what to do, no favour being shown to either. It is a fundamental principle that the payment of the purchase money and the delivery of the conveyance are to be simultaneous acts to be performed interchangeably: see *Anspach* v. *Noel* (5), at p. 316, and *Cooper* v. *Morgan* (6). The headnote of the last-named case is as follows:

> Where a motion for judgment in default of defence is made in a vendor's action for specific performance of an agreement for the sale of real estate, the title to which has been accepted by the purchaser, the minutes should provide for the delivery of a conveyance of the property to the purchaser on payment by him of the purchase-money, interest, costs, and damages (if any).

Warrington, J., said in his judgment, at p. 262:

> It cannot be right to order a purchaser to pay his purchase-money without giving him his conveyance.

I am quite aware that orders in the *Robinson* v. *Galland* (3) form have been made quite frequently, down to very recent times; indeed, I find that on a Monday morning in chambers I made one such order myself: and see *Austins of East Ham, Ltd.* v. *Macey* (7), at p. 340. I know, however, that objection has been taken to the form from time to time by many judges, and I am rather at a loss to know why it did not go out of use, as, in my judgment, it should have done, after *Cooper* v. *Morgan* (6) was reported. An order on the defendant purchaser to pay, followed by a direction that the plaintiff vendor shall "thereupon" deliver the deeds, etc., might produce most extraordinary results in the event of the plaintiff levying execution and recovering part only of the sum due, assuming, that is, that such levying of execution would, as suggested to me, be possible without any further order being obtained.

In the present case I make the following order as being that to which the plaintiff is, in my view, entitled :

> Declare that the agreement dated 1943 in the statement of claim mentioned ought to be specifically performed and carried into execution and order and adjudge the same accordingly ; and let interest be computed at the rate of 4 per cent. per annum on the sum of £270 (the residue of the purchase money for the property comprised in the said agreement) from Dec. 31, 1943, when the purchase ought to have been completed according to the terms of the said agreement to the day to be fixed by the judge as hereinafter directed ; and let the following accounts be taken (that is to say) (i) An account of what is due to the plaintiff for the balance of the said purchase money and interest and for his costs of this action such costs to be taxed by the taxing master (ii) an account of the rents and profits of the said property received by the plaintiff or by any other person or persons by the order or for the use of the plaintiff since Dec. 31, 1943 ; and let what shall be coming upon the said account of rents and profits be deducted from the amount of the said purchase money and interest and costs when so computed and taxed as aforesaid and the balance certified. And it appearing from the statement of claim that the defendants have accepted the plaintiff's title to the said property, let the plaintiff be at liberty to prepare and execute a conveyance to the defendants (as an escrow to be delivered to the defendants as hereinafter mentioned), such conveyance to be settled by the judge. And upon the plaintiff, at a time and place to be appointed by the judge after the said conveyance shall have been so executed as aforesaid, delivering to the defendants the said conveyance together with all deeds and writings in his possession or power relating solely to the said property, let the defendants at the same time and place pay to the plaintiff the amount of the said certified balance. And the parties are to be at liberty to apply as they may be advised.

I desire to add that I sympathise with those who find difficulty in drafting appropriate minutes of order in such cases as this, and are embarrassed by the criticism which their efforts encounter at the hands of judges and officials of the court. I should certainly have thought that a few, say half a dozen, standard forms might have been prepared so as to cover all, or almost all, the usual combinations of possible circumstances, and officially authorised. I understand, however, that CLAUSON, J., as he then was, did attempt some years ago to have some such forms prepared, but that the task was found to be impracticable ; so that it is still necessary for an appropriate form to be made out for each particular case. I do not myself attempt to lay down any propositions beyond such as have seemed to me to be necessary for the present case, and what I have said is not at all likely to reduce to any substantial extent the uncertainty which does undoubtedly surround the subject.

Declaration accordingly.

Solicitors : *Coode, Kingdon, Cotton & Ward*, agents for *Orchard & Co.*, Exmouth (for the plaintiff).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

CONTINENTAL GRAIN CO., INC. *v.* TWITCHELL.

[KING'S BENCH DIVISION (Atkinson, J.), **November 22, 23, 24, December 4, 1944.**]

Insurance—Marine insurance—Insurance against total loss of estimated earnings due to constructive total loss of vessel—Constructive total loss of vessel—Losses after repair occasioned by fluctuation in charter market—No total loss of earnings—Losses not due to constructive total loss of vessel.

The plaintiffs time-chartered 16 vessels as from Mar. 20, 1937. The plaintiffs then entered into an insurance policy with the defendant. Incorporated in the policy was the specification headed "anticipated earnings . . . insurance. Monthly declaration of amount to be insured from Oct. 1, 1937." Then followed the names of the ships. Beside the names of the ships were three sets of figures. The total of the first column was $2,040,000. The total of the third column headed "Hereto U.S.A. dollars," was $1,775,148. In the left hand corner of the policy were the words "U.S.A. $1,775,148 part of U.S.A. $2,040,000." The opening clause in the policy contained these words ". . . and shall be valued at

U.S.A. dollars 1,775,148. On anticipated earnings and/or interest warranted free of all average. Only against total and/or constructive total loss of the vessel as per clause attached." This clause was headed "This insurance is only against the total and/or constructive total loss . . . of the vessel." On Sept. 22, 1937, the plaintiffs sub-chartered a certain vessel, which transaction was estimated to bring the plaintiffs a profit. On Oct. 29, whilst under the sub-charter, the vessel was damaged and this was immediately brought to the notice of the plaintiffs. The interruption of this sub-charter involved a loss of $28,000 to the plaintiffs. On Nov. 22 the plaintiffs were notified by the owners of the vessel that it was to be repaired and that this would take 64 days. From the date of the casualty to the date of the completion of repairs no hire was paid by the plaintiffs in accordance with the terms of the time charter. On Jan. 6, 1939, the sub-charterers were released by the plaintiffs from the sub-charter on the payment of $5,000. On Feb. 15 the repairs were completed and the vessel was used for the performance of a sub-charter which was completed on May 4. On May 4 the vessel was used for the performance of another sub-charter which was completed on July 19. Owing to the fluctuation in the charter market the rate of the sub-charters was at a lower rate than the rate under the time charter and the plaintiffs suffered losses of $11,470 and $9,972 on the sub-charters. On July 18, 1938, the plaintiffs purported to cancel the time-charter and on Mar. 24, 1939, an agreement was entered into between the plaintiffs and the time-charterers by which the plaintiffs paid $35,000 by way of damages. It was admitted that the vessel was a constructive total loss on the date of the casualty. On behalf of the plaintiffs it was contended that they were entitled to recover their losses incurred from the date of the constructive total loss. On behalf of the defendant it was argued that the plaintiffs were insured only against a total loss of the estimated earnings for the whole of the period of the time charter due to the total constructive loss of the vessel:—

Held: upon the true construction of the policy the defendant only underwrote a total, and not a partial, loss of anticipated earnings of which the total or constructive total loss of the ship was the proximate cause. The plaintiffs' losses, except as to the $28,000 on the first sub-charter, were not due to the constructive total loss of the ship but due in part to the collapse of the charter market and in part to the surrender of the charter-party on July 18, 1938.

[**EDITORIAL NOTE.** It is here held that in a policy of marine insurance against loss of anticipated earnings, "earnings" refers to the difference between the freight received and the freight paid by the assured. As to the words of the policy "warranted free of all average" it is held that this covers only a total loss of earnings owing to the total or constructive total loss of the ship. The action fails since there was only a partial loss of earnings of which the casualty was the proximate cause.

As to Proximate Cause of Loss, see HALSBURY, Hailsham Edn., Vol. 18, pp. 304-307, para. 430; and for Cases, see DIGEST, Vol. 29, pp. 205, 206, Nos. 1642-1650.]

Cases referred to:

*(1) *Robertson* v. *Petros M. Nomikos, Ltd.*, [1939] A.C. 371; [1939] 2 All E.R. 723; Digest Supp.; 108 L.J.K.B. 433; 160 L.T. 542.

(2) *Coker* v. *Bolton*, [1912] 3 K.B. 315; 29 Digest 289, *2348*; 82 L.J.K.B. 91; 107 L.T. 54.

(3) *M'Carthy* v. *Abel* (1804) 5 East, 388; 29 Digest 209, *1677*; 1 Smith K.B. 524.

Action on a marine insurance policy. The facts are fully set out in the judgment.

Patrick Devlin and *C. Fletcher-Cooke* for the plaintiffs.

Sir Robert Aske, K.C., and *Robert E. Gething* for the defendants.

Atkinson, J.: In this action the plaintiffs claim against a Lloyd's underwriter his proportion of the loss which is alleged to be covered by the policy issued. There was an agreed statement of facts from which I take the following. The plaintiffs are a corporation under the laws of the city of Delaware in the United States of America with an office and place of business in New York. They are dealers in grain and bulk commodities all over the world. In connection with this business they charter vessels and from time to time sub-charter some of the vessels which they have under charter. In June, 1937, they held under charters of varying lengths 16 ships, and they were minded to insure the earnings they anticipated making by the use of the ships. On June 2, 1937, the plaintiffs obtained from Lloyds in London an open cover insurance for 12 months beginning on June 1 insuring the plaintiffs' anticipated earnings and/or interest in a list of vessels which were to be declared monthly and policies were to be issued monthly. Under this cover declarations were in fact made monthly and policies so issued. The declaration relevant to this cover was made on Sept. 23, and the relevant policy is dated Oct. 21 and covered the period from Oct. 1 to Oct. 31.

The policy incorporated a specification. That specification is headed:

> Anticipated profits . . . insurance. Monthly declaration of amount to be insured from Oct. 1, 1937.

Then followed a list of 16 names. To the right of the specification there are three columns of figures. Opposite each ship there are in this way three sets of figures. The first figure is obviously the value of the anticipated profits, and that first list adds up to $2,040,000. The third column of figures headed "Hereto U.S.A. dollars" seems to be about thirteen-fifteenths of the figures in the first list, as far as I can make out, and they add up to $1,775,148. The middle column we are not concerned with, the column of the varying rates at which these figures were insured. The policy has up in the left-hand top corner "U.S.A. 1,775,148 dollars part of U.S.A. 2,040,000 dollars," so that the policy is obviously intended to cover roughly about thirteen-fifteenths of any loss of anticipated earnings. As usual the bulk of the opening clauses are completely inappropriate for the subject-matter of this insurance, but midway down one comes upon these words:

> . . . and shall be valued at U.S.A. dollars 1,775,148. On anticipated earnings and/or interest, warranted free of all average. Only against total and/or constructive total loss of vessel as per clause attached.

The clause attached is not a specification but is a printed document headed:

> This insurance is only against the total and/or constructive total loss and/or arranged and/or compromised total loss of the vessel. The insured value in policies on ship and machinery shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Then there are a number of clauses which are wholly irrelevant, but there is one other to which counsel for the plaintiffs attached some weight, a clause dealing with what should happen should the vessel be sold or transferred to new management.

I shall have to discuss the meaning of the relevant words of this policy a little later. But at the moment I will merely say this: I can see no reason whatever for not giving the words "warranted free of all average" their customary meaning, which, of course, is that the policy does not cover a partial loss but only a total loss of the anticipated earnings insured and, of course, that total loss must be occasioned by a total loss of the ship or a constructive total loss of the ship, or, though it is irrelevant in this case, an arranged loss.

On Mar. 13, 1937, the plaintiffs time-chartered the motor-ship Aakre for a period of 30 months at a rate of $1,675 per dead weight ton per month. On Mar. 20 the Aakre came under the said charterparty and from then until about Oct. 20, the plaintiffs used her in the transportation of their own property and merchandise. On Sept. 22, 1937, the plaintiffs sub-chartered the Aakre to the Lamport & Holt Line, Ltd., for a voyage from St. John, Newfoundland, to a river Plate port at the rate $3.50 per dead weight ton. The gross freight which the Aakre was earning under it, was at the rate of $27,265 per month and exceeded the hire which the plaintiffs were paying under the time charter by the sum of $14,206.75 per month. Evidence was given that the voyage or subject-matter of that sub-charter would take about 24 days given good weather and no untoward injuries. In the list in the declaration sent in September the figure opposite the ship Aakre was, I think $227,000.

On Oct. 29, 1937, the Aakre while proceeding from St. John, Newfoundland, on her voyage under the sub-contract, stranded on Grand-Manan Island in the Bay of Fundy. On Nov. 11 she was recovered from the strand by Merritt-Chapman & Scott Corporation, and was towed to St. John, Newfoundland, for repairs.

On Nov. 16 the owners made a contract for her repair for the sum of $149,000. The repairs began on Nov. 23. The plaintiffs were informed of the casualty by the master immediately after it occurred, and on Nov. 22 were notified by the owners that the repairs were estimated to take 64 days. They were kept in touch with the progress of repairs while they were being carried out, but they did not know until early in July, 1938, what the repairs had cost. The cost of recovery and repairing the ship exceeded the insured value, and it is common ground that the ship was a constructive total loss on Oct. 29. On Jan. 6, 1938, an agreement was made between the plaintiffs and Lamport & Holt, Ltd., releasing the latter from the sub-contract on payment of $5,000. On Jan. 26 while the Aakre was still under repair the plaintiffs substituted her for another vessel for the performance of a sub-contract dated Jan. 15. Up to January the market-rate for the chartering of vessels had been very high. In January there was a great decline in the charter-market and the rate fell so far that it was impossible to sub-charter the Aakre at a rate equal to that payable under the time charter.

On Feb. 15 the repairs were completed. She sailed from St. John, Newfoundland, and shortly thereafter entered into performance of a sub-charter to a Japanese firm Mitsubishi. That sub-charter was completed on May 4, and the gross freight paid to the plaintiffs under it was less by $11,470 than the corresponding amount of hire payable by them under the time-charter. On Apr. 28 prior to the completion of that last sub-charter they sub-chartered the vessel to Mitsui & Co., for a voyage from Japan to Stettin. The vessel went under this sub-charter about May 4, and that was completed on July 19. Again the gross freight paid was less by $9,972 than the corresponding amount of hire payable by them under the time charter.

From the date of the casualty to the completion of repairs the Aakre was off hire under the terms of the charterparty and, therefore, no hire was paid by the plaintiffs in respect of that period. On July 18 the plaintiffs wrote to the owners of the Aakre purporting to cancel the time charter. They had no right to take this course. Negotiation followed and on Mar. 24, 1939, an agreement was arrived at settling the dispute between them under which the plaintiffs paid $35,000 by way of damages. There was thus, the plaintiffs say, after the constructive total loss of the ship a total loss of profit freight. There was a loss of freight taking the Lamport & Holt, Ltd., sub-charter as being roughly $28,400 for those two months. That was followed by a loss of $11,470 between Feb. 15 and May 4, and a further loss of $9,972 between May 4 and July 19, and then a lump sum loss of $35,000 in respect of the cancellation of the time charter. That is nearly $85,000. On the other hand there was the receipt of $5,000 from Lamport & Holt, Ltd. The plaintiffs say that that receipt cannot be regarded separately, or indeed, as an earning at all and that there was in fact a complete loss of earnings after the stranding. If an account be taken over the whole period there was a loss of some $80,000 giving credit for the $5,000. If one takes an account merely for the period up to Feb. 15 while the ship was under repair, deducting the $5,000 from the $28,000 there was a loss of some $23,000. They say if it is wrong to take an account and if they have to regard the $5,000 separately that cannot be regarded as earnings. The contract with Lamport & Holt, Ltd., they say was clearly frustrated on Oct. 29, nothing could be earned or be payable under it. It was a payment made to cancel a contract made before the date of the policy, and if an earning at all it was earned by the making of the contract and not by its performance. They say that it can be regarded as a salvage payment or as a payment *ex majore cautela* by Lamport & Holt, Ltd., to be safely rid of a very expensive contract, and in any event, it has nothing to do with the earnings insured by the policy. The plaintiffs, therefore, claim the contract proportion of the $227,000 as for a total loss of earnings following the constructive total loss of the ship. Another way in which I understood the plaintiffs to put their case was this: assuming, without admitting that they can claim only for a total loss of earnings attributable to the stranding, there was in fact a total loss and the fact that it was total was due to the stranding because the stranding deprived them of the use of the ship during the only period in which a profit could be made.

It is necessary to determine exactly what was the subject-matter insured and valued by the policy. The relevant words are "Anticipated earnings and/or interest." "Anticipated" must, of course, mean anticipated by someone and that someone can only be the assured. The earnings in this case must mean earning by the ships insured. Therefore it is clear and is not open to argument that what is being insured is the anticipated earnings by these ships during the respective periods of their charters. As between an assured who holds a number of ships on charter and underwriters those words mean the earnings which the assured expects to make out of the ships during the rest of the charter periods. "Earnings" means, I think, the difference between the freight received and the freight to be paid by the assured. Take the figure of \$227,000; it leaves almost exactly \$1¼ a ton for two years. That was certainly not the gross freight expected to be received but a margin of freight profit. Sperling's evidence taken in New York—I ought to have said this has already been litigated there and his evidence was read here by consent—proved of course, quite clearly, that that was indeed what they intended to cover by this insurance. A total loss of earnings necessarily results from a total loss of the ship, but there is not necessarily a total loss of earnings after a constructive total loss of a ship. If the ship is repaired before the expiration of the charter and is again in service, there has been only a partial loss of earnings due to the constructive total loss. If the repairs are not completed until after the termination of the charter, then there is a total loss of earnings due to the constructive total loss of the ship.

I have no doubt whatever that both the underwriters and the assured understood by this policy that if the whole of the charter period of the ship were lost owing to constructive total loss or total loss of the ship during October, the underwriters would pay without further inquiry the insured proportion of the named sums of money as the agreed estimate of what the ship would have made if she had been in service during the rest of the charter. Reading the policy as it would reasonably be understood by any merchant or insurance broker I think it means exactly what the parties intended.

But, counsel for the plaintiffs says, for the purposes of interpretation I have no right to assume that the assured is not an owner and is interested only in charterparties and that between an owner and an underwriter an insurance against total loss of earnings arising from a constructive total loss of a ship must mean a temporary total loss of earnings; otherwise that part of the cover would have no meaning whatever. I do not see why I should assume that this contract is something which it is not and that the underwriters did not know the position of the plaintiffs. If in fact it is a contract with a company holding charters of ships I cannot see why I should ignore that fact and assume it is a contract made with owners. The cover note was endorsed "Charter vessel, Anticipated profits." Then came the conditions "Warranted free of all average. Being against the risk of total" and so on. Therefore, it is quite clear that the plaintiffs themselves knew that the anticipated profits were profits from charters. Why should I assume that they had not indicated that fact to the underwriters? The cover note ought to follow the slip. Unfortunately the latter is not in evidence. To aid construction relevant surrounding circumstances may be regarded and surely the character of the business being insured is a relevant circumstance. The intention of the assured is also at least a relevant circumstance in determining subject-matter. Therefore, I construe this policy as covering the excess freight the plaintiffs anticipated receiving either under sub-charters or for carriage of goods over and above that which they had to pay during the whole of the various periods for which they held the named ships on charter. That which was valued with regard to the Aakre was not an excess on an existing sub-charter which might last for a couple of months but an excess anticipated to be earned by the plaintiffs by that ship if in service throughout the period of their charter. To succeed on the policy the plaintiffs must prove that there has been a total loss of such earnings, that is, of the valued earnings of which the proximate cause was the constructive total loss of the ship. The only earnings lost by reason of the constructive total loss of the ship were those that would have been made between Oct. 31 and Feb. 15. That which was lost as the result of the stranding was only part of that which had been valued. Any loss after Feb. 15 was not attributable in any way to the constructive total loss. The policy did not insure against a loss of profits while the ship was in service but against a total loss through being out of service.

There was a suggestion that the stranding might be said to have caused all the loss which followed because the plaintiffs missed the market—they lost the period during which profitable freights were obtainable. But they knew by Nov. 22 that the ship was going to be repaired and that its repair would take about 65 days. Therefore, there was nothing to prevent them arranging forward sub-contracts after Nov. 22. If this view is right both the plaintiffs' main contentions are answered. The answer to the contention that a constructive total loss causes a temporary complete loss of freight not covering the whole period of the charter is that that is not a total loss of that which was valued but only a partial loss of that which was valued. The answer to the contention that if a constructive total loss is in fact followed by a total loss of earnings throughout the valued period they are entitled to the agreed sum, even though in part that loss may be due to some extraneous cause, is that the constructive total loss was not the proximate cause of the total loss of earnings.

The importance of causation was discussed in *Robertson* v. *Petros M. Nomikos, Ltd.* (1). There the plaintiffs were insured in respect of a steamer in the sum of £4,110 on freight for 12 months. The policy incorporated the Institute Time Clauses and the material one, cl. 5, read as follows :

> In the event of the total loss, whether absolute or constructive of the steamer, the amount underwritten by this policy shall be paid in full.

There had been a constructive total loss and the plaintiffs were claiming the whole of the £4,110. The main fight was on the question whether there had been a constructive total loss, notwithstanding that notice of abandonment had not been given to the underwriters. The decision was that there had been a constructive total loss and that cl. 5 stipulating for payment in full fixed the financial measure of indemnity under the freight policy where the ship had become a constructive total loss. The vessel was at the time of loss actually chartered and the charter was never performed. The actual decision is not material to this case but one of the matters discussed arises here. It was contended in that case, as here, that once it was proved or admitted that there had been a constructive total loss of the ship due to perils insured against the underwriters were liable to pay for any loss of freight even due to some extraneous causes and not to the constructive total loss of the vessel. On p. 385 ([1939] 2 All E.R. at p. 729, Lord Wright deals with this question. He says :

> I do not think it is necessary to express any final view on an argument which was strenuously urged on behalf of the respondents. This argument was to the effect that cl. 5 involved some extension of the list of perils insured against which were enumerated in the policy. It was contended that all that was necessary to prove under the clause was that the loss of the vessel was due to perils insured against. Thereupon, it was said, the underwriters were liable to pay for any loss of freight, even though due to some extraneous cause, such as the bankruptcy or default of the consignee. In other words, that the condition on which payment became due was the loss, actual or constructive, of the vessel by perils insured against, as the stipulated event in which the sum due under the freight policy became payable, though it had no actual effect in causing the loss of freight. The question does not, in my opinion, as I have explained arise in this case, and I should be content to say no more than that I reserve my opinion on it. I shall, however, out of respect to the argument advanced, add that, as at present advised, I should not be prepared to accept that construction. It would mean that the policy, *pro tanto,* was not a policy of indemnity which appears to me to be inconsistent with the view of Hamilton, J., in *Coker* v. *Bolton* (2).

The same view is expressed by Lord Porter, at p. 395 ([1939] 2 All E.R. at p. 736) :

> I desire also to reserve the question raised in argument by the respondents and, I think, adopted by the Court of Appeal, that under the terms of cl. 5, provided the freight was in fact lost, the sum insured was payable on the happening of a total loss whether that event caused the loss of freight or not. If, it was said, the ship became an actual or constructive total loss, at any rate in a case where that loss was due to one of the perils insured against, and freight also was lost, the sum insured was payable even though the loss of freight was caused by the bankruptcy of the freighter or some extraneous conditions which prevented loading.

He, along with Lord Wright indicates his view. He ends up by saying, at p. 396 ([1939] 2 All E.R. at p. 737) :

> It is not necessary, however, to come to any final decision upon this point in the present case . . .

It will be observed that in that case there was cl. 5 which was the only clause which made the argument possible; at any rate, it is a much more difficult argument where cl. 5 is not incorporated in the contract.

I think there is no answer to the defendants' contention that they underwrote only a total loss of anticipated earnings, of which loss the total or constructive total loss of the ship was the proximate cause, that, even if there was a total loss of earnings, that loss, except as to $28,000, was not due to the constructive total loss of the ship but was due in part to the collapse of the freight market and in part to the surrender of the charterparty on July 15, 1938. There is no evidence because no evidence has been given, but there is no suggestion in the agreed statement of facts that if the charterparty had been retained profit would not or could not have been made in 1939. In *M'Carthy Corner and Henderson* v. *Abel* (3) LORD ELLENBOROUGH pointed out that a loss due to the act of the assured themselves was not due to a peril of the sea, nor is it due in this case to the constructive total loss of the ship.

I think this action fails and must be dismissed with costs.

Order accordingly.

Solicitors: *William A. Crump & Son* (for the plaintiffs); *Ince, Roscoe, Wilson & Glover* (for the defendant).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

SPOFFORTH AND PRINCE *v.* GOLDER (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Wrottesley, J.), **January 23, 1945.**]

Income Tax—Deduction against profits—Chartered accountants—Partnership—Legal costs incurred in connection with criminal proceedings against one of the partners—Not moneys wholly and exclusively laid out or expended for the purposes of the profession—Income Tax Act, 1918 (c. 40), *Sched. D, Case II, r.* 3 (*a*).

The appellants were partners of a firm of chartered accountants. The appellant S. had advised one White to form a company with the object of avoiding the payment of sur-tax. The company was formed and three clerks employed by the appellants applied for shares in the company. They paid the proper amount to the company for the shares and were duly allotted their shares. On Dec. 12, 1940, S. received a letter from the solicitor of Inland Revenue stating that the latter wished to take evidence from two employees of the appellants' firm, in order to consider whether there had been any infringement of the criminal law. S. immediately consulted his solicitors who arranged for the statements to be taken in their presence. On Jan. 1, 1941, the Solicitor of Inland Revenue advised the solicitors of S. that the facts disclosed constituted a conspiracy by S., White, and other persons to defraud the Crown. On Feb. 26, 1941, S. and White were summoned to appear before the Bow Street Police Court on a charge of defrauding the Revenue. When the summons was issued S.'s solicitors who had so far acted for the appellants jointly as a partnership firm, advised him that arrangements for separate representation should be made. This was done and on the hearing of the summons the appellant S. was represented by leading counsel and junior counsel. The appellant P. retained leading counsel and junior counsel to hold watching briefs. On Apr. 17, 1941, the magistrate dismissed the summons. The total of the costs incurred by the appellants in connection with these proceedings (including the costs incurred before the issue of the summons and the costs of the watching of the proceedings on behalf of the appellant P.), was £1,187 4*s.* 3*d.* In their profit and loss account for the year ended Mar. 31, 1941, the appellants showed "legal costs" amounting to £1,052 as an expense, and the question at issue was whether this sum, being a part of the legal costs incurred in connection with the criminal proceedings, was in whole or in part an allowable deduction in computing the profits of the firm for the year in question:—

HELD: (i) the costs of the solicitors acting for the appellants' firm down to the issue of the summons were costs incurred by the appellants for ordinary professional purposes and, therefore, deductible.

(ii) neither the costs of the defence of S., even if they were strictly incurred by the firm, and not by him personally, nor the costs in respect of the advice and separate legal assistance of P., were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the appellants' profession.

Test laid down by Lord Davey in *Strong & Co., Ltd.* v. *Woodifield* (3) *applied.*

[**EDITORIAL NOTE.** This case involves the consideration of the extent to which legal costs are deductible from profits. The court applies the test laid down by Lord Davey in *Strong & Co.* v. *Woodifield* (3), when he said: "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits." The costs here under consideration fall into three groups: (*a*) costs of advice from the firm's solicitors sought as a matter of ordinary business precaution; (*b*) costs incurred to the firm's solicitors in the course of defending one partner against a criminal charge; (*c*) costs to the other partner of a watching brief. (*a*) Being incurred in the ordinary course of business are held to be deductible, but as to (*b*) and (*c*) it is held that, however important to the business the establishment of the partners' innocence of fraud might be, it could not be said that such a disbursement was made for the purpose of earning profits, within Lord Davey's test.

This case may usefully be contrasted with *Southern* v. *Borax Consolidated, Ltd.*, [1941] 1 K.B. 111, and *I.T. Comr. for Bihar* v. *Rameshwar Singh*, [1942] 1 All E.R. 362.

As to Deductions against Profits, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152-155, paras. 312-317; and for Cases, see DIGEST, Vol. 28, pp. 42-47, Nos. 215-226, 233-236.]

Cases referred to:

*(1) *Inland Revenue Comrs.* v. *Warnes & Co.*, [1919] 2 K.B. 444; 28 Digest 46, *235*; 89 L.J.K.B. 6; 121 L.T. 125.

*(2) *Inland Revenue Comrs.* v. *Von Glehn*, [1920] 2 K.B. 553; 28 Digest 46, *236*; 89 L.J.K.B. 590; 123 L.T. 338.

*(3) *Strong & Co., Ltd.* v. *Woodifield*, [1906] A.C. 448; 28 Digest 57, *290*; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215.

(4) *Noble (B.W.), Ltd.* v. *Mitchell* (1926), 43 T.L.R. 102; Digest Supp.; 11 Tax Cas. 372.

(5) *Scammell & Nephew, Ltd.* v. *Rowles*, [1939] 1 All E.R. 337; Digest Supp.; 22 Tax Cas. 479.

(6) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.* [1914] 2 K.B. 891.

(7) *Norman* v. *Golder*, [1945] 1 All E.R. 352; 171 L.T. 369.

Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The point at issue was as to whether a sum of £1,052 being a part of the legal costs incurred by the appellants in connection with certain criminal proceedings was in whole or in part an allowable deduction in computing the profits of the appellants' firm for the year in question. The following facts were found by the Commissioners:

On Dec. 12, 1940 . . . Spofforth received a letter from the solicitor of Inland Revenue stating that the latter wished to take statements of evidence from two employees of the appellants. Spofforth immediately consulted his partner, Prince, and sought an interview with their solicitors . . .

On Feb. 26, 1941, a summons was issued against Spofforth to appear before the court of summary jurisdiction sitting at the Bow Street Police Court . . . [on a charge of unlawfully conspiring, combining, confederating and agreeing with Harold Artis White and other persons unknown to defraud the Revenue between May 1, 1936 and Dec. 31, 1940.]

Up to this time Messrs. Rowe & Maw, solicitors . . . had been acting for the appellants jointly as a partnership firm, but when the summons was issued Mr. Maw advised the partners that arrangements for separate representation should be made. It was finally decided that Messrs. Rowe & Maw should defend Spofforth and that Prince should consult another firm, Messrs. Godden, Holme & Ward . . .

The summons was heard before the chief magistrate at Bow Street Police Court on Mar. 13, 25, and Apr. 4, 17, 1941. Leading counsel and junior counsel instructed by Messrs. Rowe & Maw appeared on behalf of Spofforth and leading counsel and junior counsel instructed by Messrs. Godden, Holme & Ward held watching briefs for Prince . . .

On Apr. 17, 1941, the chief magistrate dismissed the summons . . .

The total of the costs incurred by the appellants in connection with these proceedings (including the costs incurred before the issue of the summons and the costs of the watching of the proceedings on behalf of Prince) was £1,187 4*s.* 3*d.* . . . The accounts of the appellants' firm for the [year ended Mar. 31, 1941, show] "legal costs" £1,052 as an expense in the profit and loss account . . .

The decision of the Commissioners was as follows:

. . . on the authority of the decisions in *Inland Revenue Comrs.* v. *Warnes & Co.* (1) and *Inland Revenue Comrs.* v. *Von Glehn* (2), the legal costs incurred in the police court proceedings were not moneys wholly and exclusively laid out or expended for the purpose of the appellants' profession, and . . . the sum of £1,052 was accordingly not allowable as a deduction in computing the firm's profits under Sched. D, case II, for the year in question.

J. Millard Tucker, K.C., and *F. Heyworth Talbot* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the respondent.

WROTTESLEY, J.: Spofforth is a chartered accountant, but is rather more than this. To White he supplied not merely the scheme which was to enable White to avoid payment of sur-tax, but he even supplied three clerks from his office to apply for shares in the one-man company formed solely for the purpose of avoiding sur-tax by White. The profession in question is that of chartered accountant and not of a firm which sells to their customers devices for avoiding sur-tax, including the provision of shareholders. Spofforth was accused in conjunction with a person, by whom sur-tax was to be avoided, of conspiring with his client to defraud the revenue. But the case broke down *in limine*; on submissions made at the conclusion of the case for the prosecution, the magistrate declined to commit Spofforth for trial. It must, therefore, be presumed that a *prima facie* case was not made out, and, broadly speaking, the reasons given by the magistrate were that the company was in fact a company, and the shareholders in it alleged to be dummies who were clerks in the employment of the appellants became shareholders in fact, and beneficial owners of their shares. It further appears from the judgment of the magistrate that Spofforth's share in the matter was that the company was set up on his advice. The device, therefore, was not merely successful, but within or, at any rate, not outside the law, and such conspiracy as there was was a conspiracy not to defraud the Revenue, but merely to avoid certain provisions of the Income Tax Acts. Faced with the prosecution Spofforth and Prince took the steps set out in the case. The costs of the services rendered by Spofforth's solicitors or Prince's solicitors have in fact been paid by the firm, and the firm now claims to deduct that part of the bill which can properly be appropriated to the year ending Apr., 1941, from the profits of the partnership for that year.

In order to succeed in this claim it must be shown that these costs were incurred by the appellants' firm, and were moneys wholly and exclusively laid out or expended for the purpose of the appellants' profession—accountancy. Alternatively, the appellants claim that the sums so expended were an allowable deduction in computing their profits. The commissioners found that these costs were not wholly and exclusively laid out or expended for the purpose of the profession, and were not allowable as a deduction under Sched. D, case II.

It is claimed by the Attorney-General that this is a finding of fact, and that, therefore, if there is material on which they could so find, the court ought not to interfere. It would be difficult to say that there is not material in the facts set out in the case from which a reasonable man might refuse to infer that the costs were laid out wholly and exclusively for the purpose of the appellants' profession. The establishment of Spofforth's innocence, the saving of him from conviction and punishment, are matters which must have been the purpose of the expenditure, just as it would have been had the charge been one of fraud against Spofforth in his personal capacity. No doubt Spofforth was an important member of the firm, and his conviction, and still more his imprisonment, would have been a severe blow to it. That, however, is not the test. It is not every expenditure made by a firm which falls within the definition, however prudent it may be, even though it may tend to benefit the firm. But here the commissioners used language which indicates that they did not approach the question as a pure question of fact. They decided as they did "on the authority of the cases, *Warnes'* case (1) and *Alexander von Glehn* (2)." Those are both cases where the taxpayer sought to deduct penalties in which he had been mulcted as the result of proceedings against him for infringement of the law and costs, and were not for the costs of defending proceedings in which he was wrongly sued and succeeded. That alone makes it necessary for the court to examine these cases, in order to see whether the reasoning in the judgments would have led to the same result if the appellants in those cases had been wrongly sued. I am not, therefore, absolved, as I otherwise might have been, from going into the law on this question. A

In the judgments of the Court of Appeal in *von Glehn's* case (2), there are passages showing that the court decided as they did, partly because they had to deal with a person who was endeavouring to deduct a penalty imposed for a breach of the law. Nothing of that kind can be alleged here. On the other hand, the real *ratio decidendi* in that case, as in many others cited during the argument, was the application of the test laid down long ago by LORD DAVEY in *Strong* v. *Woodifield* (3). All three members of the court made use of it. Here it is once B more : Is the disbursement one made not merely in the course of, or arising out of or connected with, or made out of the profits of the profession, but also for the purpose of earning the profits of the profession ? It is difficult, if not impossible, to think of anything so nearly approaching the formula referred to by LORD LOREBURN [in *Strong* v. *Woodifield* (3)] as unattainable, as this last phrase. It covers the most multifarious kinds of expenditure, as has been C shown in cases like *Noble* v. *Mitchell* (4) ; *Scammell and Nephew's* case (5) ; *Usher's* case (6). It is not by any means a harsh test to apply to a taxpayer. But it appears to me definitely not to cover anyhow the payment of the costs of defending Spofforth against the criminal charge preferred against him. As I have said, it was, of course, important to Spofforth and to his partner, and so to the firm, that he should be acquitted, or still better that the charge should be dismissed by the magistrate. But so was it important to the appellant in D *Norman* v. *Golder* (7), a shorthand writer, that he should recover his health. *Mutatis mutandis* I could apply almost word for word the reasoning of LORD GREENE, M.R., in that case, substituting for the doctor's bill in that case, the lawyer's bill in this case, and for Norman's bodily health—Spofforth's good name and freedom.

I am driven, therefore, to this conclusion, that in respect of the bill of costs for Spofforth's defence, even if it were strictly incurred by the firm, it is not E deductible. I would add that on the facts disclosed by the case, and the documents, I have great doubt as to the firm ever having incurred this expenditure in the strict sense. The case and the documents appear to me to negative this : rather they point to Spofforth having retained the firm's solicitor to defend him, and the bill, it will be seen, was sent in to him and in his name.

But that leaves two other matters, which are not so readily disposed of : F firstly, the costs incurred prior to the service of the summons. From the letter written by Messrs. Rowe & Maw on Dec. 31, 1940, it would appear that at and down to this stage this firm was acting for the appellants in the ordinary course of business, and in circumstances in which the appellants can fairly say that the purpose for which they gave the instructions and incurred the resulting costs were their ordinary professional purposes. There had been a somewhat unusual demand by a Government Department to interview servants of the firm, and in G that case it was an ordinary business precaution that the firm's solicitors should be called in to advise. If, therefore, any appreciable sum of costs was incurred by the firm up to this point, it is, in my view, properly to be deducted.

Finally comes the bill of costs in respect of the advice and legal assistance to Prince—Spofforth's partner. I have endeavoured to fit into LORD DAVEY'S formula this expenditure. But the facts so clearly set out at the end of para. 3 of the case are explicit and precise : H

> It was finally decided that Messrs. Rowe & Maw should defend Spofforth and that Prince should consult another firm, Messrs. Godden, Holme & Ward . . .

From that moment the interests of Spofforth were thought to be likely to diverge so widely from those of Prince that each should be separately represented. It was no doubt a wise decision. As a result Prince was separately advised, as the bill of costs shows, and in deciding to take that course, both he and Spofforth were aiming, not at the making of profits by the partnership, but at enabling Prince to protect his own interests, so far as that could be done, by his having separate legal advisers, when his partner stood his trial for a fraud alleged to have been advised and abetted by that partner and their clerks. As things fell out the advice given to Prince was of considerable value to the partnership, and may have brought the ultimate result that Spofforth continued to defend the case, with the result that it was dismissed. But Prince was not the partnership, and the object and purpose of the retainer by Prince of Messrs. Godden, Holme & Ward was not the best interests of the partnership but the best interests of Prince, if necessary at the expense of the partnership. Moreover, counsel for the appellants agrees that unless the costs were authorised in advance to be incurred by the partnership they cannot be said to be incurred by it. These costs seem to me to be comparable with the charges which Prince doubtless incurs in order to reach the firm's office in the morning. Here again, therefore, I am quite unable to say that on the facts so carefully found by the commissioners, and supported by the documents, the commissioners were wrong in saying that the costs of Messrs. Godden, Holme & Ward were not expenditure by the firm solely and exclusively for the purposes of the partnership profits, as a firm of accountants. It will be seen that, in the result, therefore, I find in favour of the appellants in so far as this firm incurred professional costs down to the issue of the summons.

Appeal allowed as to part of the deductions claimed.

Solicitors: *Rowe & Maw* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

EDE (INSPECTOR OF TAXES) *v.* WILSON AND CORNWALL.

[KING'S BENCH DIVISION (Wrottesley, J.), **January 25, 1945.**]

Income Tax Allotment of bonus shares at par value to senior company officials—Shares saleable only with permission of directors—Whether difference between market value and par price paid a profit or gain arising from office—Value of shares—Income Tax Act, 1918 (c. 40), *Sched. E, r.* 1.

The respondents were senior officials of the H. Brewery Co., a subsidiary of the A. Brewery Co. At an extraordinary general meeting of the A. Brewery Co. it was resolved to issue bonus shares to its shareholders and also to offer certain further shares on bonus terms, *i.e.*, one ordinary share for every two ordinary shares held was offered at par instead of at market value. Some 5,700 of these shares were left over and it was decided to allow the senior officials of A. Brewery Co. and its subsidiary companies to subscribe for the remaining shares at par. Both respondents took up and paid for their allotted number of shares, agreeing not to part with the shares without the permission of the directors of A. company so long as they remained servants of the company. The shares so allotted to the respondents on payment of the nominal value of £1 per share had a market value of £4 10*s.* each. The respondents were assessed to income tax under Sched. E on the basis of the difference between the market value of the shares taken up and the par price actually paid for them. The General Commissioners took the view that, since the shares could not be sold as a result of the respondents' undertaking, their value over and above £1 did not fall into Sched. E, r. 1, and they discharged the assessment. On appeal the question at issue was whether by reason of the circumstances under which the respondents took the shares, the shares were to be regarded as not falling within Sched. E, r. 1:—

HELD: the respondents received an advantage by virtue of their office which was of such a nature that it could be turned into money. This advantage, though of restricted value by reason of the agreement not to sell, was assessable to income tax under Sched. E, r. 1.

[**EDITORIAL NOTE.** It is sought here to bring the advantage conferred by the gift of the shares under consideration within the test laid down by LORD WATSON in *Tennant* v. *Smith* (1), where he says that profits, in the ordinary acceptation of the word, appears to denote something which can be turned to pecuniary account. The shares are held assessable because although of restricted value by reason of the clog on sale, they are nevertheless saleable with consent of the directors, or even without, at the possible risk of dismissal, and so are of pecuniary value. This value, however, is affected by the restriction under which the allotment was accepted.

As to Profits, Gains or Emoluments Derived from Office or Employment, see HALSBURY, Hailsham Edn., Vol. 17, pp. 215, 216, para. 436; and for Cases, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to:

*(1) *Tennant* v. *Smith*, [1892] A.C. 150; 28 Digest 17, *87*; 61 L.J.P.C. 11; 66 L.T. 327; 3 Tax Cas. 158.

*(2) *Salmon* v. *Weight* (1935), 153 L.T. 55; Digest Supp.; *sub nom. Weight* v. *Salmon*, 19 Tax Cas. 174.

*(3) *Nicoll* v. *Austin* (1935), 19 Tax Cas. 531; Digest Supp.

Case Stated by the Commissioners for the General Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The following facts were found by the commissioners.

The respondent [W.] was employed as brewery manager and director of Holt Brewery Co., Ltd., [and the respondent C. as their outside manager. Both had been so employed for many years.] In May, 1934, Ansells Brewery, Ltd., acquired the whole of the ordinary shares of Holt Brewery Co., Ltd. . . . At an extraordinary general meeting of Ansells Brewery, Ltd. . . . in Dec., 1936, it was resolved to issue bonus shares to its shareholders and also to offer certain further shares on bonus terms, *i.e.*, they offered one ordinary share for every two ordinary shares held at par instead of at market value. Some 5,700 of these shares were left over and as the directors of Ansells Brewery, Ltd., wished to ensure that the higher officials of Ansells Brewery, Ltd., and its subsidiary companies had a share in the business they decided to allow them to subscribe for these remaining shares at par. Before granting these officials . . . this privilege, the [respondents were] interviewed by a member of the board of Ansells Brewery, Ltd., who made it clear that if the shares were subscribed for they were not to be sold without the permission of the directors of Ansells Brewery, Ltd., so long as the respondents remained in the employ of Holt Brewery Co., Ltd., but it was admitted that there was nothing in writing and that there was no legally binding restriction . . .

The [respondents] took advantage of the privilege so afforded [them] of applying for shares, and [W. took up and paid for 500 shares, whereas C. took up and paid for 300 shares.] The assessment appealed against is the difference amounting to 70*s.* per share, between the par value of the shares so taken up and allotted by Ansells Brewery, Ltd., to the respondents, and their market value at the time of the allotment. The par value of the shares was 20*s.* per share and it was admitted that the market price of the shares when allotted was 90*s.* per share.

On these findings the commissioners held that no profit could reasonably arise from this transaction owing to the tie and discharged the assessment. On appeal to the King's Bench Division the case was remitted to the commissioners:

> . . . for a further investigation into the facts and circumstances of the case with reference to the terms on which the shares were issued and for further evidence to be heard in connection therewith.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the appellant (Inspector of Taxes).

F. Heyworth Talbot for the respondents.

Wrottesley, J.: As a result of the reference back by Macnaghten, J., the case must, I think, be taken to be amended to the following effect: Each of these respondents accepted the allotment of shares and undertook not to part with them without the permission of the directors of Ansells company, at any rate so long as he was a servant of the company.

It is common ground that the shares allotted to the respondents on payment of the nominal value £1, were on the market worth about £4 10*s.* The claim of the inspector was to levy income tax on the £3 10*s.*, which represented, roughly, the value of the privilege conferred upon the respondents by the directors, partly for services well rendered in the past, and partly as a stimulus to similar conduct in the future. It is clearly something which reached them in virtue of their position as officers in the company of Holt & Co.; and the reason why, nevertheless, the commissioners held it was not a payment, nor a profit or emolument is elaborated in the chairman's statement in answer to the question of Macnaghten, J. It is as follows:

> The chairman said that he thought he was right in saying that the commissioners' use of the word "tie" was because there was an obligation, with certain restrictions, which, in the opinion of the commissioners, were so strict that it would have amounted to a breach of trust if the shares had been sold and that this would have been considered

very serious misconduct on the part of the sellers and that the commissioners considered, looking at it from a business point of view, that the "tie-up" of the shares was such that they could not be sold. [The chairman went on to say that:] There was a definite verbal agreement not to sell the shares.

I can pass over the "breach of trust"; that is not contended for by counsel for the respondents. The commissioners think that the shares could not be sold as the result of the undertaking given by the respondents and, therefore, their value over and above £1 does not fall into Sched. E, r. 1, which I will read:

> Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule, or to whom any annuity, pension, or stipend, as described in this schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever, therefrom for the year of assessment . . .

I think that the commissioners are wrong in saying that the shares could not be sold. Quite clearly, they could. By consent of the directors they could, and I do not see why I should conclude that that consent would be unreasonably withheld. Moreover, even without the consent they could be sold, though in that case the seller would expose himself to the displeasure of the board, possibly even to dismissal. On the other hand, in the hands of the respondents, the shares may not have the same value as would shares as to which there was no such clog or tie.

The question to be resolved here is whether, by reason of the circumstances under which they took them, the shares are to be regarded as not falling within r. 1 of the schedule which I have read. There are *dicta* to be found in the cases in which the matter has been discussed, which indicate that an advantage which comes to a man by virtue of his office or employment is not taxable unless it can be turned into money. This was said clearly enough by LORD HALSBURY, L.C., LORD WATSON, and yet again by LORD MACNAGHTEN, in *Tennant* v. *Smith* (1). That was the case of a bank manager's official residence over the bank where, except by leave, he has to reside in performance of his duties. It is, nevertheless, important to bear in mind the very words of LORD HALSBURY, L.C., at p. 156, to the effect that they must be things "capable of being turned into money from their own nature." Those words apply to these shares. The facts in *Weight* v. *Salmon* (2), are nearer to the facts in this case. A managing director obtained shares on very advantageous terms, as here, and, also as here, in order to give him a stake in the business; but Salmon was not restricted from selling and to this fact attention was drawn in the judgment. On that ground I am asked to say that since the shares in this case may not be sold, they do not fall to be taxed. Moreover, the respondents say that unless the shares can be turned into money during the year of assessment they are not taxable. This is, I think, going too far, and would exclude a present of land made so late in the year that it could not be sold before the end of it. My attention was also called to the case of *Nicoll* v. *Austin* (3), where a taxpayer was taxed on the advantage he received from having his house and garden kept up for him by the company of which he was the managing director. I am reluctant, however, to rely on that case, because as was pointed out by counsel for the respondents, there were, in that case, actual payments made on behalf and for the benefit of the taxpayer which, therefore, he might be said to receive as emoluments. Nevertheless, it shows that the principle laid down in *Tennant* v. *Smith* (1) may not meet every case. Generally, it appears to me that the respondents here have used material which may well go to the value of the perquisite as ground for saying it has no value at all, and is not a profit, and that the commissioners have mistakenly accepted this view. Looking at the substance of the matter, the respondents have received an advantage which is of such a nature that it can be turned into money. At the same time, these shares in the hands of these shareholders are doubtless not so valuable for certain purposes as they would be but for the restriction. Nevertheless, they are a valuable nest-egg, and will doubtless produce a good income in the form of dividend, at any rate, when calculated on the purchase price, that is to say, of course, the purchase price by the recipients. They are, therefore, within r. 1, though it will be for the commissioners to say whether any, and, if so, what, reduction ought to be made in the proposed assessment in view of the agreement entered into by the recipients not to sell them without the permission of the directors. Thus, to a man not likely to need to sell them, they will doubtless hold their full value as on the Stock Exchange. To a man who has no other capital they may possibly have a lesser value; though to a servant in such a case the directors may well be expected to hold a more lenient view than towards his more opulent colleague in the event of a sale.

In the result, therefore, going back to the original case, I find that the commissioners came to a wrong opinion when they held that no profit could reasonably arise from the transaction owing to the tie, and that the case must go back, if required by the appellant, in order that the commissioners may decide what the proper amount of the assessment is having regard to the restriction under which these four persons concerned accepted the allotment which they took up. The appeal will be allowed with costs.

Appeal allowed with costs. Case remitted to the commissioners.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Field, Roscoe & Co.*, agents for *Pinsent & Co.*, Birmingham (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

CHRISTIE *v.* DAVIES (INSPECTOR OF TAXES).

[King's Bench Division (Wrottesley, J.), **January 30, 1945.**]

Income Tax—Sched. A and Sched. B—Profits arising from ownership and occupation of land—Woodlands—Operation of a sawmill—Timber grown on estate and timber bought outside worked up and sold—Treating and sale of timber grown on estate not carrying on of a trade—Income Tax Act, 1918 (c. 40), *Sched. A, Sched. B, Sched. D.*

The appellant owned an estate in Sussex consisting substantially of woodlands which had, for a long period, been managed on a commercial basis. Since it had not been found profitable to sell standing timber alone, the appellant set up a sawmill. The mill, employing some twenty hands, was particularly well-equipped and included items of plant not usually found in such sawmills. Not only timber from the estate but also a considerable quantity of timber bought locally was treated and worked up in order to ensure sufficient material to keep the sawmill running. The appellant admitted that in so far as he bought, worked up and sold timber purchased from outside, he was carrying on a trade assessable under Sched. D. He contended, however, that so far as the working up and selling of timber grown in his own woodlands was concerned, he had already borne tax therefor under Sched. A and Sched. B; the activities of the sawmill were simply a method of marketing the produce of his woodlands and could not properly be taxed again under Sched. D merely because he had machinery on a scale necessitating the sale of outside timber. It was contended for the Crown that all the profits from the sawmill were assessable under Sched. D, case I, as the profits of a trade, and such part thereof as was attributable to the timber grown on the estate did not arise from the occupation of woodlands and was not covered by the assessment made on the woodlands under Sched. B:—

Held: the working of the sawmill was the ordinary method of rendering the timber marketable and the woodlands commercially successful. To the extent to which timber grown on the estate was dealt with, the profits therefrom arose from the occupation of woodlands and were covered by the assessment under Sched. B.

Back v. *Daniels* (1) and *Croft* v. *Sywell Aerodrome, Ltd.* (5) *applied.*

[**EDITORIAL NOTE.** This decision puts the owner of woodlands who works up his timber for sale in his own sawmill on the same footing as a progressive farmer. In both cases the fruits of the soil, whether *fructus naturales* or *fructus industriales* are made as attractive and marketable as the owner can make them and there is no more justification for regarding the owner of the timber estate as carrying on a trade assessable under Sched. D than the dairy farmer. This is in accordance with the *dictum* of Scrutton, L.J., in *Back* v. *Daniels* (1). The profits of timber brought in from outside and worked up in the sawmill are admittedly taxable under Sched. D, but the fact that the sawmill has a greater capacity than is necessary to deal with timber grown on the estate does not make the whole activity of the mill a carrying on of trade.

As to Application of Schedules, see HALSBURY, Hailsham Edn., Vol. 17, pp. 83-85, paras. 168-172; and for Cases, see DIGEST, Vol. 28, pp. 15, 17-21, Nos. 74, 87-107.]

Cases referred to:

*(1) *Back* v. *Daniels*, [1925] 1 K.B. 526; 28 Digest 15, *74*; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183.

*(2) *Glanely* (*Lord*) v. *Wightman* (1932), 17 Tax Cas. 634; *on appeal*, [1933] A.C. 618; Digest Supp.; 102 L.J.K.B. 456; 149 L.T. 121.

(3) *Coman* v. *Rotunda Hospital, Dublin* (*Governors*), [1921] 1 A.C. 1; 28 Digest 82, *462*; 89 L.J.P.C. 162; 123 L.T. 529; *sub nom. Rotunda Hospital, Dublin* (*Governors*) v. *Coman*, 7 Tax Cas. 517.

(4) *Marshal* v. *Tweedy*, [1927] S.C. 243; Digest Supp.; 11 Tax Cas. 524.

*(5) *Croft* v. *Sywell Aerodrome, Ltd.*, [1942] 1 K.B. 317; [1942] 1 All E.R. 110; 111 L.J.K.B. 215; 24 Tax Cas. 126.

Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The following facts were found by the Commissioners:

The appellant is the owner and occupier of the Glyndebourne Estate, near Lewes, Sussex. The Glyndebourne Estate contains 530 acres of woodlands, which have been managed on a commercial basis as one unit. One wood, Plashett Wood, consists of about 400 acres, and in this wood there is a sawmill containing the usual machinery for preparing timber for sale and an office where the business in connection with the woodlands is conducted. The business in connection with the woodlands is carried on under the title The Plashett Saw Mills and that name appears in the telephone directory, and also in Kelly's directory under the heading Trades—Timber Merchants . . .

The woodlands are under the charge of a woodreeve, and come under the general supervision of the appellant's general business manager, W. E. Edwards. 20 men are employed in connection with the woodlands and the sawmill, many of them skilled men . . . The business done is all local business.

No election has been made by the appellant to be assessed in respect of his woodlands under Sched. D in accordance with the provisions of Sched. B, r. 7 . . . The sawmill buildings have been assessed under Sched. A separately from Plashett Wood and have not been included in any of the Sched. B assessment for the reason that it was thought that proviso (*b*) of r. 1 of that schedule applied.

. . . the appellant's general business manager . . . gave evidence before us, which we accepted, to the following effect:—

(*a*) the woodlands are and for many years have been managed on a commercial basis. The sawmill was installed in order that the timber might be converted into marketable products. The sawmill contains the usual machinery for preparing timber for sale including racksaw bench, steam engine, boring machine, recut machine, planer, thicknesser and bandsaw.

(*b*) most large estates containing woodlands which are being managed on a commercial basis have a sawmill, but not every such estate sawmill would be so well provided with machinery as the Plashett Saw Mills . . .
The sale of standing timber was not a commercial proposition, and in order to sell to the best advantage a sawmill was essential.

(*c*) in addition to the timber grown on the Glyndebourne estate a considerable quantity of timber was purchased, mostly from local estates. This was necessary in order to keep the staff fully employed and to ensure sufficient material to keep the sawmill running.

(*d*) such articles as hurdles, fencing and gates were made in the sawmill both for use on the Glyndebourne estate and for outside purchasers . . . The bark of trees was sold to a tannery . . .

(*e*) the timber grown on the Glyndebourne estate was brought into the sawmill accounts at a valuation and included under the heading "purchases" . . .

The appellant stated in evidence that the sawmill was maintained primarily for the use of the Glyndebourne estate and in order to manage the timber efficiently . . .

The decision of the Commissioners was as follows:

The appellant's activities in connection with his woodlands and the Plashett Saw Mills constituted the carrying on of a trade in respect of which the appellant was assessable under Sched. D, case I, and the profits arising from the sale of timber grown on the Glyndebourne estate should not be excluded in computing the amount of the assessment . . .

J. S. Scrimgeour for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the respondent.

Wrottesley, J.: The appellant owns an estate in Sussex, which includes substantial woodlands. The woodlands alone amount to 530 acres, and include one wood of 430 acres. These woods have, for a long period, been managed on a commercial basis, and it being impossible to do this by the sale of standing timber, the appellant has set up a saw-mill, this being essential if he was to sell to the best advantage. This mill is a particularly well equipped mill, and includes two items of plant not necessarily found in such saw-mills. But nowhere is there a suggestion that these items are more elaborate than would be introduced by an up-to-date owner of woodlands, bent on occupying and using them to the best advantage. Having set up this plant, he has found it economical to employ some 20 hands, and to buy from local sources a considerable quantity of timber, which is treated and worked up in the mill side by side with the timber of the estate. The Commissioners have accepted the view that:

> . . . this was necessary in order to keep the staff fully employed and to ensure sufficient material to keep the sawmill running.

The accounts form part of the case and show that during the year of assessment the sales of estate timber amount to £1,788 out of £5,561, and the profit thereof £164 out of a total net profit of £778. Before the Commissioners the appellant claimed that the whole of the activities of this sawmill were already taxed under Sched. B. But in this court the appellant admits that in so far as he buys, works up and sells timber bought from outside, he is carrying on a trade to which he is liable to be assessed under Sched. D. But to the extent to which he works up and sells his own timber grown in his own woodlands, and in respect of which he is already taxed twice, *viz.*, once under Sched. A and again under Sched. B, he claims that the activities of the sawmill are merely the proper up-to-date method of marketing the produce of his woodlands. If he is right in this there is no doubt that he has, so to speak, paid ransom, and is not properly to be taxed again on it merely because he has machinery on a scale which makes it necessary to buy timber outside, and to this extent to engage in trade which attracts tax under Sched. D.

The question to be resolved, therefore, as the matter falls to be debated here, is whether what the appellant is doing in the way of treating his own timber is the carrying on of a trade, and something which exceeds that in respect of which he has already been taxed under Sched. B. Tax under this schedule is chargeable in respect of the occupation of woodlands. R. 7 provides as follows:

> Any person occupying woodlands, who proves to the satisfaction of the general commissioners or of the special commissioners that those woodlands are managed by him on a commercial basis and with a view to the realisation of profits, may elect to be assessed and charged to tax in respect of those woodlands under Sched. D instead of under this Schedule in the same manner as a person occupying lands for the purposes of husbandry only, and r. 5 shall apply accordingly . . .

It is to be observed that the legislature recognises that persons may manage their woodlands on a commercial basis, and with a view to the realisation of profits, and that all this may occur without the occupier being exposed to tax otherwise than under Sched. B. Such an occupier may, if he chooses, elect to be taxed under Sched. D and not under Sched. B, just as a farmer may. But the converse does not apply, and the Crown is not entitled to tax an occupier under Sched. D just because he is progressive and, therefore, unusually prosperous in marketing the products of his commerce. For it must be borne in mind that it is the commerce of his woodlands which is taxed under Sched. B, and not merely the use of them for the watching of birds or the writing of poetry. Still less is a person to be taxed both under Schedules B and D for the commercial management of his woodlands.

It is also, I think, relevant and helpful to remember that this is the schedule devised by the legislature for the taxation of farmers in respect of the farms which they occupy. It is helpful because, used as we all are to regarding a farm as producing a variety of crops, each of which requires its peculiar processes to render them marketable, yet we are apt to regard woods as amenities in the landscape, only to be removed when decay threatens. I can see no reason why the owner of woodlands should not be as progressive as the most progressive farmer, and be permitted to render the subject-matter in which he deals as attractive as he can make it, without incurring the rather startling result which will occur here of having to pay tax under three schedules in respect of the same woodlands. To meet this difficulty the Attorney-General suggested that, if the appellant charges the timber which he supplies to his mill in the same way as he pays for the timber which he buys from outside, no hardship or injustice will result. I am bound to say that at first I found this solution rather attractive, though there is nothing in the case to show that in the accounts of the mill this was in fact done. But, on consideration, I am not satisfied that it will really be just or in accordance with the Act. No one suggests that the introduction of an up-to-date sawmill and other commercial plant is something not already taxed under Sched. B. So that this suggestion will still leave to bear a double tax that part of the appellant's activities which consist of the working up of his own timber in his own mill. It is true that there are two machines in this sawmill not necessarily, which means, I suppose, not usually, found in the sawmills of estates. And it is also true that the staff is sufficiently trained in this sort of craft to be able to turn out hurdles, fencing and gates, and even roughly shaped sections for cart-wheels and axles. These are, of course, blocks of wood sawn to certain typical shapes. One would expect to find most of these items being turned out for use on the estate, and in fact they are. So that there is nothing in the nature of the output to take the sawmill out of the schedule. It was said if a furniture factory were set up this would be beyond the purview and scope of this schedule. But that does not really get me out of the difficulty. That may be true, but this case is not concerned with furniture, nor with the employment of cabinet makers.

Three cases have been referred to as providing some guidance. *Back* v. *Daniels* (1), is generally known as the potato case. The facts are in this respect peculiar, that they by no means correspond with the ordinary methods of cultivation of either lands or woodlands in this country. The potato growers came in and rented land from, and employed the services of, farmers for some part of the cultivation and harvesting of the crop. They did the rest of the cultivation themselves. It does, however, bring out this point, that the tax under Sched. B exhausts the tax that can be levied on the profits made by the cultivation of land. Notwithstanding that this process amounts to a trade, it is not again to be taxed under Sched. D. I will read one paragraph from the judgment of SCRUTTON, L.J., to be found at p. 543 :

> Cultivating land to grow produce for the purpose of sale is in my opinion a trade. But Parliament has dealt with that trade where it is exercised by the occupation of land, by assessing the occupier on the annual value of the land and not on the profits made out of its produce, unless the occupier himself elects to be so taxed. When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation ; but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under Sched. D as well as or in substitution for Sched. B.

I can see no reason why the cultivation of woodlands should not obtain the same freedom from further taxation by payment of the taxes laid under Sched. B as other lands.

Then there is the case of *Lord Glanely* v. *Wightman* (2). This was another case where it was sought to tax under Sched. D the profits from stallion fees, where the stallions were kept upon the appellant's farm in respect of which he was already taxed under Sched. B. In a dissenting judgment delivered in the Court of Appeal, ROMER, L.J., at p. 663, referred to two passages which are helpful. The first is what LORD BIRKENHEAD had said in the *Rotunda Hospital* case (3), which I will read :

> Sched. A clearly shows that the object is to tax what for the sake of brevity may, with substantial accuracy, be called the landlord's income. Over and above that income, there is, almost without exception, a user of the premises whereby a further or tenant's profit is sought to be made. It is for that purpose that Sched. B is directed to tax the benefit of occupation.

And, secondly, what was said by LORD CLYDE in *Marshall* v. *Tweedy* (4) :

> So far as that is concerned, the profits either of his farm, or of his horse breeding, or of his cattle dealing are all, I assume, made by means of, and in reference to, land which he actually occupies, and if so then they are all of them properly taxable under Sched. B.

Then Romer, L.J., goes on :

> So that the test which he applies or thinks ought to be applied to the question is whether the profits are or are not made " by means of, and in reference to, the land."

Then Viscount Buckmaster, at p. 629, draws attention to the fact that the terms of Sched. B contain no qualification of the occupation to which it refers, and that the occupation referred to is not " limited to the purposes of husbandry as is shown by the latter part of the rule." Lord Wright says that where a person has been assessed under Sched. B in respect of the occupation of land as a whole, no further tax can be levied in respect of the farm, unless it is shown that he is there conducting some separate and distinct operation unconnected with the occupation of the land. Moreover, he pointed out, at p. 639, that the elaborate, expensive and scientific equipment of the stud farm was not adverse to the appellant's claim that the profits (if any) were exhaustively covered by Sched. B.

The fact that the appellant's sawmill here is better equipped than the average sawmill to be found in the woodlands of such an estate is not, therefore, any reason for saying that the sawmill is not already covered by Sched. B in so far as it deals with the timber of the home woodlands. The sawmill is no different in principle from the threshing machines, the churns, or other machinery to be found in many up-to-date farms. Finally, there is the case of *Sywell Aerodrome* (5) in which the Court of Appeal, by a majority, negatived an attempt by the Crown to levy under Sched. D a tax in respect of use and occupation, which had already been taxed either under Sched. A as Lord Greene, M.R., thought, or at least under Sched. B.

If the contention of the Crown should prevail before this court, an injustice will be done which can be best illustrated as follows. If, on some neighbouring estate, a sawmill should be set up, as well equipped as the appellant's mill, but so carefully calculated in the matter of size that it can be kept fully occupied in the working up of timber from the estate, it would be impossible, as I view the authorities, to say that it and its products were not taxed under Sched. B, being the ordinary method of rendering the timber marketable, and the woodlands commercially successful. I cannot see why the appellant's sawmill and its products should not have the same immunity from double taxation, in so far as it serves his woodlands. In view, therefore, of the facts found in the case, I think that the appeal should be allowed to the extent to which the appellant's sawmill deals with the timber grown on the estate.

Appeal allowed with costs.

Solicitors : *Hunt, Nicholson, Adams & Co.* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

SANDILANDS *v.* CARUS.

[Court of Appeal (Scott, du Parcq and Morton, L.JJ.), **January 21, 22, February 9, 1945.**]

Husband and Wife—Desertion of wife—Maintenance order—Necessaries supplied to wife during stay at boarding house—Wife's authority to pledge husband's credit—Liability of husband—Effect of maintenance order—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), *ss.* 4, 5 (*a*), (*c*)*—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 194*—Law Reform (Married Women and Tortfeasors) Act,* 1935 (*c.* 30), *Sched. I.*

The respondent deserted his wife and, on her application to a court of summary jurisdiction, a maintenance order of 10*s.* a week, but not a separation order, was made against the respondent under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*c*). While in receipt of payments made regularly by the respondent under the order, his wife lived for some six years at a boarding house kept by the appellant who, having regard to the respondent's position, allowed his wife credit and also lent her sums of money to purchase articles of clothing. The appellant brought an action against the respondent for the payment of £651 which consisted partly of board and lodging expenses incurred by the respondent's wife and partly of loans made to her. The judge held that he was bound by authority to dismiss the action on the ground that the respondent was not liable for his wife's debts in view of the order made under the 1895 Act. On appeal the main question for the determination of the court was whether a claim against the respondent for necessaries supplied to his wife whom he had deserted was defeated by proof that at the material times the respondent was making weekly payments in pursuance of an order made under the Summary Jurisdiction (Married Women) Act, 1895, ss. 4 and 5 (*c*) :—

Held : the fact that the regular weekly payments were made by the respondent in compliance with a maintenance order made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*c*) was, in the absence of a separation order, no answer to a claim at common law for necessaries supplied, which was otherwise established.

Willson v. *Smyth* (3) *distinguished.*

[**EDITORIAL NOTE.** At common law a husband is liable for necessaries supplied to his wife whom he has deserted. Her right is lost when a separation order is made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*), and the payments under it are duly made, but it is held here that this express exclusion, by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended, leads to the conclusion that where an order for maintenance is made under sect. 5 (*c*) the common law rule still applies. The sum ordered by the justices is not the final measure of a wife's "necessaries" suitable to her husband's means and position. The summary jurisdiction was provided for persons of small means and the serious consequences of disobedience are such that the order is generally for a sum small enough to be certainly within the husband's means, and not necessarily for a sum sufficient to provide for the wife's necessaries. Application to the ecclesiastical courts in former days was made by a very different class of persons, and the *dictum* of Taunton, J., in *Willson* v. *Smyth* (3) that "*prima facie*, the amount of alimony ordered is evidence that that sum was sufficient," is distinguishable from a case under the summary jurisdiction on the ground that where an order for alimony was made by the ecclesiastical courts, as there, the intention was to make provision for the wife suitable to the husband's means and position, which were usually, in such cases, substantial.

The maintenance order is apparently like a voluntary allowance made by a husband to his deserted wife, which, if insufficient, will leave him liable for her necessaries (*Baker* v. *Sampson* (1863), 14 C.B.N.S. 383).

As to Agent for Husband, see HALSBURY, Hailsham Edn., Vol. 16, pp. 699, 700, para. 1128 ; and for Cases, see DIGEST, Vol. 27, pp. 199, 200, Nos. 1691-1704.]

Cases referred to :

*(1) *Eastland* v. *Burchell* (1878), 3 Q.B.D. 432 ; 27 Digest 196, *1661* ; 47 L.J.Q.B. 500 ; 38 L.T. 563.

(2) *R.* v. *Richardson,* [1909] 2 K.B. 851 ; 27 Digest 564, *6231* ; *sub nom R.* v. *Richardson, Ex p. Sherry,* 79 L.J.K.B. 13 ; 101 L.T. 541.

*(3) *Willson* v. *Smyth* (1831), 1 B. & Ad. 801 ; 27 Digest 204, *1766.*

(4) *Cooke* v. *Cooke* (1812), 2 Phillim. 40 ; 27 Digest 497, *5317.*

Appeal by the plaintiff from a decision of Croom-Johnson, J., given at Lancaster and dated June 2, 1944. The facts are set out in the judgment of the court read by Scott, L.J.

Wilfred Clothier, K.C., and *S. R. Baker* for the appellant.

G. Glynn Blackledge for the respondent.

du Parcq, L.J. [read by Scott, L.J.] : This is the judgment of the court. The main question for decision is whether a claim against a husband for money due for necessaries supplied to a wife whom he has deserted is defeated by proof that at the material times the husband was paying weekly sums to his wife in pursuance of an order of a court of summary jurisdiction made under the Summary Jurisdiction (Married Women) Act, 1895, ss. 4 and 5 (*c*).

The common law doctrine was accurately stated by Lush, J., in delivering the judgment of the Court of Queen's Bench Division in *Eastland* v. *Burchell* (1). Dealing with the case of a husband who compels his wife to leave his home (which, of course, does not differ in any essential respect from that of a husband who deserts his wife and refuses to provide a home for her) that judge said, at p. 436 :

> . . . he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's

means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both.

In the case now before us there is no doubt that the defendant not only neglected to maintain his wife but deserted her, and the evidence (to which we will refer later) satisfies us that, although he had complied with the magistrates' order, he had not made adequate provision for her maintenance. The wife never agreed to a separation, nor did she apply to the magistrates for what is commonly called a "separation order" under sect. 5 (*a*) of the Act. The order was made under sect. 5 (*c*) on the ground that the husband had "been guilty of wilful neglect to provide reasonable maintenance for her." The husband had regularly paid to her the 10*s*. a week which the magistrates had considered to be a "reasonable" payment, "having regard to the means both of the husband and wife." We quote the words of the sub-section, but admittedly this wife had no means of her own and was not in a position to earn her own living. There is no doubt that where magistrates grant the wife a "separation order" under sect. 5 (*a*), and the payments ordered are duly made by the husband, she loses her right to pledge his credit. This is a statutory exception to the common law rule. Sect. 5 (*a*) enacts that:

> A provision that the applicant be no longer bound to cohabit with her husband (. . . while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty).

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 194, which corresponded to the Matrimonial Causes Act, 1857, s. 26, must now be read as amended by the First Schedule to the Law Reform (Married Women and Tortfeasors) Act, 1935. In its present form it provides that:

> (1) In every case of judicial separation . . . (*b*) if alimony has been ordered to be paid and has not been duly paid by the husband he shall be liable for necessaries supplied for the use of the wife.

Having regard to the history of the relevant legislation and to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4 (2) (*a*), it is, we think, manifest that sect. 194 of the 1925 Act, as it now stands, must be taken impliedly to exempt from his common law liability in respect of necessaries a husband who, after a judicial separation, has duly paid the alimony which he has been ordered to pay. There is, however, no provision in the relevant statutes to the effect that a wife who has obtained an order for maintenance, loses her right to pledge her husband's credit if he complies with the magistrates' order. The fact that provision is thus made in sect. 5 (*a*) for the exclusion of that common law right in one event only is, we think, a strong indication that in other cases falling within the same section Parliament did not intend the common law right to be abrogated or diminished. On this ground alone we should be disposed to hold, on principle and apart from authority, that the order of the magistrates in this case cannot have the effect for which the defendant contends.

There are, in our judgment, other cogent reasons for rejecting the defendant's submissions. It cannot be suggested, of course, that the decision of the justices created an estoppel, since the plaintiff was no party to the proceedings at petty sessions. Even if the justices had decided in terms that 10*s*. a week was (in the words of LUSH, J.) "a provision suitable to the husband's means and position," it is difficult to see why a jury (or a judge performing the functions of a jury) should be precluded from re-considering that matter on all the available evidence, or why the justices' finding on this question of fact should bind another tribunal. But we are far from being satisfied that the justices were bound to decide, or did decide, that precise question. When a wife applying for such an order as was here made is *bona fide* willing, and indeed anxious, as this wife was, to resume cohabitation with her husband, the justices are making, and know that they are making, an order which is in its nature temporary. The husband may at any moment again assume all the obligations which are inseparable from the proper performance of his marital duties. In such circumstances, and having regard to their power to review the order on a subsequent application, the justices are very likely to order weekly payments which will no more than suffice to satisfy the wife's immediate and most pressing needs. The jury in a common law action is asked the question whether the goods or services obtained from the plaintiff were "necessaries," in the sense indicated by Lush, J., in the passage which we have quoted. Though they may be satisfied that the husband's present means do not enable him to pay for those "necessaries" forthwith, they may still be fully justified in giving a verdict against him. A wife may be entitled, having regard to her husband's means and position, to pledge his credit (for example, to a draper for clothing or to a doctor for his fees) to an amount which could never be provided out of such temporary weekly payments. Indeed, it is not too much to say that in some circumstances a deserted wife may pledge her husband's credit (just as he might, if they were living together, pledge his own credit) to an amount which he can only pay if a reasonable time for payment is given to him. If it be granted that the goods or services are "necessaries," it is for the creditor to decide whether he is willing to give credit to the husband, and it is never an answer to a claim which is otherwise lawful to say merely that the defendant has not the means to pay it. A husband with £500 a year might well be held liable to a single creditor for necessaries valued at £25 or even £50, but magistrates making an order for maintenance are not in a position to order him to pay week by week a sum which would enable the wife, perhaps in a sudden emergency, to find such an amount. Nor could a wife in whose favour such an order is made expect credit to be given to her personally. She would indeed be put into the position of a *feme sole* (which she is not) without enjoying any of the advantages which may sometimes be associated with that status. It is not a sufficient answer to say that the wife can always apply to have the weekly payments increased. On such an application the magistrates (unless they decline jurisdiction in favour of the High Court) can still only order small weekly payments, and the wife's needs may be such as to demand immediate satisfaction.

Further, it is, we think, noteworthy that the consequences of non-compliance with a magistrates' order (which usually affects men with small, fluctuating and insecure weekly incomes and with little or no capital) are so grave that the petty sessional court is likely of set purpose to order a weekly payment small enough to be certainly within the husband's means in any given week. By sect. 9 of the Act payment is to be enforced in the same manner as payment of money is enforced under an order of affiliation. The result of this provision is that on failure to make a weekly payment the husband may be imprisoned without any further evidence that he has the means to make the payment. See *R.* v. *Richardson* (2). The power of making an order merely for maintenance is possessed only by courts of summary jurisdiction, and we think it reasonably plain that what Parliament intended was that the husband should be compellable, under pain of imprisonment, to pay so much at least as his wife's necessities required and as his means would certainly permit. We see no sufficient ground for holding that a wife can only obtain such an order on the implied understanding that she thereby surrenders a common law right which has for centuries been an incident of the status of marriage.

The judge considered himself bound to decide in favour of the defendant on the authority of *Willson* v. *Smyth* (3). In that case a husband was sued for necessaries supplied to his wife, who was living apart from him. His defence was that his wife had obtained a decree in an ecclesiastical court for alimony *pendente lite*, with which he had duly complied. Lord Tenterden, C.J., who tried the action, in the words of the report, at p. 802:

> . . . thought that the decree for alimony, and payment of the amount by the husband, discharged him from further liability, and were an answer to the action. He therefore directed a non-suit.

On motion for a new trial, it was contended on behalf of the plaintiff that the payments made by the husband were in fact to be regarded as a voluntary allowance, because the decree in compliance with which they were paid had become inoperative by the transfer of the cause in which it was made from the Consistory Court to the Court of Arches, and that the sufficiency of the allowance could, therefore, be questioned. This contention was rejected, and, on the footing that the payments were not voluntary, the court refused to grant a rule for a new trial. Of the four judges who heard the motion (Lord Tenterden, C.J., Littledale, J., Taunton, J., and Patteson, J.) only Lord Tenderden, C.J., and Taunton, J., gave reasons for their judgments, and it is perhaps of some importance that Taunton, J., is reported, at p. 804, as saying that:

> . . . *prima facie,* the amount of alimony ordered is evidence that that sum was sufficient . . .

There can be no doubt that in most, if not in all, cases the alimony decreed *pendente lite* by an ecclesiastical court constituted a provision for the wife suitable to the husband's means and position. Relief was not often sought from the ecclesiastical courts by persons with very small incomes, except in cases where a suit was brought *in forma pauperis,* and then no order for alimony was made. When an order for alimony was made, it must almost always have been reasonable to presume its sufficiency for the purpose of the common law action. It is true, as the note at p. 804 of the report of *Willson v. Smyth* (3) points out, that it was the practice to make a much smaller allowance for alimony during suit than for permanent alimony, but that was mainly because the wife's position *pendente lite* was so delicate that she would naturally be expected to live in seclusion and so would want " a mere subsistence." (See *Cooke* v. *Cooke* (4), at p. 44). It may be open to doubt whether it was right in 1831, or would be right to-day, to lay down an absolute rule that a plaintiff in a common law action for the price of necessaries can never question the sufficiency of the amount payable under an order for alimony *pendente lite.* It is not, however, necessary for us, on this appeal, either to question or positively to affirm the decision in *Willson* v. *Smyth* (3), which is, in our view, distinguishable from the present case. When an order for alimony *pendente lite* was made in the ecclesiastical courts in favour of a petitioner, the wife's position was very different from that of a wife who is not asking for any relief except a reasonable sum for her maintenance. In *Willson* v. *Smyth* (3) the wife was praying for an order which would free her from any obligation to cohabit with her husband, and was asking the court, as an incident of the relief which she was seeking, to compel her husband to give her a sum which would keep her in a manner appropriate to her position. There is no true analogy between an order for alimony *pendente lite* and such an order as is here in question.

For these reasons we are of opinion that *Willson* v. *Smyth* (3) has no application to this case and that the defendant's compliance with the magistrates' order does not of itself provide him with a defence. We wish to add, however, that it must not be supposed that, as a general rule, credit may safely be given to a wife in whose favour a similar order has been made. We think that it was manifestly the primary intention of Parliament that, by this new form of summary procedure, speedy relief should be made available to wronged wives whose husbands are persons of small means. The provision for the wife which is " suitable to the husband's means and position " will in such cases usually be but small and is, as a rule, likely to be fairly represented by the payments which the magistrates have ordered. The law is the same for all, but the decision must always turn on the facts of the particular case, and the facts of this case make it exceptional.

After a full consideration of the evidence, we are satisfied that the plaintiff's claim is amply justified by it. Early in his judgment Croom-Johnson, J., said :

> I see no reason at all to tax down the amount of this claim if the plaintiff satisfies me that she is entitled to maintain the claim at all.

By this the judge seems to have meant no more than that the charges were reasonable, since later in the judgment he expressed the view that there was no evidence before him to show what were the husband's means at the material time. We respectfully dissent from this view. The wife's evidence showed that while she was living with her husband he allowed her £2 a week for housekeeping alone, and that they kept a car, travelled in first class carriages, stayed at good hotels and generally lived like prosperous people. It is not to be presumed, without evidence, that his means had been reduced : indeed, the presumption is that they had not, and, though such a presumption may easily be rebutted, no evidence was called to rebut it. Further, there was evidence that the husband, according to his own admission, had been left a substantial sum of money by his father's will. The judge attached importance to the fact that he had sold his farm, but for all that was proved the sale may have been advantageous to him. In the circumstances, the sums charged for board and lodging by the plaintiff, which in themselves are certainly reasonable, were, we think, no more than than a husband in the defendant's position (judged, as it must be, from the evidence) should be called upon to pay on his wife's behalf, and we think that any jury, properly directed, would have been likely so to hold. The charges for interest must, however, be excluded from the amount claimed. Counsel for the appellant, while admitting that these charges could not be supported, asked that interest at 3 per cent. might be allowed (under the Law Reform (Miscellaneous Provisions) Act, 1934) on the total amount of the claim from the date when the last account was presented, namely, Feb. 24, 1940. This seems to us to be a reasonable request.

The appeal is allowed with costs. The judgment and order of the judge must be set aside, and in lieu thereof judgment will be entered, with costs, for the total amount of the plaintiff's claim, excluding all interest except that which in our discretion we have awarded under the statute.

Appeal allowed with costs. Leave to appeal to the House of Lords refused.

Solicitors : *Gibson & Weldon*, agents for *E. Geoffrey Wilson*, Kendal (for the appellant) ; *Beachcroft & Co.*, agents for *E. Temple*, Kendal (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

McVITTIE *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BOLTON.

[COURT OF APPEAL (Scott, du Parcq and Morton, L.JJ.), **February 9, 1945.**]

Public Health—Dangerous and dilapidated structure—Seriously detrimental to the amenities of the neighbourhood—Order to repair or demolish—Failure by owner to comply with order—Demolition carried out by local authority—Whether "rubbish resulting from the demolition" included machinery on the premises—Public Health Act, 1936 (*c.* 49), *s.* 58.

A cinema owned by the appellant was damaged by fire, with the result that it became a dangerous or dilapidated building or structure. On the adjoining land a machine shop also belonging to the appellant was damaged as well. A complaint was made by the respondents, the local authority, to the justices, who made an order under the Public Health Act, 1936, s. 58, calling upon the appellant to execute works of repair or restoration, or, if he so elected, to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as might be necessary for remedying the cause of complaint. The order, however, referred only to the cinema premises. The appellant having failed to comply with the order, the respondents cleared both the sites and, in doing so, removed certain machinery from the premises on the ground that they were "rubbish resulting from the demolition." In an action by the appellant for trespass to his land and goods, the respondents admitted trespass to land and goods in respect of the site occupied by the machine shop. With regard to the cinema premises, it was contended for the appellant (i) that the respondents were not entitled under the section to dig below the ground level, but that they did so and extracted certain pieces of machinery, thereby committing trespass to the appellant's land ; (ii) that the machinery so taken away were not "rubbish" within the meaning of the section ; (iii) that the section gave the respondents no power to take any chattels off the site :—

HELD : (i) the power to demolish a building necessarily extended to the whole of it and, therefore, to its basement.

(ii) (SCOTT, L.J., dissenting) : on a true construction of sect. 58, "rubbish resulting from demolition" did not include machines.

(iii) the section conferred no power to remove chattels unless they came within the description of "rubbish resulting from the demolition." The respondents, therefore, were also liable in damages to the appellant for the removal of machinery from the site covered by the order.

[**EDITORIAL NOTE.** This is an interesting decision on a new provision of the Public Health Act, 1936, designed to preserve the visual amenities of a neighbourhood from unsightly dilapidated buildings. The case turns upon the meaning to be given to "rubbish resulting from the demolition." SCOTT, L.J., would give these words a wide interpretation, but the majority of the court hold that the machines in question even if they can be regarded as "rubbish," do not "result from the demolition."

The defendants, therefore, had no statutory power to remove the machines, nor had they any common law right as agents of necessity. It would seem to be in accordance with the intention of the Act to order such removal, but the words of the Act do not go so far and it must be left for the legislature to provide for the removal of all unsightly chattels, whether resulting from demolition or not, by an amending Act.

As to the Public Health Act, 1936, s. 58, see HALSBURY'S STATUTES, Vol. 29, pp. 368, 369.

As to Dilapidated Structures, see HALSBURY, Hailsham Edn., Vol. 26, pp. 352-354, paras. 696, 697 ; and for Cases, see DIGEST, pp. 188, 189, Nos. 269-278.]

Cases referred to :

(1) *R.* v. *Bolton Recorder, Ex p. McVittie,* [1939] 2 All E.R. 334.

(2) *R.* v. *Bolton Recorder, Ex p. McVittie,* [1940] 1 K.B. 290 ; [1939] 4 All E.R. 236 ; Digest Supp. ; 109 L.J.K.B. 198 ; 161 L.T. 403.

Appeal by the plaintiff from a judgment of Singleton, J., made at Lancaster, and dated May 3, 1944. The facts are fully set out in the judgments of Scott and Morton, L.JJ.

E. G. Hemmerde, K.C., and *S. R. Baker* for the appellant.

W. Gorman, K.C., and *A. E. Jalland* for the respondents.

Scott, L.J. : The amount of money involved in this appeal is small ; but a question is raised, of general importance to the public, on the interpretation of the Public Health Act, 1936, s. 58. That section extended the powers of a local authority in relation to dangerous buildings, by including a most valuable new provision, namely, to deal with :

> . . . any building or structure, [which] is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood . . .

English law had long recognised the duty of occupiers of land not to offend their neighbours' sense of smell or hearing, but had left them lamentably free to offend their neighbours' sense of sight. This section gives the local authority power, and inferentially imposes on it a duty, to consider the visual appearance of dilapidated buildings and structures and the injury it may do not only (as in the case of dangerous buildings) to persons on the premises or on adjoining premises, but to a whole neighbourhood. It is obviously a remedial measure in aid of town and country planning, and a valuable adjunct to that legislation, and one which may help materially in preventing ugliness and thus preserving and increasing the beauty of England and Wales.

The legal procedure of the section is similar for both types of social offence with which it deals, but the powers conferred on the local authority under the new jurisdiction are, naturally enough, in view of the expressed object of Parliament in conferring them, somewhat wider than in the old case of a building which causes a merely physical danger to persons on the premises or adjoining premises. By sect. 58 (1) the local authority is, in both cases, given power to apply to a court of summary jurisdiction for an order upon the owner requiring him to repair or, if he so elects, to demolish the offending building or structure, and, in that case, "to remove any rubbish resulting from the demolition" ; but, in the case of a building or structure "detrimental to amenities" the alternative duties imposed are "to execute such works of repair or restoration," or "to take such steps by demolishing" it in whole or in part "as may be necessary for remedying the cause of complaint," that is, for remedying the harm to "the amenities of the neighbourhood." Subsect. (2) confers definite powers on the local authority in the event of the owner failing to comply with the order within the time given him by the magistrate ; and these powers are both wide and discretionary, namely, to "execute the order in such manner as they think fit" and thereafter to recover from the owner in default "the expenses reasonably incurred by them." Two limitations are, no doubt, imposed upon the default powers so given to the local authority, in the event of the owner failing effectually to achieve the object of the provision, namely, that of protecting "the amenities of the neighbourhood" from detriment. The first is that the local authority must not do more than is reasonably necessary to achieve that object ; and the second (which is implied) is that in executing the order "in such manner as they think fit," they must act reasonably. But, in construing the statutory provision, it is material to bear in mind that the power conferred is a default power, that is, to act in the place of the owner and do what he, as a reasonable person, could and should have done. The local authority stand in his shoes in order that they may act as the statutory owner *pro hac vice*, and they are free to do what he ought to have done, in such manner as they think fit, and are not called upon to consult his wishes.

The facts of the present case are fully and clearly stated in the judgment of SINGLETON, J. The appellant was the owner of two adjoining plots of land in Bolton (Lancashire), each under a 999 years' lease, one large and one small, both facing the street, on the other side of which was a row of houses. The
A respondents had been the owners of both plots, but had sold them, some years before 1930, to the appellant, both being included in a single assignment. When in their hands there had been a tram-car shed on the larger plot. When the appellant bought the plots he converted the tram-shed into a cinema, and used the smaller plot for a machine shop with certain machinery in it. In 1930 the cinema was burnt down, involving a heavy financial loss to the appellant as he had not been able to insure it. The photographs in the case
B taken at some date thereafter for the respondents, showed the structure as a gaunt double row of tall, steel angle-bar stanchions, each parallel to the street, with some brickwork of walls still standing, and part of the dilapidated machine shed on the smaller site. Whatever value the odds and ends of boilers and other machinery and plant on the two sites may once have had, the appellant had simply left them exposed to the elements to rust and rot. After the fire he
C apparently took no interest in the place and never came near it. During the succeeding years the respondents tried to get the appellant to do something to remedy the public eyesore, but were unsuccessful: and so, when the Public Health Act, 1936, came into operation, they quite properly took action under sect. 58. On Dec. 16, 1937, an order was made by the magistrates but, by an unfortunate mistake, was limited to the larger site. It gave the appellant six months to comply, but he did nothing. The only action he took was legal. He appealed
D to quarter sessions and failed. He applied for a *certiorari* in the King's Bench Division and failed (*R.* v. *Bolton Recorder, Ex parte McVittie* (1)). He appealed to this court and failed, and was refused leave to appeal (*R.* v. *Bolton Recorder, Ex parte McVittie* (2)). He also applied to the House of Lords Committee for leave to appeal, but again failed. The corporation then gave him another six months in which to act. Even then he did nothing, except to bring some old pieces of roofing timber on to the site. In Aug., 1940, more than six months
E having elapsed, the respondents took the necessary default action and cleared the site. Twenty-three photographs were in evidence. Numbers 1, 6 and 5 show it before, and numbers 16 and 17 after their action.

Unfortunately the respondents made a mistake, not only in the proceedings but also in their action upon them. They thought the magistrates' order applied to both sites, and, therefore, cleared them both. As they cleared the
F site they took away all the moveable material, including any machinery there, and stored everything in their own yard, carefully and properly, as shewn by photographs numbered 18 to 23. In regard to the machine shed site, their action was obviously a trespass, but the judge gave the appellant £42 damages in respect of it, and I am satisfied that that figure is ample compensation for any loss caused by the trespass. There could be no claim in the circumstances except for the money loss suffered. It is not necessary to say anything further about
G that part of the case.

In regard to the main site, counsel for the appellant contended first that the respondents were not entitled under the section to dig below the ground level, but did so and extracted certain pieces of machinery, and thereby committed trespasses to the appellant's land. His second contention was that some of the things so taken away were not "rubbish" within the meaning of the section and that, therefore, the respondents had no power to take them off the site,
H even for safe storage, and, therefore, by taking them away, converted them. His third contention was that the section gave the respondents no power to take any chattels off the site. I do not accept any of these contentions. To the first the answer is, in my opinion, that power to demolish a building necessarily extends to the whole of it, and, therefore, to its basement and cellars and foundations. To leave basements exposed below the level of the street, as has, in the necessities of war, been so often the case in London under emergency powers of demolition, is obviously to stop short of the total demolition of a house, and from the point of view of amenity causes a horrible eyesore in a

well-ordered, urban street. The contention that some of the ancient and rusted pieces of machinery were not " rubbish " is more arguable ; but I take the view that all " scrap " is included in the term " rubbish," and these things were all mere scrap—valued at so much a ton. The word " rubbish " in the part of the section about amenities has, by reason of its context, a very wide meaning. " Dirt " is often defined as " matter out of place." I think anything left on the site of a building demolished under the default powers of the section which in fact results from the demolition is " rubbish." One test may be its function. All the machines, etc., about which the appellant complains, were there, not for their functional purposes, but merely as derelict appurtenances of the derelict building : and, indeed, were nearly as dilapidated as the building, though not quite ; and it may be they could have been sold not as mere scrap but for some trivial figure beyond scrap value. None the less, the utter neglect of them by the appellant, I think. shows that he was treating them as mere scrap. In my view (and also in that of the judge) they were all things within the meaning of the word " rubbish " in the section ; but if any of them were not rubbish, the answer I think is that the respondents had implied authority under the section to do what the owner ought to have done, namely, to remove any such chattels to a safe place of storage ; and that they did. If so, there was no conversion. To leave a quantity of such things on the site would have prevented its restoration to a condition consistent with " the amenities of the neighbourhood," which was the object it was their duty to achieve. I go further. I think that the respondents were under a duty to take care of such chattels belonging to the owner, by removing them, together with what was technically " rubbish," and holding them at the owner's disposal in a suitable place at his expense. This they did. Such authority was, I think, impliedly conferred upon the respondents when acting in the place of the owner on the true interpretation of the section as a whole, under the discretion conferred by the words of subsect. (2) which I have quoted. As du Parcq, L.J., suggested during the argument, they were agents of necessity to do this. It follows that there was no trespass to the chattels. They have all been properly cared for, and the appellant has been under a continuing request to remove them on payment of the expenses for storage.

There are no merits in this appeal. The appellant ignored his social duty from 1934 onwards and his legal duty from the moment when the magistrates' order under the 1936 Act was served upon him. It is obvious that he kept the land and his structure and machines on it, in the state he did, solely because he thought it helped him towards finding a purchaser of the land. I agree with the judge that his utter absence of any care for the machines is conclusive that he attached no value to them as machines.

Since writing this judgment I have read the judgments of my brethren. I had, of course, realised that the word " rubbish " with the qualification " resulting from the demolition " might be construed as limited to things like bricks, steel and other constructional materials ; but I still think that the wider interpretation is the right one in the context of the section. If I am wrong Parliament might well be disposed to amend the section so as to prevent its object of preserving, restoring or improving amenities being defeated.

I think the appeal should be dismissed with costs ; but, as my brethren are not in complete agreement with me, I leave the order of the court to them.

du Parcq, L.J. : I have had the privilege of considering in advance the judgment which has just been delivered by Scott, L.J., and also the judgment which Morton, L.J., is about to read. If the word " rubbish " in the section were not qualified by the words " resulting from the demolition " I should have agreed with Scott, L.J., that the engine and boilers in question could, on the evidence, properly be regarded as " rubbish," having regard to the context in which the word appears. I am, however, impressed by the difficulty of saying that they are " rubbish resulting from the demolition ", and I have come to the conclusion, not without some regret, that it is insuperable.

If it had been impossible for the corporation to ascertain the plaintiff's wishes as to the disposal of the chattels, it may well be that they would have been entitled as agents of necessity, to remove them to a place of safety. But they made no attempt to ascertain his wishes until the removal was complete, and there is no evidence that it was impossible to do so. In the circumstances, therefore, this plea will not avail them. I concur in the order which Morton, L.J., is about to propose.

Morton, L.J.: In this action the plaintiff alleges trespass by the defendants on two pieces of land, respectively 938 square yards and 272 square yards in extent, in Tonge Moor Road, Bolton, and trespass to goods, the property of the plaintiff, on each of these two pieces of land. The two pieces of land adjoin one another and I shall refer to them as "the larger site" and "the smaller site" respectively. Both sites are held by the plaintiff under long leases which were originally granted to the defendants, and were on May 27, 1913, assigned by the defendants to the plaintiff.

It was admitted during the trial before Singleton, J., that there was trespass by the defendants on the smaller site, and trespass to certain goods which were upon the smaller site.

As to the larger site, it is not disputed that the defendants were entitled to go upon it, to demolish a certain structure upon it known as "Tonge Picturedrome," and to remove any rubbish resulting from the demolition. These acts they were entitled to do under the Public Health Act, 1936, s. 58, and an order made thereunder. The plaintiff, however, claims that the defendants exceeded their powers in removing certain machinery belonging to him which was upon the larger site.

Sect. 58 of the Act (so far as material) is in the following terms:

> If it appears to a local authority that any building or structure, or part of a building or structure . . . (*b*) is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood, the authority may apply to a court of summary jurisdiction, and the court may . . . (ii) in the second mentioned case, make an order requiring the owner of the building or structure to execute such works of repair or restoration or, if he so elects, to take such steps by demolishing the building or structure or any part thereof and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint.

Subsect. (2) provides:

> If the person on whom an order is made under subsect. (1) of this section for the execution of works, or the demolition of a building or structure or of any part of a building or structure, and the removal of any rubbish resulting from the demolition, fails to comply with the order, within the time therein specified, the local authority may execute the order in such manner as they think fit and may recover the expenses reasonably incurred by them in so doing from the person in default, and without prejudice to the right of the authority to exercise those powers, he shall be liable to a fine not exceeding ten pounds.

I do not think that subsect. (3) is material for the present purpose. The words "execute the order" in subsect. (2) are to be noted. The words "in such manner as they think fit" do not confer any power upon the local authority to travel outside the terms of the order.

In 1937 the defendants applied to the magistrates at Bolton for an order under that section, on the ground that the Tonge Picturedrome was "by reason of its ruinous condition seriously detrimental to the amenities of the neighbourhood," and on Dec. 16, 1937, an order was made under that section.

The operative part of that order is as follows:

> And it is ordered that the said Millar Johnstone McVittie the owner of the said structure is required under the said sect. 58 of the said Act to execute such works of repair or restoration or if he so elects to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as may be necessary for remedying the cause of complaint within six calendar months from this date.

It is quite plain that the words "the structure" refer, and refer only, to the Tonge Picturedrome which had been almost entirely destroyed by fire in 1930. Its condition in 1937 is well shown in photograph number 1 which was before us. It was certainly a very ugly structure at that time.

The plaintiff appealed to quarter sessions and failed. He then applied for a *certiorari* to the divisional court, and failed again. The plaintiff then appealed to this court and this court supported the order of the divisional court; he then sought to go to the House of Lords, but leave to appeal was refused by this court and by the House of Lords Committee.

The defendants waited a further six months after the dismissal of the application of the plaintiff for leave to appeal to the House of Lords. Nothing was done by the plaintiff to comply with the order of the magistrates, therefore the corporation thought it right to exercise their powers under the Public Health Act, 1936, s. 58. Unfortunately, they exceeded their powers. Besides demolishing (as they were entitled to do) the unsightly remains of the Picturedrome they demolished a shed upon the smaller site, and they removed some machinery from both sites to the corporation yard in Mare Street. The machinery on the smaller site consisted of a gas engine and a crude oil engine, which were inside the shed, and two cooling tanks and a concrete mixer, which were lying upon the ground outside the shed. I can find no adequate reason why the defendants should have thought that the smaller site came within the order, or why they should have thought that the machinery upon the smaller site was "rubbish resulting from the demolition." However, they admitted trespasses to land and goods in respect of the smaller site in the course of the trial before SINGLETON, J. He awarded the plaintiff £42 in respect of those acts, and I see no reason for differing from his judgment upon this point.

I now turn to the larger site. It is not in dispute that there was certain machinery upon the larger site, at the time of demolition, which was removed by the defendants to their yard. That machinery is very briefly described in the judgment of the judge, but it seems clear from the evidence, and from photographs 18 to 22, that it consisted of two heating boilers, a gas engine, a dynamo and cooling tank and a stone crusher. These machines were valued by the plaintiff's son at £125, but the judge obviously did not accept this evidence. He thought the machines were worth very little, and I see no reason for disagreeing with his view, but I think that, on any view of the evidence, the machines were there, and each of them was saleable in 1940 even if the purchaser would have dealt with them as scrap-iron. I regard the plaintiff's complaint under this head as a very trivial one, but it raises a question of some importance as to the construction of the Public Health Act, 1936, s. 58.

That question is, do the words "rubbish resulting from the demolition," on their true construction, include these machines? It is to be noted that nothing can come within these words unless it is rubbish, and is rubbish which results from the demolition. The OXFORD ENGLISH DICTIONARY defines "rubbish" as:

> Waste or refuse material; in early use especially such as results from the decay or repair of buildings; debris, litter, refuse.

Other meanings are then added, but to my mind these are the meanings which the word covers in this section. I can see no reason for giving it a more extended meaning in the context in which it occurs, and I think the reason why the section makes no reference to the removal of anything other than rubbish is that it never occurred to the framers of the section that anyone would be so foolish, or so unreasonable, as to desire to leave articles of any value on the site, or to object to their removal. If this is the true construction of the section, I do not think that the machines in question were "rubbish." If, however, they can fairly be described as rubbish, I entirely fail to see how they can fairly be described as "rubbish resulting from the demolition."

After any demolition of a structure, it is inevitable that there will be certain things upon the site, for example, fragments of plaster or stucco, pieces of brick and other pieces of matter, which were part of the structure when it was standing, and which became rubbish as a result of its demolition. Such things would clearly be "rubbish resulting from the demolition." On the other hand, a house already damaged by fire, or by enemy action, may have in it such articles as a safe or a mantelpiece, each of them complete in itself but built into the wall of the house. If the house is subsequently demolished under the section, and the demolition is carried out with due care, the safe and mantelpiece will still be in existence in their original condition, but each of them will be a wholly separate article instead of being part of a house. This is a result of the demolition, but can it be said that the safe or the mantelpiece is "rubbish resulting from the demolition" within the section? I cannot so construe the section. There may be border-line cases in which it is difficult to say whether the article in question is rubbish, and, if so, whether it results from the demolition. For instance, opinions might differ as to whether such things as blocks of stone or undamaged bricks, which formed part of the structure demolished and could be used in other building operations, were "rubbish" within the section, though it would seem clear that, if they were rubbish, they resulted from the demolition.

In the present case, while opinions may differ as to whether the machines in question are "rubbish," I cannot see in what sense they resulted from the demolition. The demolition had no effect whatever upon these machines. Before the demolition they were two heating boilers, a gas engine, a dynamo and cooling tank and a stone crusher. They were lying on the ground, and at least one of the boilers, and probably both of them, lay in a cavity. They were old and of little value and, according to the evidence of the witness Dodworth, covered with debris. After the demolition they were still the same machines, in exactly the same condition, except that the debris had been removed from them. For the purpose of removing them to the defendants' Mare Street depot the two boilers were "taken into their sections" (as Dodworth put it) and the wheels were taken off the gas engine, but I do not think that has any bearing upon the question whether these machines were "rubbish resulting from the demolition." Nor do I think it is material, for the decision of this question, to consider whether any one or more of these machines was or were beneath the surface of the site when the demolition took place. Wherever they were, it seems to me quite clear, on the evidence, that the demolition in no way altered the condition of any of them. The result is that, even if I were prepared to put so wide a meaning on the word "rubbish" as to include these machines, I should still feel quite unable to describe them as "rubbish resulting from the demolition" of the structure in question.

I ought now to deal with certain other matters which were discussed before us. In the first place, it was said, and said truly, that the object of the section was to improve amenities, and it was suggested that this object would be defeated if the magistrates had no power to order the removal of old machines, or safes, or mantelpieces from the site.

I quite agree that an assortment of articles lying spread out on an open site may be a very ugly spectacle, and I think it might have been well if the section had given the magistrates power to make an order for their removal, with the result that the local authority could have removed such articles, if the owner failed to carry out the order. In my view, however, the section confers no power to order the removal of chattels, unless they come within the description of "rubbish resulting from the demolition," and I have already suggested a reason why it was not thought necessary to confer such a power. The result is that, if a man is so foolish, or so obstinate, as to insist on his machinery or mantelpieces being left on the site, he is entitled to do so, so far as regards this section of this Act.

Next it was said that the local authority must have an implied power to remove chattels from the site, so long as they act reasonably in so doing, and that the defendants have acted reasonably in this case. For my part, as the section gives an express power for the local authority to remove rubbish resulting from the demolition, on default being made by the owner, I see no reason for implying a power to remove things which are not rubbish and do not result from the demolition. Further, even if such a power can be implied, I do not think the defendants acted reasonably in removing these machines to their own premises without first asking the owner what were his wishes in regard to them.

Again, it was suggested that, in removing these machines to their yard, the defendants acted as the plaintiff's agents "of necessity." I doubt if this defence is raised by the pleadings, but, assuming that it is sufficiently raised, on the facts of this case it is not established that any agency of necessity arose. No attempt was made to consult the plaintiff as to the disposal of these machines, and there is no evidence that it was impossible or even difficult to ascertain his wishes before removing the machines. The truth is, as the correspondence shows, that the defendants thought they had power to remove the machines on the larger site as rubbish, just as they thought (quite wrongly) that they had power to demolish the buildings on the smaller site and to remove machines therefrom. If they were wrong as to the machines on the larger site, I see no reason why they should not pay damages to the plaintiff in respect of this trespass to his goods.

Lastly, it was argued that the question whether these machines were "rubbish resulting from the demolition" was a question of fact, decided by the judge in favour of the defendants, and that his decision ought not to be disturbed. I do not agree that this was a question of fact; there was no real dispute as to what machines were on the land, though there was a marked difference of opinion as to their value. In these circumstances, the question which had to be decided was one of construction; SINGLETON, J., thought that the machines were "rubbish resulting from the demolition" within the meaning of the section, and I differ from him for the reasons which I have already expressed.

There being, in my view, a trespass to goods in respect of the larger site, I have carefully considered what damage the plaintiff has suffered by reason of that trespass. In my judgment, any damage which he may have suffered was negligible. If the machines had not been removed, they would have been lying in the open upon the larger site. There is no evidence that the plaintiff could have used them, and, if he had wished to sell them, I see no reason why they were not just as easy to sell from the defendants' yard. SINGLETON, J., expressed the view that, if he was wrong on the construction of the section, the plaintiff should only have 40*s.* damages, and I agree with this view. The result is that I would increase the damages awarded to the plaintiff from £42 to £44. I would leave undisturbed the order of SINGLETON, J., as to the costs before him, and in all the circumstances of this case I would make no order as to the costs of this appeal.

Appeal allowed. Damages increased by 40*s. No costs.*

Solicitors: *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (for the appellant); *Simmons & Simmons*, agents for *P. S. Rennison*, Town Clerk Bolton (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HARRIS *v.* BRENT.

[COURT OF APPEAL (Scott, Lawrence and Morton, L.JJ.), **February 20, 1945.**]

Landlord and Tenant—Rent restriction—Possession—Agricultural worker—Dwelling-house "reasonably" required for his occupation—Evidence—Certificate of War Agricultural Executive Committee—Whether certificate conclusive evidence that dwelling-house was "reasonably" required—Other suitable accommodation on landlord's property—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *Sched. I, para.* (*g*) (ii).

A farmer, who was the landlord of a cottage to which the Rent Restriction Acts applied, brought an action for possession against the tenant on the ground that the cottage was "reasonably" required for occupation by a worker engaged for the proper working of the farm. There were on the farm fourteen cottages, the tenants of most of which were not employed on the farm; there was also a large farm-house which was occupied by one person only. The landlord applied to the War Agricultural Executive Committee for a certificate that the worker, for whose occupation the dwelling-house was required by the landlord, was to be employed on work necessary for the proper working of the farm, in accordance with the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (*g*) (ii). Members of the committee visited the farm and selected the particular dwelling-house and issued a certificate. The deputy county court judge took the view that the certificate so issued was conclusive evidence that the dwelling-house was reasonably required by the landlord within the meaning of the Act and made an order for possession:—

HELD: although the certificate was conclusive evidence that the agricultural worker was necessary for the proper working of the farm, it was not evidence that the particular dwelling-house was reasonably required by the landlord within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (*g*) (ii).

[**EDITORIAL NOTE.** It is held here that the certificate of the county agricultural committee provided for in Sched. I, para. (*g*) (ii) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, is not evidence that a dwelling-house is reasonably required by the landlord. This still remains a condition precedent to the granting of a possession order. Reference may be made to *Pickford* v. *Mace* ([1943] 2 All E.R. 321), where the sufficiency of this certificate was fully discussed.

As to Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (*g*) (ii), see HALSBURY STATUTES, Vol. 26, p. 280.

Appeal by a tenant from an order of His Honour Deputy Judge Ritson, made at Reading County Court, on Oct. 20, 1944. The material facts are set out in the judgment of Scott, L.J.

Cecil R. Havers, K.C., and *L. MacLaren* for the appellant.

T. J. Sophian for the respondent.

Scott, L.J.: This case must be sent back for a new trial. It was an application under the Rent Restriction Acts by the landlord for possession of a dwelling-house occupied by a tenant, and it is, therefore, an application for ejectment.

The deputy county court judge made one mistake in arriving at his conclusion that the landlord ought to have possession, namely, that he thought the certificate of the War Agricultural Executive Committee was conclusive of the issue as to whether the house was reasonably required by the landlord within the meaning of the 1933 Act, Sched. I. para. (*g*). Read with the introductory words of the schedule, it says:

> A court shall, for the purposes of sect. 3 of this Act, have power to make . . . an order . . . for the ejectment of a tenant . . . without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*g*) the dwelling house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment . . . and . . . (ii) the court is satisfied by a certificate of the county agricultural committee . . . that the person for whose occupation the dwelling-house is required by the landlord is, or is to be, employed on work necessary for the proper working of [the farm] . . .

In this particular case the certificate was given in due form. The judge took the view that the language of para. (*g*) made the certificate conclusive not only of the statements of fact contained in it, but also of the fact required to be proved by the condition precedent laid down at the beginning of the paragraph, "if the dwelling-house is reasonably required by the landlord." He was in error in thinking that the certificate was any evidence of that fact. As we are sending the case back for re-trial, I say nothing whatever about the other facts of the case. The case will be tried by a different judge. The appeal must be allowed, with costs here; and the costs below will abide the decision of the judge who re-tries the case.

Lawrence, L.J.: I agree.

Morton, L.J.: I agree.

Appeal allowed with costs. Case remitted for new trial.

Solicitors: *W. H. Thompson* (for the appellant); *Berrymans* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

LEE *v.* NURSERY FURNISHINGS, LTD.

[Court of Appeal (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **February 12, 1945.**]

Factories—Dangerous machinery—Circular saw—Guard provided with ½in. clearance—" . . . . as low as practicable . . . "—Woodworking Machinery, Use of, Regulations, 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 10 (*c*).

The appellant was 19 years of age and employed in the respondents' factory as an operator of a circular saw used for cutting wood. The saw was mounted through a slot in a movable table. Fixed to the movable table was a cross-bar 2½ins. high against which the wood to be cut was placed and the table was pushed towards the saw. A guard was attached over the saw leaving a gap of 2¼ins. between the lower edge of the guard and the surface of the movable table. At the material time the appellant was engaged in cutting strips of wood two at a time, one being placed upon the other; in this way the overall height of the two strips of wood was 1¾ins. During this operation the appellant cut the fourth finger of her right hand on the saw. Upon the evidence it was uncertain whether the accident occurred as a result of the gap between the guard and the wood. On behalf of the appellant it was contended that the guard was not fixed as "low as practicable," within the meaning of the Woodworking Machinery Regulations, 1922, reg. 10 (*c*) :—

Held : (i) there was a clearance of ½in. between the top of the wood to be cut and the lower edge of the guard ; and in the absence of evidence to the contrary the guard could not be said to have been extended "as low as practicable" within the meaning of the regulation.

(ii) where there has been a breach of the safety regulations and the accident in question is of the very class that the regulations are designed to prevent, the court should not be astute to find that the breach of the regulation was not the cause of the accident.

[**EDITORIAL NOTE.** This is purely a question of the construction of the phrase "as low as practicable" in reg. 10 of the Woodworking Machinery Regulations. The point of wider interest established by the decision is that a court should not be astute to find that a breach of regulation is not connected with the accident, where the accident is one of the class which the regulation was intended to prevent.

As to Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-596, paras. 130-133 ; and for Cases, see DIGEST, Vol. 24, pp. 908-912, Nos. 62-84.]

Appeal by the plaintiff from a decision of Asquith, J., dated Oct. 2, 1944, on a question of the construction of the Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 (*c*). The facts are fully set out in the judgment of Lord Goddard.

S. R. Edgedale for the appellant.

F. W. Beney, K.C., and *Humfrey H. Edmunds* for the respondent company.

Lord Goddard : In my opinion, this appeal succeeds.

This is an appeal from a judgment of Asquith, J., who, in an action brought by the plaintiff for damages for personal injuries suffered by her by reason of the breach of the Woodworking Regulations, as she alleges, found for the defendants.

The facts of the case can be quite shortly stated. The plaintiff was a young girl of 19 at the time this accident happened and had apparently been employed in this factory, which I suppose was a war factory, for something like two years. The machine that she was working was one of those machines which have given rise to a great many cases in the courts, a circular saw. The circular saw was mounted through a slot or slit in a movable table, and it was the plaintiff's duty to push the movable table away from her so as to bring the wood, which had to be cut, in conjunction with the teeth of the saw. The movable table had on it a cross-bar against which the wood to be cut was held, and the cross-bar was some 2½ins. high. She was cutting chair legs, taking pieces off to reduce them to a particular length, and each of these legs had already been cut so that the dimension was that they were ⅞ins. thick. According, apparently, to the way that she was instructed to do her work, she cut two at a time, one being superimposed upon the other. She then held them against this piece of wood and pushed the table forward until the two pieces that had to be cut came into contact with the circular saw ; and that was the operation. It is, of course, obvious that two chair legs measured 1¾ins., and the lower edge of the guard had been fixed so that it was 2¼ins. above the surface of the table ; so there was a space of ½in. between the bottom of the guard and the wood that had to be cut.

In some way or another—and that is perhaps one of the more difficult parts of the case—the fourth finger of her right hand came in contact with the saw and a piece of it was cut off or nearly cut off, and she suffered accordingly. I say that possibly that is one of the more difficult features of the case because it is not easy to visualise exactly how this accident happened. It is no reflection on the plaintiff to say that her evidence on this point was neither clear, nor in one sense, reliable. She had obviously suffered a great shock and she probably did not remember exactly how this accident happened. Her evidence was that she was holding the two pieces of wood with both hands at the time of the accident. If that were so, it is quite impossible to understand how it was her right hand was injured and not her left hand, because her left hand would be nearer to the saw than her right hand. It is indeed more than probable that at the moment when the accident took place she had only got her right hand on this wood and not her left hand at all. It is also somewhat difficult to understand how the particular finger was hurt and not the first or second finger; but with that I will deal in a moment, when I have dealt with the question of the breach of the regulation.

The regulations which are in point are the Regulations for the Use of Woodworking Machinery, 1922. Those regulations were passed, as was explained in this court not very long ago, because it is quite impossible to fence a circular saw in such a way that no part of the saw is exposed, because if that were done it would be quite impossible to bring the wood that has to be cut against the saw. There are provisions in the Factories Acts which enable regulations to be applied to particular machines or machinery so as to allow them to be worked and the Use of Woodworking Machinery Regulations, 1922, are one of those regulations that have been passed for that purpose. They prescribe the precautions which are to be taken with regard to circular saws and other machines used in woodworking, and if those precautions are taken, then there is sufficient compliance with the Act.

Reg. 10 (*c*) is the first regulation that is material. It provides:

> The top of the saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw farthest from the fence.

There is no question here that the guard that was supplied answered that description. Then it goes on:

> The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw.

Reg. 21, which does not really, I think, as the judge said, carry the matter any further, provides:

> The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk.

In finding for the defendants, ASQUITH, J., based his judgment on two grounds. First, he said (and, if I may say so, I entirely agree):

> The word "practicable" here, in my view, must be read not *in vacuo*, but with due regard to two factors: (*a*) the nature of the material which the saw was required to cut [with that I think we may agree; you have got to adjust your guard as low as is practicable to enable you to cut the pieces of wood that you have got to cut] and (*b*) possibly also with due regard to the nature of the machine of which the saw formed part or of which it was an adjunct.

I think, from the rest of his judgment, he did not really base his judgment on that second ground and, if he had done, I think I should have had some difficulty in agreeing with him, because if your machine does not enable the guard to be adjusted as low as practicable, you must alter your machine or get another one; and in this case the reason why the guard was adjusted, as it was, was because this baulk of wood at the back, this cross-bar, was higher than the two pieces of wood which were being cut and, therefore, provision had to be made for the adjustment of the guard to enable it to clear that baulk of wood, but it is quite possible either to have used a less high cross-bar or to have scooped out (if I may use that expression) a place where the guard would go, so that the guard, in clearing the two pieces of wood which were being cut, would also clear the cross-bar. Admittedly in this case there was a clearance left of ½in. and it would seem, therefore, to be reasonably clear to anyone that that guard fixed with so large a clearance as ½in., was not as low as was practicable.

"Practicable" is defined in the OXFORD DICTIONARY as "capable of being carried out in action" or "feasible." Obviously, and indeed as ASQUITH, J., said, it could have been put lower and it was not. Where I think I differ from ASQUITH, J., is this: he said:

> In relation to such an object [that is 1¾ inches high] how low was it practicable to fix the guard? It was in fact fixed in such a way as to be 2¼ins. above the surface of the table. It seems to me, in these circumstances, that there was no extravagant clearance above the table, and that reg. 10 (*c*) was substantially complied with.

With all respect to Asquith, J., I think that he has there directed his mind to a consideration which is not what the Act requires. He considered whether there was an extravagant clearance. What the regulations, which have the force of statute, require is that the guard should be fixed as low as practicable. It speaks for itself that the guard in this case was not fixed as low as practicable.

On behalf of the respondents it has been said that the evidence was that it was fixed as low as was practicable, but, as I say, the fact really speaks for itself. It was not. If it was to be said that there was some particular reason why you could not fix it lower, so that there was not this ½in. gap, the expert should have said why you could not fix it so low or any lower than it was fixed. The fact is that, as it was, there was a gap of ½in. between the wood that was being cut and the bottom of the guard, and unless there was some compelling reason to make the court find that that was as low as practicable and not, as Asquith, J., thought, whether the gap was extravagant, I do not think that there can be any doubt in this case that there has been a breach of the statutory regulation, and I should so hold, because there was no evidence here to show that that gap could not have been very considerably decreased.

The only point that has given me some hesitation in this case is whether or not the evidence was sufficient for us to say that it was due to this gap or breach of the regulation that the accident happened. I have already said that one difficulty in the case is the evidence which the young lady gave herself, in which on certain points obviously she was mistaken. In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident. I think here that the evidence is clear enough on one point. We have not only got the evidence of the plaintiff that she was holding the wood, and it was inherently likely that she would be holding the wood; we also have got the evidence of a boy, who, although his evidence is somewhat vague, is quite firm on one thing, and that is the young lady was holding this wood with her right hand. If she was holding the wood, it is quite possible—indeed, it is much more probable—that the hand went where it did because of this gap.

Under the circumstances, I think that she has established her case. Accordingly, the appeal will be allowed and judgment will be entered for the plaintiff for the damages found for her by Asquith, J., which amounted to £267 10*s.*, and she will have the costs here and below.

MacKinnon, L.J.: I agree. Asquith, J., delivered an extremely careful judgment, with almost all of which I entirely agree. The only passage that I have marked as a point with which I disagree is that which has been read by my Lord, where he says, having given the measurements:

> It seems to me, in these circumstances, that there was no extravagant clearance above the table . . .

That is to say, that the ½in. clearance between the bottom of the guard and the top of the wood that was being cut was not an extravagant clearance. That, I think, is not the question, the point of law that Asquith, J., was called upon to face. The question was whether it was practicable, under the regulations, to diminish that ½in. and make it smaller. It is clear to me that it was quite practicable; and that being so, I think there was a breach, though a venial one, of the regulations and in the result the plaintiff is entitled to succeed.

du Parcq, L.J.: I am of the same opinion and for the same reasons.

Appeal allowed with costs; judgment for the plaintiff for £267 10s. with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the appellant); *Hewitt, Woollacott & Chown* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

HENDERSON SHORTT *v.* McILGORM (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Wrottesley, J.), **January 22, 1945.**]

Income Tax—Schedule E—Deductions from emoluments—Employment obtained through employment agency on payment of fee—Fee calculated on a percentage of one year's earnings—Whether fee so paid "money wholly, exclusively, and necessarily" expended in the performance of the employment—Income Tax Act, 1918 (*c.* 40), *Sched. E, r.* 9.

The appellant obtained the post of a secretary-accountant at a salary of £450 per annum, through an employment agency. On his appointment a fee of £30 became payable to the agency, calculated at the agreed rate of 5 per cent. of the appellant's remuneration for the first year. The appellant claimed to deduct the sum of £30 as an expense necessarily incurred within the meaning of Sched. E, r. 9, contending that by having obtained the post through the agency he became liable to pay their fee, the amount of which depended on the salary actually earned, and that he was, therefore, necessarily obliged to incur and defray, out of the emoluments of his office, the money so expended :—

HELD : the money expended in order to obtain employment was not money spent in the performance of the duties attached to the employment within the meaning of Sched. E, r. 9.

Nolder v. *Walters* (1) *applied.*

[**EDITORIAL NOTE.**] A sum paid in order to obtain an appointment is clearly distinguishable from expenses incurred in the performance of the duties of the appointment when obtained. This case is, therefore, an even stronger one for disallowing the deduction than *Ricketts* v. *Colquhoun* (2).

AS TO DEDUCTIONS FROM EMOLUMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 220-223, paras. 444-448 ; and FOR CASES, see DIGEST, Vol. 28, pp. 88-90, Nos. 519-535.]

Cases referred to :

*(1) *Nolder* v. *Walters* (1930), 46 T.L.R. 397 ; Digest Supp. ; 15 Tax Cas. 380.

(2) *Ricketts* v. *Colquhoun*, [1926] A.C. 1 ; 28 Digest 88, *519* ; 95 L.J.K.B. 82 ; 134 L.T. 106 ; 10 Tax Cas. 118.

CASE STATED by the Commissioners for the General Purposes of the Income Tax for the opinion of the King's Bench Division of the High Court of Justice. The following facts were found by the Commissioners :

The assessment [to income tax in the sum of £450 for the year ended Apr. 5, 1944] was made on the appellant under Sched. E of the Income Tax Act, 1918, in respect of the emoluments of his employment . . . the following facts are admitted :

(*a*) in the year 1942 the appellant was offered the position of secretary-accountant to . . . H. W. Clarke & Sons (Erith), Ltd., by . . . Laurie & Co., an employment agency with whom the appellant had previously registered for employment.

(*b*) The position could be obtained only through . . . Laurie & Co., and the appellant was recommended by them for the post and was appointed.

(*c*) The fee paid to the agency by the appellant was £30 being 5 per cent. of the remuneration for the first year calculated at the rate accepted.

(*d*) This payment was subject to a refund concession whereby the agency undertook to refund one-half of the amount should the employer terminate the employment within six months of the date of the engagement, unless such termination were caused by the employee's faults.

. . . It was contended by the appellant that since the fee paid to the agency was entirely dependent on the amount earned in performing the duties of the office, that it was money expended by him in such performance, and he claimed that the £30 should be allowed as a deduction from the sum assessed . . . the appellant submitted that [Sched. E], r. 9 . . . dealt with travelling expenses and had no bearing whatsoever on the question at issue—the fee paid to the agency—which covered commission for services rendered.

The Commissioners were of the opinion that Sched. E, r. 9, applied and that on the correct interpretation thereof the expense claimed was inadmissible.

The appellant appeared in person.

Reginald P. Hills for the respondent.

WROTTESLEY, J. : In this case the facts are all quite clearly set out in the case, and I need not repeat them categorically. The appellant now asks that he shall be allowed to deduct from, I think, the first year's salary the fees which he became liable to pay to the employment agency when he accepted the job found for him by the agency, and that liability is to pay the sum of £30. He says this : Had he not entered into the performance of that duty or job he would not have earned the money. He could not have earned the money from which to pay the £30, nor would he have been liable to pay that sum of money. He puts it like this : "I accepted the post, and by entering into the position I became liable to the employment agency to pay them their fees," and he also says and claims that upon those facts he is a man with an office which falls within the words of r. 9 of the rules applicable to Sched. E, for, he says, "I am the holder of an office or employment of profit, and I was necessarily obliged to incur and defray out of the emoluments of that office, or at any rate to expend this money wholly, exclusively and necessarily in the performance of the said duties." The commissioners found that r. 9 applies ; before the commissioners the appellant thought that r. 9 did not apply, but before me he has told me that it does apply and he has, in the way I have indicated, sought to bring himself within the language of that rule.

It seems to me that where the appellant's claim fails is that this expenditure was not money spent wholly, exclusively and necessarily in the performance of the said duties ; indeed, I go so far as to say it was not spent in the performance of the said duties at all within the meaning of that rule. It was money, the liability to pay which was incurred when he went to this particular employment agency and when they found him a job for he then became liable, subject to certain conditions, to pay that money in respect of the services which he had received from the employment agency in finding him the job ; so that the money expended in order to get the job was in no sense money spent in the performance of the duties attached to the job ; and I think, therefore, that the commissioners came to a right conclusion. If authority were needed, there is clear authority in the case referred to by the commissioners, the case of *Nolder* v. *Walters* (1), where Rowlatt, J., gives instances and expounds the meaning of this phrase, "money wholly, exclusively and necessarily expended in the performance of the duties." I see that in the argument he refers back to *Rickett's* case (2), which was an endeavour by a recorder to get the expenses of travelling down to the town where he acted as recorder deducted from his income tax assessment. In my judgment, therefore, the commissioners being right, the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

WIGAN COAL AND IRON CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Wrottesley, J.), **January 15, 1945.**]

Revenue—Stamp duty—Voluntary disposition inter vivos—Company—Transfer of shares—Transfer in pursuance of special resolutions dividing amongst members part of company's assets in specie or in kind—Transfer by company of shares owned in another company—Whether transfer liable to ad valorem duty—Finance (1909-10) *Act,* 1910 (*c.* 8), *s.* 74 (1), (5), (6).

At an extraordinary general meeting the appellant company passed special resolutions altering its articles by providing, *inter alia*, that a return to the members of paid up capital might be effected by dividing among them either *in specie* or in kind any part of the company's assets ; that the capital of the company which was divided into £1 shares, each fully paid, should be reduced by redeeming paid up capital to the extent of 10*s.* a share and that such redemption should be carried into effect by "distributing in satisfaction of one-fifth of the amount by which each holding of shares was to be reduced certain preference shares in the Lancashire Steel Corporation, Ltd., and in satisfaction of four-fifths of such amount certain ordinary shares" in the same corporation. In accordance with these resolutions some 134 shares of the Lancashire Steel Corporation, Ltd., representing a value of £149, were transferred to an owner of shares in the appellant company. The commissioners were of opinion that the transfer conferred a substantial benefit on the transferee, and, since it was not a disposition for valuable consideration, but a transfer operating as a voluntary disposition *inter vivos*, it attracted stamp duty corresponding to the value of the shares transferred :—

HELD : the transaction was in the nature of a voluntary disposition *inter vivos* and was liable to *ad valorem* duty under the Finance (1909-10) Act, 1910, s. 74 (1).

Associated British Engineering, Ltd. v. *Inland Revenue Comrs.* (1) *applied.*

[**EDITORIAL NOTE.** Three points of interest may be noted in connection with this claim for *ad valorem* duty on transfer of shares. (1) The company does not become a trustee of the shares, formerly part of its assets, for the individual shareholder. The position is distinguishable from that of a liquidator who has a fiduciary duty to distribute the assets. (2) There is a substantial benefit to the shareholder in holding the shares himself, as distinct from his position when the company held them as part of the assets of the company. (3) The action of the court in approving the reduction of capital does not make the transfer by the company otherwise than voluntary.

AS TO VOLUNTARY DISPOSITION DUTY, see HALSBURY, Hailsham Edn., Vol. 28, pp. 475-477, paras. 1004-1007 ; and FOR CASES, see DIGEST, Vol. 39, pp. 284, 285, Nos. 667-671.]

Cases referred to :

*(1) *Associated British Engineering, Ltd.* v. *Inland Revenue Comrs.*, [1941] 1 K.B. 15 ; [1940] 4 All E.R. 278 ; Digest Supp ; 164 L.T. 335.

*(2) *Cohen & Moore* v. *Inland Revenue Comrs.*, [1933] 2 K.B. 126 ; Digest Supp. ; 102 L.J.K.B. 696 ; 149 L.T. 252.

(3) *Garnett* v. *Inland Revenue Comrs.* (1899), 81 L.T. 633 ; 39 Digest 279, *636*.

CASE STATED by the Inland Revenue Commissioners pursuant to the Stamp Act, 1891, s. 13. The following facts were found by the commissioners :

On Apr. 19, 1943, an instrument being a transfer (hereinafter called " the transfer ") dated Apr. 3, 1943, whereby Wigan Coal and Iron Co., Ltd. (hereinafter called " the appellant company ") . . . transferred 134 A ordinary shares of £1 each fully paid in the Lancashire Steel Corporation . . . to William Rhodes . . . (hereinafter called the " transferee ") was presented on behalf of the appellant company to the Inland Revenue Commissioners . . . under the Stamp Act, 1891, s. 12, for their opinion as to stamp duty chargeable upon it . . .

At an extraordinary general meeting of the appellant company, held on Feb. 1, 1943, special resolutions were passed to alter the articles of association of the appellant company by providing (*inter alia*) :

(*a*) That upon any return to the members of capital paid up such return might be effected by dividing amongst the members *in specie* or kind any part of the assets of the company.

(*b*) (i) that the capital of the company be reduced from £1,809,725 divided into 1,809,725 shares of £1 each fully paid to £904,862 10*s.* 0*d.*—divided into 1,809,725 shares of 10*s.* each.

(ii) that such reduction be effected by redeeming capital paid up on the said 1,809,725 shares of £1 each to the extent of 10*s.* a share, and by reducing the nominal amount of each of the said 1,809,725 shares from £1 to 10*s*.

(iii) that such redemption be effected by distributing in satisfaction of one-fifth of the amount by which each holding of shares was to be reduced certain preference shares in the Lancashire Steel Corporation, Ltd., and in satisfaction of four-fifths of such amount certain ordinary shares in the Lancashire Steel Corporation, Ltd., and

(*c*) that upon such reduction taking effect the capital of the company be increased to its former amount of £1,809,725 by the creation of 1,809,725 new shares of 10*s.* each . . .

On Feb. 22, 1943, upon the petition of the appellant company an order was made in the Chancery Division of the High Court that the reduction of the capital of the company resolved on by the said special resolution be confirmed . . .

On Mar. 1, 1943, an office copy of the said order was duly filed with the registrar of companies and the said special resolution for reducing the share capital thereupon took effect.

At all times material hereto the transferee was the owner of shares in the appellant company and accordingly became entitled on Mar. 1, 1943, to receive from the appellant company a proportion of shares in the Lancashire Steel Corporation, Ltd., which at that date formed part of the assets of the appellant company distributable *in specie* among the members of the company in accordance with the said special resolutions. The 134 shares represented the proportion of ordinary shares in the capital of the Lancashire Steel Corporation, Ltd., to which the transferee was so entitled and they were accordingly transferred to him by the appellant company by the transfer on Apr. 3, at which date their value was £149 1*s.* 6*d*.

On these findings the commissioners came to the conclusion that the transfer conferred a substantial benefit on the transferee and was a conveyance or transfer operating as a voluntary disposition *inter vivos*. They held, therefore, that the transfer was liable to *ad valorem* duty under the Finance (1909-10) Act, 1910, s. 74, upon the value of the shares transferred, and assessed the duty at £1 10*s*. 0*d*., being the *ad valorem* duty upon £149 1*s*. 6*d*., under the relevant statutory provisions.

. . . The questions for the opinion of the court [were]:
(i) whether the transfer [was] liable to the *ad valorem* duty assessed by the commissioners.
(ii) if not, with what duty it [was] chargeable.

D. N. Pritt, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

Wrottesley, J.: The facts in this case are so simply and shortly set out in the case stated that they may be taken as part of my judgment, and I will not repeat them. As a result, the commissioners were of opinion that the transfer conferred a substantial benefit on the transferee, and accordingly it followed that this was not a disposition for valuable consideration, but a transfer operating as a voluntary disposition *inter vivos*, and so attracted stamp duty corresponding to the value of the shares transferred.

This follows from the Finance (1909-10) Act, 1910, s. 74 (1). That subsection is as follows:

> Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale . . .

The consideration for the sale was ten shillings. What would have to be substituted would be the value of the property, if the commissioners are right. Subsect. (5) of the same section is as follows:

> Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

There is also subsect. (6), the effect of which is that a conveyance or transfer made for nominal consideration for certain purposes (one of which is that it is made to a beneficiary by a trustee or person in fiduciary capacity) whether the trust is expressed or implied (to leave out irrelevant words) shall not be charged with duty under this section.

The decision of the commissioners in applying this section is said to be wrong for various reasons, with which I will deal one by one. First, it is said it is barely a transfer at all. That is, I think, only a figure of speech and not an argument, for, after the transfer has been given effect to, the transferee will become the owner of 134 ordinary shares in the Lancashire Steel Corporation, Ltd., whereas before the transfer those shares were owned by the Wigan Coal and Iron Company, Ltd., in which the transferee was merely an ordinary shareholder. Secondly, it is said that if the appellant company had wound itself up and distributed all its assets instead of only a part of them, as here, then, if that distribution of all its assets in a winding-up had involved a transfer of the shares to individual shareholders, that transfer would not attract tax *ad valorem*. If this is true, it is said by the Attorney-General to arise from the fact that such a distribution would be made by a liquidator, a person in a fiduciary capacity towards a shareholder and transferee. That case has apparently been thought by the Crown to be covered by subsect. (6) which I have read.

The appellant company in this case is not, in my view, in a fiduciary capacity towards its shareholders, and I have had no authority quoted to me or any passage from any book to indicate to me that, by reason of what took place here—namely, the passing of these special resolutions which are set out in the case, the application to the court, the order of the court and the minute approved by the court when it made its order—the company became thereby trustees of these shares, and the shareholders (I suppose, on the register at the time) became *cestuis que trust.* All that arises, as far as I am able to see, from that, is that the shareholders doubtless had some remedy at law, whatever it might be, to bring about a transfer to them of the shares or their value. If the result of this is that a liquidation produces one result *vis-a-vis* these sections and the distribution of part of the assets of a company produces a different result, and if that is thought to be anomalous, on the other hand it must be said that there are obvious differences between a company distributing part of its assets amongst its shareholders and thereafter continuing to carry on business, as this company clearly intended to do, and a liquidator charged with the fiduciary duty of distributing to the shareholders property in which the liquidator had no personal rights or interest whatever.

Then it is said that, notwithstanding the finding of the commissioners, there cannot in the circumstances of this case be a substantial benefit to the shareholders, because it is merely to take the assets out of the company's coffers and put them into the shareholders' coffers—that it is only to take £100, as counsel for the appellants puts it, from one pocket and put it into another pocket. Again, that appears to me to be rather a figure of speech than an argument, rather a criticism of the fairness of the section than an argument as to its meaning. After all, there is even more difference between 100 of these shares in the ownership of the company and 100 shares in the ownership of a shareholder in the holding company than there is, for instance, between £100 in a client's banking account and £100 in the client's pocket. I need not dilate on the difference. The moneys represented by the shares when the appellant company held them were in no sense under the shareholder's control. After the transfer the shares will pass, carrying with them all that shareholding implies, including any sum of money for which he could sell them.

Then it was said that the transfer cannot be said to be voluntary, because it was done or made in pursuance of the shareholders' rights once the court had made its order. What the court actually ordered was not that anything should be done with the shares, but that the capital might be reduced by the amount and in the way stated. The court also at the same time approved a special resolution under which, after the reduction of capital, it might be increased again by the creation of, and in fact there was created, the same amount of capital, again in 10*s.* shares, by doubling the number of 10*s.* shares. Whether the transfer is voluntary or not seems to me to depend on the language of sect. 74 (5). This is an uncompromising subsection which provides that all transfers which are not *inter alia* (I leave out " made in good faith " ; I have not to deal with that) for valuable consideration are to be deemed to be transfers operating as voluntary dispositions *inter vivos*, and the consideration is not (this is the effect of the appendix) valuable consideration where the commissioners are of opinion, as they are here, that the transfer confers a substantial benefit on the transferee. It is not for the commissioners to examine and see whether the transaction can be called a voluntary disposition. It is only for them to see whether there is inadequacy in the consideration or some other circumstance from which they can come to the opinion that the transfer confers a substantial benefit on the transferee. That phrase, I think, (and everybody agrees with me ; I have asked them) means a benefit over and above what is paid for at the time. The statute therefore decides that if a transfer is not a disposition for valuable consideration—and valuable consideration is not consideration which is inadequate in the view of the commissioners—or for other circumstances confers a substantial benefit on the transferee, it is to be deemed to be a transfer operating as a voluntary disposition. So that topic, as I have said, is not one that is confided to the commissioners for them to determine one way or the other.

In addition I see that LAWRENCE, J., took this matter into his consideration in the case of *Associated British Engineering, Ltd.* v. *Comrs. of Inland Revenue* (1). The judge's opinion there was, at p. 19 ([1940] 4 All E.R., at p. 280) :

> . . . I do not think that it can successfully be argued that the company was not acting voluntarily because it was acting in pursuance of the wishes of the majority of the corporators legally expressed . . .

It seems to me that the only distinction between that case and this one is, as was pointed out by counsel for the appellants, that there has intervened in this case, as there did not intervene in that one, the action of the court in approving the reduction of capital, the court doubtless having been told that it could be done in the way in which it was done here, namely, by the distribution of shares. It does not seem to me that that makes any difference. There, I think, the Attorney-General's argument is sound and that the transaction must in this respect be looked at as a whole.

For the reason that I have stated, if the commissioners are here entitled to bring into force and effect what I may call the appendix to subsect. (5), that is, the latter part of it, which sets out what valuable consideration is and what it is not, then the question does not arise, because the Act says that such a transfer is to be deemed to be a voluntary disposition *inter vivos*, and that matter is not left for determination either to the commissioners or to myself; it is settled by the Act of Parliament. Where a statute says that A is to be deemed to be B it deals purposely with things which are not B; and it would not be necessary to say that A was to be deemed to be B if A and B were the same thing.

So really I am left here with this—the opinion of the commissioners that the transfer conferred a substantial benefit on the transferee. I cannot say there is not ample material upon which the commissioners could come to that conclusion. It is quite clear that shares which are owned by a company in which I happen to hold shares are one thing and shares which I have in my own name are another. The latter I can sell; in respect of the latter I can vote; the latter I can pledge. None of those things can be done in respect of shares held by a company in which I hold shares. So it cannot for a moment be said that there was not ample ground upon which the commissioners could come to the conclusion to which they have come. That still leaves this point. It is argued by the Attorney-General that quite apart from that, and even if they did not hold that opinion, this conveyance or transfer falls within subsect. (1) as being a conveyance or transfer operating as a voluntary disposition *inter vivos*, because of the whole transaction being of the nature it was. The transfer obviously has a nominal consideration and only a nominal consideration. It is ten shillings. The value of the shares is found in the case to be £149. It is said by counsel for the appellants that really the consideration for this transfer moved when the transferee as a shareholder in the holding company had his capital cut down by one half. As to that aspect of the case, if it were necessary I should say that I agree with the views expressed by not only LAWRENCE, J., in the case to which I have referred, but also with the views expressed by FINLAY, J., when he quoted, with approval, a passage from a judgment of CHANNELL, J., which is to be found set out in *Cohen & Moore* v. *Inland Revenue Comrs.* (2). This is the passage, at p. 136:

> If this argument is good . . . [said CHANNELL, J., in the case of *Garnett* v. *Inland Revenue Comrs.* (3)] it seems to me that by paying your money first and executing your deed afterwards you could always get out of the *ad valorem* stamp. That cannot possibly be so. It seems to me that the question whether this is to be stamped as a conveyance is very much the same as the question which has arisen over and over again on that rather awkward definition in the Bills of Sale Act about a receipt being a conveyance; and the question is whether it is one transaction. If there is a clearly independent transaction and it is not all part of one transaction, then the thing would stand on a different footing.

Viewing this as one transaction, it seems to me that the reduction of capital by one half cannot be said to be the true consideration for this transfer. It was really a step, and a necessary step, having regard to the law controlling limited companies, in order to enable the company to do what it desired to do, namely, to hand over these shares to its shareholders. The reduction of capital was not the consideration. It was narrative; it was part of the story, and a necessary step.

For these reasons I think that the first question asked by the commissioners should be answered as follows: The transfer is liable to the *ad valorem* duty assessed by the commissioners. The second question, therefore, does not arise.

Appeal dismissed with costs.

Solicitors: *Roney & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

Re BROWN'S MORTGAGE, WALLASEY CORPORATION *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Cohen, J.), **January 25, 1945.**]

Public Health—Housing—Small dwellings—Money advanced by local authority for purchase of small house—Charge by way of legal mortgage—Foreclosure—Local authority takes possession—Increase in value of house—Whether local authority entitled to pay mortgagor profit on sale of house—Small Dwellings Acquisition Act, 1899 (c. 44), *ss.* 3 (3), 5, 6.

Under the provisions of the Small Dwellings Acquisition Act, 1899, a local authority advanced A.B. the purchase money for his house by way of legal mortgage. A.B. died in Oct., 1939, and in 1940 his personal representative wrote to the local authority asking them to foreclose and also handed over the keys of the house. The local authority thereupon obtained an order allowing them to enforce the power of sale, but, on the house being offered for sale, it was impossible to find a purchaser at the price required. Since then, however, owing to the shortage of house property, the value of the house had considerably increased and the local authority thought that they would now be able to sell it for a sum in excess of the amount owing on the mortgage and interest. They wished to let A.B.'s personal representative have the benefit of the increased value and, therefore, asked for the decision of the court as to whether they were at liberty to pay her the sum representing the difference between the amount owing to them for principal and interest and the net purchase price received by them on the sale of the property. They contended that the words " shall not be liable to pay " in sect. 6 (2) of the 1899 Act did not mean " shall not pay " but left them an option :—

HELD : the local authority were trustees for the ratepayers and, on the true construction of the Small Dwellings Acquisition Act, 1899, s. 6 (2), they were not at liberty to make the payment.

[**EDITORIAL NOTE.** It is held here that a local authority are in the position of trustees as regards the ratepayers, and, therefore, however humane their desire to give the representative of the mortgagor the benefit obtained by this sale, they had no more right to do so than would trustees in a private trust without the consent of all the beneficiaries. The Act must be strictly construed as " shall not pay " and left the corporation no option.

FOR THE SMALL DWELLINGS ACQUISITION ACT, 1899, see HALSBURY'S STATUTES, Vol. 13, p. 881.]

ADJOURNED SUMMONS by the Wallasey Corporation to determine whether, on the true construction of the Small Dwellings Acquisition Act, 1899, ss. 5, 6, and in the events which have happened, the plaintiffs are at liberty, on any sale of the property comprised in a mortgage dated Oct. 1, 1927, namely, the freehold dwellinghouse, 27, Burrel Drive, Moreton, in the county of Chester, to pay to the personal representatives of the mortgagor (who died on Oct. 25, 1939) a sum representing the difference between the amount owing to the plaintiffs for principal and interest and the net purchase money received on such sale, or, alternatively, to allow the personal representatives to redeem the property on payment of the amount so owing to the plaintiffs for principal and interest. The facts are set out in the judgment.

W. L. Blease for the Wallasey Corporation.
H. O. Danckwerts for the Attorney-General.

COHEN, J. : Before stating the facts of this particular case, which form the basis of the application, I had better refer to the Small Dwellings Acquisition Act, 1899, as a result of which statute this application arises. It is an Act to empower local authorities to advance money for the purpose of enabling persons to acquire the ownership of small houses in which they reside, and lays down the advances which are to be made. Sect. 3 (3) provides :

> Where default is made in complying with the statutory condition as to residence, the local authority may take possession of the house, and where default is made in complying with any of the other statutory conditions, whether the statutory condition as to residence has or has not been complied with, the local authority may either take possession of the house, or order the sale of the house without taking possession.

The local authority has two alternatives. Sect. 5 deals with the position in the event of the authority taking possession of the house and provides:

> (1) Where a local authority take possession of a house, all the estate, right, interest, and claim of the proprietor in or to the house shall, subject as in this section mentioned, vest in and become the property of the local authority, and that authority may either retain the house under their own management or sell or otherwise dispose of it as they think expedient. (2) Where a local authority take possession of a house they shall, save as hereinafter mentioned, pay to the proprietor either (*a*) such sum as may be agreed upon; or (*b*) a sum equal to the value of the interest in the house at the disposal of the local authority, after deducting therefrom the amount of the advance then remaining unpaid and any sum due for interest . . .

The local authority thus becomes liable to make certain payments to the owner of the house. Sect. 6 deals with the case where a local authority exercises its alternative of ordering the sale of the house without taking possession. It provides:

> (1) Where a local authority order the sale of a house without taking possession, they shall cause it to be put up for sale by auction, and out of the proceeds of sale retain any sum due to them on account of the interest or principal of the advance, and all costs, charges, and expenses properly incurred by them in or about the sale of the house, and pay over the balance (if any) to the proprietor. (2) If the local authority are unable at the auction to sell the house for such a sum as will allow of the payment out of the proceeds of sale of the interest and principal of the advance then due to the authority, and the costs, charges, and expenses aforesaid, they may take possession of the house in manner provided by this Act, but shall not be liable to pay any sum to the proprietor.

It is on that section that the local authority acted in the case which gave rise to the present application.

When the mortgagor, Arthur Brown, entered into the mortgage the mortgagees were the Wirral Rural District Council. All the property of that district council is now vested in the Wallasey Corporation. The principal and interest payable under that mortgage were repayable by an annuity of £32 11*s*., payable over a period of 20 years from Jan. 1, 1928. By a supplemental deed, dated Jan. 22, 1937, the annuity was extended to 30 years and as from Jan. 1, 1937, it was reduced to £28 13*s*. The mortgagor died on Oct. 25, 1939. Letters of administration were granted to the widow, and in 1940 the corporation received a letter from her asking them to foreclose, as she did not wish to have any further responsibilities with regard to the property; and she handed over the keys of the property to the town clerk. Owing to the amount of arrears of interest outstanding on the mortgage and in view of the request of the widow, the corporation applied for leave to enforce the power of sale and, on that application, an order was made giving them leave to exercise that power. The corporation put the house up for sale but failed to sell. They then took possession of the property and have since collected the rent. A position has, therefore, now arisen under which the local authority are in possession, but under sect. 6 (2) of the Act, they are not liable to pay any sum to the mortgagor.

Owing to damage, due to enemy action, it was at the time difficult to find a purchaser, but owing to the shortage of accommodation the property is now of considerably higher value than it was in 1940 and the corporation think that they can sell for a sum in excess of the amount owing on the mortgage and interest to date. The corporation wish to let the widow have the benefit of this increase in value and accordingly desire to reopen the transaction.

I can well understand that the corporation do not wish to take advantage of an adventitious rise in the value of the property at the expense of the widow, but the town clerk very properly advised them that they are in the position of trustees and should consider whether it is consistent with that position for them to make a payment to the widow. If it were the case of private trustees, such a payment could not be made without the consent of all the beneficiaries. I cannot see that the fact that the corporation are trustees, not under a private trust but for the ratepayers, makes any difference. Unless, therefore, the trustees are liable to pay, they cannot properly do so. Counsel for the corporation asked me to hold that the words "shall not be liable to pay" do not denote "shall not pay" and leave the corporation an option. I am unable, however, to take that view and I hold that on the true construction of sect. 6 (2) of the statute, and having regard to their position as trustees for the ratepayers, the corporation must not pay to the legal personal representative of the mortgagor the sum representing the difference between the amount owing to them for principal and interest and the net purchase price received by them on the sale of the property.

Order accordingly.

Solicitors: *E. Evans*, Town Clerk, Wallasey (for the Wallasey Corporation); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

EDWARD FAIRLESS BARBER *v.* JESSIE CHALMERS WOLFE.

[Chancery Division (Romer, J.), **February 13, 1945.**]

Sale of Land—Contract—Deposit—Purchaser in possession of property—Decree of specific performance—Failure of purchaser to complete—Rescission of contract—Forfeiture of deposit—Election by vendor to rescind contract—Right to recover damages or mesne profits as damages barred by election—Occupation rent not payable by purchaser.

The defendant was a tenant of certain property belonging to the plaintiff. By a contract for sale the defendant agreed to purchase the property and paid a deposit. The defendant made default in completing the purchase and the plaintiff brought an action for specific performance. The defendant failed to complete on the appointed date. On a motion by the plaintiff for rescission of the contract and forfeiture of the deposit, the plaintiff claimed (i) that the defendant should pay a sum of £142 8*s.* 11*d.* for *mesne* profits as provided under the contract; (ii) that the defendant was liable for damages for breach of contract; or alternatively (iii) that the defendant, having been in possession or control of the property, was bound to pay an occupation rent:—

Held: (i) the result of rescinding the contract was to rescind it *ab initio* and, therefore, the plaintiff was not entitled to the money claimed.

(ii) if, as a result of the failure of the defendant to complete, the plaintiff elected to apply for a rescission of the contract, he was not entitled to obtain damages for the breach of the contract.

Harold Wood Brick Co., Ltd. v. *Ferris* (2) *distinguished.*

(iii) as it was not proved that the defendant received rents as profit out of this property, the plaintiff was not entitled to charge the defendant with an occupation rent.

Hutchings v. *Humphreys* (3) *applied.*

[**EDITORIAL NOTE.** The court holds it to be well established that on an application for rescission in a vendor's action for specific performance, damages will not be granted for breach of the contract which it is sought to rescind. The argument to the contrary based upon *Harold Wood Brick Co.* v. *Ferris* (2) fails because in that case no decree for specific performance had been made and the court regarded what happened there as a repudiation of the contract by one party to it, which put the other party in a position to claim damages.

As to Remedies under an Uncompleted Contract, see HALSBURY, Hailsham Edn., Vol. 29, pp. 374-379, paras. 513-519; and for Cases, see DIGEST, Vol. 40, pp. 221-229, Nos. 1914-1994.]

Cases referred to:

(1) *Hall* v. *Burnell*, [1911] 2 Ch. 551; 40 Digest 228, *1985*; 81 L.J.Ch. 46; 105 L.T. 409.

*(2) *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K.B. 198; Digest Supp.; 104 L.J.K.B. 533; 153 L.T. 241.

*(3) *Hutchings* v. *Humphreys* (1885), 54 L.J.Ch. 650; 40 Digest 224, *1931*; 52 L.T. 690.

Motion by vendor for judgment in an action for specific performance and for rescission of the contract of sale and forfeiture of the defendant purchaser's deposit. The decree for specific performance was made on June 19, 1944. The defendant purchaser failed to complete on the appointed date. The material facts are fully set out in the judgment of Romer, J.

C. L. Fawell for the plaintiff.

A. G. N. Cross for the defendant.

ROMER, J. : This is a motion for judgment in a vendor's action for specific performance. The decree for specific performance was made on June 19, 1944, directing the usual accounts and inquiries and payment. A certificate has now been made. The defendant, who is the purchaser, failed to complete on the appointed date, whereupon this motion has been brought on asking for rescission of the contract and forfeiture of the deposit. The only point that I think may give rise to some little difficulty is the claim that the plaintiff makes that the defendant should pay what was originally a sum of £212 14*s.* 5*d.*, but now is conceded to be treated as a sum of £142 8*s.* 11*d.*, for *mesne* profits, being 5 per cent. on the purchase price from Dec. 21, 1944, to the present time. The first way that it is put by the plaintiff in asserting that he is entitled to this is by pointing to cl. 9 of the contract which, if the contract had been carried into effect, would have resulted in that sum being payable to him. But, inasmuch as the plaintiff has now elected to come to the court and ask for an order rescinding the contract, it does not appear to me to be open to the plaintiff now to point to that clause and say : " Notwithstanding the rescission, I am entitled to the moneys payable thereunder." It seems to me that the result of rescinding the contract is, at all events for this purpose, to rescind it *ab initio*, with the result that the plaintiff is not entitled to the moneys payable under any particular clause, or, at all events, to the moneys payable under that particular clause.

Then it is said that, apart from that, he is entitled to something in the nature of *mesne* profits or occupation rent by way of damages. The position, apparently, is that the defendant remained in personal possession of the property, or, at all events, had control of it, and let somebody else live there if she did not live there herself. But, as far as I know, there were no actual receipts representing rents which she got out of this property. If there were, I think she would be obliged to account for them, but it is not suggested that she has in fact received moneys for which she should account. So it comes down, really, as I see it, to a question whether she is bound to pay something in the nature of occupation rent, either under some general principle of equity, or as forming part of damages properly awardable to the plaintiff. In a vendor's action for specific performance, if the vendor elects to take a decree for specific performance, and that decree is worked out, and the certificate is made and the purchaser fails to complete, undoubtedly the plaintiff is entitled to come back to the court and ask for the rescinding of the contract. But, if the plaintiff elects to take that course, I thought it was abundantly established that he could not, at the same time, obtain damages for the breach of the contract which he was asking the court to rescind, and I still believe that to be the practice. The relevant cases are summarised in 3 SETON, JUDGMENTS AND ORDERS, 7th Edn., p. 2220, and they range over a considerable period of time, the last one being a decision of EVE, J., in *Hall* v. *Burnell* (1). Whatever the foundation of the rule is, I am not sure that it is necessary to inquire into it at the present moment. If that is established, as I think it is, it seems to me that only a decision of a higher court can introduce some new rule.

It is suggested in the present case that a higher court has in fact done so, by reason of the decision of the Court of Appeal in *Harold Wood Brick Co., Ltd.* v. *Ferris* (2). It is quite plain, at p. 200, that an argument was addressed to the Court of Appeal there to the effect that :

> There is no case in which a vendor who has given notice of rescission of a contract has afterwards recovered damages for non-performance by the purchaser.

In that case the vendors, apparently did serve a notice on the defendant purporting to rescind the contract and giving notice that they would proceed to sell the property by tender. The Court of Appeal held, in the circumstances of that particular case, that the vendors were entitled to damages. But it is to be observed that that is not a case, so far as I know, where any deposit was paid under the contract. It certainly was not a case where a decree of specific performance had been made, or where, as a result of, or consequent upon, the decree of specific performance being made and the subsequent default of the purchaser, the vendor had to come back to the Court of Chancery for what was described, I think, by EVE, J., in *Hall* v. *Burnell* (1) as the relief which this court affords in those circumstances, of giving relief " by way of rescission." It was a case where the court regarded what had happened merely as a breach of contract amounting to a repudiation of the contract by one party to it, which was accepted by the other party to the contract, who was then in a position to claim damages for breach of contract. GREER, L.J., in *Harold Wood Brick Co., Ltd.* v. *Ferris* (2), at p. 205, says :

> If one party indicates by his conduct that he is unable or unwilling, whatever time is given, to perform his contract, that is sufficient to justify an acceptance of the repudiation and to entitle the other party to damages, and I base my judgment on the fact that a term which was of the essence of the contract has been broken by the appellant, and, therefore, he is liable for the damages given against him.

The other judgments seem to me to the same effect. It does not appear to me that a principle is deducible in this case of *Harold Wood Brick Co., Ltd.* v. *Ferris* (2) which is sufficient to displace the long series of authorities which are binding on me, and which, so far as I know, have been recognised for years as being the practice of this court, namely, that on rescission damages will not be awarded. The same rule is still accepted as applicable in the latest edition of WILLIAMS ON VENDOR AND PURCHASER. As I say, if the rule is to be disturbed, it must be disturbed or altered by a higher tribunal.

But, apart from the question of damages, it is then suggested that it would be right to award against the purchaser in this case an occupation rent. There, again, I have the clear authority of NORTH, J., in the case of *Hutchings* v. *Humphreys* (3), that in such a case the plaintiff is not entitled to charge the defendant, who is in possession of the property, with an occupation rent. If it could be proved, or if it be the fact, that the defendant had received rents as profits, as I have said, an account of those profits would be directed, and the same would then be recovered by the plaintiff as having been moneys actually received by the purchaser for her own benefit. Therefore, it seems to me, so far as the minutes which are before me ask for an order on the defendant to pay the sum of £142 8*s.* 11*d.* for *mesne* profits, I am unable to make that order, and it must be omitted from the minutes.

Then counsel for the plaintiff desired to add to his minutes a provision entitling him to the costs of producing and proving his title to the premises, and that counsel for the defendant concedes the plaintiff is entitled to have. With those alterations, the order can go.

Order accordingly.

Solicitors : *Kingsford, Dorman & Co.* (for the plaintiff) ; *Hasties* (for the defendant).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re EVERTITE LOCKNUTS (1938), LTD.
(APPLICATION OF BERNARD NOEL PRANGLEY).

[CHANCERY DIVISION (Vaisey, J.), **February 12, 1945.**]

Companies—Scheme to transfer shares to transferee company—Majority of shareholders approving scheme—Compulsory acquisition of shares of dissentient shareholder—Application of dissentient shareholder for order of court—Fairness of scheme—Information provided by transferor company considered insufficient by dissentient shareholder to accept or to reject offer—No ground for interference of court—Companies Act, 1929 (c. 23), *s.* 155.

The respondents, R.O. & Co., made an offer to the shareholders of Evertite Locknuts (1938), Ltd., to acquire their shares in the latter company at a price of 1*s.* 3*d.* for each 1*s.* ordinary share held. This offer was accepted by shareholders representing 699-700ths of the total share capital of Evertite Locknuts (1938), Ltd. For the remaining ordinary shares to the nominal value of £28, an application was made under the Companies Act, 1929, s. 155, for an order that the respondents were not entitled to acquire the shares of the applicant since the directors of Evertite Locknuts (1938), Ltd., had withheld from the applicant certain information concerning that firm's principal asset, as a consequence of which the applicant had not been in a position to judge whether to accept or reject the offer made :—

HELD : in the absence of proof that the proposed scheme was unfair, the mere fact that a shareholder was not provided with all the materials upon which he could come to a just conclusion in regard to the proposal, was not a sufficient ground for the court to interfere:

Re Hoare & Co., Ltd. (1) *applied.*

[**EDITORIAL NOTE.** Sect. 155 of the Companies Act, 1929, a new section making provision for the acquisition of the shares of minority shareholders in a transfer or reconstruction, gives no indication of the grounds upon which the court may intervene and "order otherwise." It is held here, following the only other decision on the section, *Re Hoare & Co.* (1), that the onus is on the dissenting shareholders to show ground for intervention amounting to evidence that the scheme is unfair.

As to Power to Acquire Shares of Dissenting Shareholders, see HALSBURY, Hailsham Edn., Vol. 5, pp. 800, 801, para. 1373; and for Cases, see DIGEST, Supp., Companies, p. 97, No. 7119*a*.]

Case referred to:

*(1) *Re Hoare & Co., Ltd.* (1933), 150 L.T. 374; Digest Supp.

Application by adjourned summons for an order of the court preventing the transferee company from acquiring the shares of a dissenting shareholder. The facts are sufficiently set out in the judgment.

C. L. Fawell for the applicant.

Cecil Turner for the respondents.

Vaisey, J.: This is an application under the Companies Act, 1929, s. 155. That section, which I believe appeared in that Act for the first time—that is to say, it is not a re-enactment of anything which appeared in any earlier statute—is of a somewhat curious character. It provides:

> Where a scheme or contract involving the transfer of shares [in one company, which the section defines as "the transferor company," to another company, which the section defines as "the transferee company"] . . . has within four monthe after the making of the offer . . . by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may [within a certain time limited by the section] . . . give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by tke dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire . . .

the shares of the dissenting shareholder on the terms applicable under the scheme or contract to the shares of the approving shareholders.

It will be observed that the section gives no indication of the grounds on which the court could intervene and make an order preventing the transferee company from acquiring the shares of a dissenting shareholder. But, fortunately, the section has already been considered by Maugham, J., in *Re Hoare & Co., Ltd.* (1). The judge in that case considered the terms of the section in relation to the facts of the case then before him. I think that the decision is accurately summed up in the headnote, which says it was held:

> . . . that where not less than nine-tenths of the shareholders in the transferor company approve a scheme . . . *prima facie* the offer must be taken to be a fair one, and that the court will not "order otherwise" . . .

so as to prevent what is described, with more or less accuracy, as the expropriation of the dissenting shareholder's shares unless it is affirmatively established in the face of the apparent views of the large majority of the shareholders that the scheme is in point of fact unfair.

The judge in his judgment says, at p. 375:

> I think it is manifest that the reasons for inducing the court to "order otherwise" are reasons which must be supplied by the dissentients who take the step of making an application to the court, and that the onus is on them of giving a reason why their shares should not be acquired by the transferee company.

After criticising the use of the word "expropriation" as being not altogether apt to the circumstances of that case, the judge goes on to say:

> Without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to "order otherwise" in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of the shareholders, the scheme is unfair.

In that particular case, where the dissentient shareholders represented ·14 per cent. of the share capital, he directed that the transferee company should pay the costs of the dissenting shareholders, who failed in their application, and he also allowed them certain interest which he described as "a small *solatium*" appropriate in the circumstances.

In the present case, the dissenting shareholder who makes this application does so in respect of a holding of shares of the nominal value of £28: while the shareholders who, either originally or subsequently had become bound to transfer their shares, held shares of a nominal value of over £19,850, those being the figures relating, I think, only to the ordinary shares: the preference shareholders also affected by the proposal having agreed, I think, with practical unanimity to accept the offer.

The applicant does not say, and does not attempt to say, that the offer of 1*s.* 3*d.* for each 1*s.* share which is made to him in common with the rest of the ordinary shareholders, is an unfair offer, an inadequate price. What he says is that at the time when the offer was made, and when he was called upon to consider whether or not he should accept it, he was without sufficient, or perhaps without any, information as to the relevant facts upon which he could have based his conclusion one way or the other. That grievance or complaint is obviously one which he cannot urge against the respondents to the present summons, who are not the transferor company under the section, but the transferee company. It may be that he could, by appropriate proceedings against the transferor company, have compelled a disclosure of documents or other information sufficient to satisfy him; or, at any rate, which would be regarded by the court as sufficient to satisfy him. I am bound to say that I think the information which he received was perhaps a little meagre. The point was that the transferor company, the name of which is The Evertite Locknuts (1938), Ltd., had as its principal asset a large holding of shares in another company known as Nuts and Bolts (Darlaston), Ltd. What the applicant says is that the directors of the transferor company withheld from him information in their possession or under their control with relation to the position or prospects of Nuts and Bolts (Darlaston), Ltd. I have really no materials before me which will enable me to say either that any information with regard to that company was withheld, or as to whether, if so, it was withheld improperly.

The difficulty I feel is that, if once it is conceded that a scheme of this kind can be upset merely for the reason that a shareholder is not given all the information which he might require or might expect from the directors of the transferor company, there would be no limit to the inquiry which would have to be set on foot as to the extent to which his demands for disclosure ought to be conceded. It may be—I do not say that it is—possible that the present applicant has some grievance against the directors of the Evertite Locknuts (1938), Ltd. But I am quite satisfied in my own mind that I should be going much further than MAUGHAM, J., was prepared to go in *Re Hoare & Co., Ltd.* (1), if I said that it was not necessary for a dissentient shareholder, making an application under the Act, to establish unfairness, but that it would suffice if he merely said that he regarded himself, or was in fact, unprovided with all the materials upon which he could come to a just conclusion in regard to the acceptance or rejection of the offer. Following as I do, the principle of *Re Hoare & Co., Ltd.* (1), and applying it as best I can to the somewhat different circumstances of the present case, I do not see how I can listen to the plea of the applicant, who refuses to tell me whether he regards the offer as fair or unfair, but merely asks the court to say that he is not bound because he might have had more information than in fact was offered to him as to circumstances which were, or might have been, relevant when he was considering the terms of the offer which he had received. I should also like to adopt the expression of sympathy of MAUGHAM, J., with the small shareholder who feels aggrieved at being overborne by the overwhelming numbers of his fellow shareholders. I think that the court should always be ready to consider the objections of those who may be prejudiced, or may feel that they are being prejudiced, by the very drastic terms of the section. At the same time, if I were to accede to this present application, it seems to me that the whole matter would be left in a condition of quite intolerable uncertainty, and that it cannot be right that one shareholder owning one-sevenhundredth part of the shares affected by the proposal should be entitled to stand out against the decision of the 699-700ths of the share capital, merely because he has, as he thinks, been left somewhat in the dark in regard to the material facts. I think I need not analyse the exact figures in this case. Those which I have stated are sufficiently accurate for the purposes of the present judgment, and I must refuse the relief for which the applicant asks.

As regards the costs of the application, this is not, in my judgment, a case in which I could follow the precedent of the case before Maugham, J., by ordering the respondent company, that is, the transferee company, to pay the applicant's costs ; but I think that justice will be done if I dismiss the application and make no order as to the costs of it.

Application dismissed. No order as to costs.

Solicitors : *Routh, Stacey, Hancock & Willis*, agents for *Maslen & Maslen*, Bournemouth (for the applicant) ; *Bristow, Cooke & Carpmael* (for the respondents).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

Re ARKWRIGHT'S SETTLEMENT, PHOENIX ASSURANCE CO., LTD. *v.* ARKWRIGHT AND OTHERS.

[Chancery Division (Romer, J.), **January 23, 1945.**]

Settlements—Mining leases—Capitalisation of rent—Resettlement subject to overriding interests not compound settlement for this purpose—Extension of term—Whether surrender and regrant—Right of tenant for life to retain whole rent—Settled Estates Act, 1877 (c. 18), *s.* 4—*Settled Land Act,* 1882 (c. 38), *ss.* 7 (1), 11—*Settled Land Act,* 1925 (c. 18), *ss.* 52, 59 (1).

Under his grandfather's will, dated May 30, 1857, William Arkwright became tenant for life of certain settled estates, without impeachment of waste and with power to grant mining leases for a term not exceeding 21 years. In 1882, he obtained the order of the court to grant a lease to the Stavely Coal & Iron Co., for 63 years subject to the provisions of the Settled Estates Act, 1877. In Sept., 1916, William Arkwright and his eldest son Bertram Arkwright, the first defendant, disentailed the settled estates and executed a resettlement subject to certain overriding estates and interests contained in the original settlement under the will. Upon William Arkwright's death on Feb. 19, 1925, Bertram Arkwright became tenant for life of the settled estates and, on July 13, 1925, he entered into a deed with the Stavely Coal & Iron Co., extending the term contained in the lease of 1882 from 1945 to 1984. The deed of July 13, 1925, expressly stated that it was supplemental to the lease of 1882 and was not a surrender and regrant, but it did not mention under what powers Bertram Arkwright professed to be acting. Under the Coal Act, 1938, the royalties vested in the Coal Commission from July 1, 1942. During William Arkwright's lifetime, the trustees of the settlement had capitalised one quarter of the rents and profits paid by the Stavely Coal & Iron Co., as directed by sect. 4 of the 1877 Act, and had continued to do so after Bertram Arkwright became tenant for life. It was contended by Bertram Arkwright that he was entitled to the whole rents and profits because his interest was not under the will settlement but under the resettlement of 1916 to which the 1877 Act did not apply, and because the true position was that he had succeeded in 1925 to a life tenancy in property which was already the subject of a mining lease granted under a different settlement. On behalf of the remaindermen it was contended that (i) owing to the overriding interests to which the 1916 settlement was subject, Bertram Arkwright was tenant for life under a compound settlement to which the 1877 Act still applied ; (ii) alternatively, by entering into the deed of July, 1925, Bertram Arkwright lost his right to a quarter of the rents since although the deed purported to be merely a variation, it could only take effect in law as a surrender and regrant, and must be regarded as so operating for all purposes :—

Held : (i) Bertram Arkwright's interest was under a new settlement to which the 1877 Act did not apply. (*Re Hall* (1) *followed*). Although there was a compound settlement for some purposes, it did not affect the matter in question.

(ii) the tenant for life had power to vary by deed the terms of a lease provided that its length should not exceed 100 years from the date when it took effect; the fact that there was no statutory provision for extension until after the deed was entered into did not affect the matter since the Settled Land Act, 1925, s. 59, did not create new powers of dealing with settled land by the tenant for life, but merely authorised him to carry into effect in a new form powers which already existed. (*Re Savile Settled Estates* (2) *followed.*) As between the tenant for life and the remainderman, the deed of 1925 was a deed of variation and not a surrender and regrant; although, as between lessor and lessee, estoppel would operate in favour of the lessee so as to prevent the lessor from denying that, as between the parties to it, the effect of the deed was that of a surrender and regrant, the estoppel fiction could not be extended so as to entitle the remainderman to say that it was something which it did not purport to be. (*Re Bruce* (4) *followed.*)

(iii) Bertram Arkwright was entitled to the whole of the rents and profits paid by the Stavely Coal & Iron Co., from Feb. 19, 1925, when he became tenant for life in possession of the settled estates, until July 1, 1942.

[**EDITORIAL NOTE.** The somewhat complicated facts in this case pivot upon the disentailing assurance and resettlement of 1916. This is held to be a new settlement for the purpose of the capitalisation of the mining rents under the lease of 1882, which accrued to the life tenancy falling into possession in 1925, although in other respects it is to be regarded as part of a compound settlement. The variation in 1925 in the terms of the mining lease of 1882, subject to which the 1916 resettlement was made, is held on its express terms and on authority to be an extension of the existing term and not a new lease by surrender and regrant. It is, therefore, subject neither to the Settled Land Act, 1882, nor, since it is made by the tenant of the new settlement under unspecified powers, to the 1877 Act. In the result, the statutory provisions for capitalisation of one-fourth of the rents do not apply.

AS TO MINING LEASES BY LIMITED OWNERS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 561-569, paras. 1224-1241; and FOR CASES, see DIGEST, Vol. 34, pp. 639-644, Nos. 371-417.]

Cases referred to:

*(1) *Re Hall, Hall* v. *Hall*, [1916] 2 Ch. 488; 34 Digest 644, *416*; 86 L.J.Ch. 59; 115 L.T. 481.
*(2) *Re Savile Settled Estates, Savile* v. *Savile*, [1931] 2 Ch. 210; Digest Supp.; 100 L.J.Ch. 274; 145 L.T. 17.
(3) *Donellan* v. *Read* (1832), 3 B. & Ad. 899; 30 Digest 500, *1578*; 1 L.J.K.B. 269.
*(4) *Re Bruce, Brudenell* v. *Brudenell*, [1932] 1 Ch. 316; Digest Supp.; 101 L.J.Ch. 204; 146 L.T. 363.
(5) *Lyon* v. *Reed* (1844), 13 M. & W. 285; 30 Digest 349, *100*; 13 L.J.Ex. 377; 3 L.T.O.S. 302.
(6) *Re Rayer, Rayer* v. *Rayer*, [1913] 2 Ch. 210; 34 Digest 643, *405*; 82 L.J.Ch. 461; 109 L.T. 304.

ADJOURNED SUMMONS by the trustees of a settlement to determine whether the tenant for life in possession of the settled estates is entitled to retain for his own benefit the whole of the rents and profits of certain mining leases granted on various parts of the estates. The facts and the relevant clauses of the settlements are fully set out in the judgment.

N. C. Armitage for the trustees of the settlement.

Geoffrey Cross for the first defendant, Bertram Arkwright, the tenant for life in possession.

H. H. King for the second defendant, the tenant for life in remainder.

A. C. Nesbitt for the third defendant, the infant remainderman.

ROMER, J.: The summons in this case raises a question as to whether the first defendant, who is the tenant for life in possession of certain settled estates, is entitled to retain for his own benefit the whole of the rents and profits of certain mining leases which have been granted on various parts of the settled estates. The particular lease which has been selected for discussion in this summons is a lease of minerals, granted to the Stavely Coal & Iron Co. With regard to the rents and royalties payable by that company, the plaintiffs, as the present trustees of the settlement, have in fact paid three-quarters of the rents to the tenant for life and set aside as capital one quarter. The question—and I think this is a question of difficulty—is as to whether they were right in adopting that course.

The first relevant document affecting the matter is the will of Robert Arkwright, dated May 30, 1857, by which he settled the settled estates, after the death of his son Godfrey, to the use of his infant grandson William and his assigns for his life without impeachment of waste :

> . . . and after the determination of that estate to the use of the first and every other son of my said grandson William severally successively and in remainder as they shall severally be in seniority of age . . .

He empowered every tenant for life to dig, sink, work and make mines, etc., and he also empowered every such tenant for life, when so in possession, and also his trustees during the minority of any such tenant for life, to appoint by way of lease the mines and minerals :

> . . . for any term or number of years not exceeding 21 years to take effect in possession from the making of the lease.

When William Arkwright became tenant for life, he was minded to grant a lease in excess of the term authorised by the will. Therefore, upon his petition to the Chancery Division, the court made an order on July 1, 1882, that a certain additional contract for granting such a lease should be prepared and carried into effect. The order went on to say :

> . . . the lease to be granted in pursuance of such contract is to be subject to the conditions required to be observed by [the Settled Estates Act, 1877, and] all money to be set aside out of the rents or royalties as directed by the said Act . . .

should be paid to the trustees of the will of Robert Arkwright deceased. It was ordered that the petitioner William Arkwright should execute the lease to be granted in pursuance of the said contract. In pursuance of that order a lease was granted on Nov. 10, 1882, for 63 years from March 25, 1882, by William Arkwright to the Stavely Coal & Iron Co., Ltd. It is to be observed that the order did not specify any portion of rents which were to be set aside under the Act of 1877, but simply made the order referential to the Act. Sect. 4 of that Act provides :

> It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed : (3) Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof . . .

In pursuance of the order under the Act, during William Arkwright's lifetime the trustees quite properly capitalised one quarter of the rents.

William Arkwright died on Feb. 19, 1925, but in the meantime, on Sept. 11, 1916, he and his eldest son, the first defendant, Bertram Harry Arkwright, had entered into a deed of settlement, which recited that " under or by virtue of an indenture dated Sept. 9, 1916 " which was duly enrolled as a disentailing assurance, the settled estates then stood limited :

> . . . subject to the estates charges powers and incumbrances particulars whereof are specified in sched. II hereunder written and to the indenture of mortgage particulars whereof are specified in sched. III hereunder written to such uses upon such trusts and subject to such powers and provisions as the said William Arkwright and Bertram Harry Godfrey Arkwright shall by any deed or deeds revocable or irrevocable jointly appoint.

The deed then recited :

> In consideration of the consent given by the said William Arkwright as protector of the settlement created by the said will to the execution by the said Bertram Harry Godfrey Arkwright of the said disentailing assurance [which is said to be given for the purpose therein specified] the said Bertram Harry Godfrey Arkwright has agreed with the said William Arkwright to make such settlement as is hereinafter contained of the said hereditaments and investments which are now subject to their joint powers of appointment.

Then it was witnessed that William and Bertram as settlors :

> . . . in exercise of the power vested in them by the said disentailing assurance

> and of every or any other power enabling them or either of them in this behalf do and each of them doth hereby direct and appoint [that the settled estates should] subject as aforesaid henceforth go and remain to the use of Robert Harry Bertram Arkwright [who is the second defendant to this summons] during his life without impeachment of waste.

There are various remainders over, under the third of which the infant defendant has an interest. The ultimate remainder is :

> . . . to the use of the right heirs of the said Bertram Harry Godfrey Arkwright forever.

There are certain provisions which I must read, because they are relied upon on one of the points which were discussed by counsel for the first defendant, Bertram Arkwright :

> Provided always and it is hereby agreed that if any person who would but for this present provision for the time being be beneficially entitled to the possession or receipt of the rents and profits of the said hereditaments and premises hereby settled as tenant for life or in tail male by purchase shall being a male be under the age of 21 years or being a female be under that age and a spinster the Phoenix Assurance Co., Ltd., or other the trustees or trustee for the time being of these presents (hereinafter called the trustees) shall enter into the possession or receipt of the rents and profits of the same premises and shall during the minority and spinsterhood as the case may be of such person continue in such possession or receipt and manage or superintend the management of the said premises with power to cut timber and underwood for sale repairs and otherwise and to open and work mines minerals quarries and brickfields . . . and shall out of the rents and profits of the said premises including the produce of timber underwood mines quarries or brickfields pay the expenses incurred in such management or otherwise in respect of the premises and any annual sums of money and the interest on any principal sum of money for the time being charged on the same premises or any part thereof and in the next place pay and apply such sum or sums of money as the trustees shall think fit having regard to the age of such minor in or towards his or her maintenance education or advancement and may either themselves so pay or apply the same or may pay the same to the guardian or guardians of such minor for the purpose aforesaid without seeing to the application thereof and shall accumulate the residue of the said rents and profits and produce in the way of compound interest by investing the same and the resulting income thereof in or upon any investments in which money arising from a sale of the said hereditaments and premises is by law authorised to be invested with power from time to time to vary such investments at discretion and shall stand possessed of the said residue of the said rents and profits and produce and the accumulation thereof and the investments representing the same upon the trusts following that is to say if the person during whose minority the same shall have been accumulated shall being a male attain the age of 21 years or being a female attain that age or marry then upon trust for such person his or her executors or administrators as personal estate but if such person being a male shall die under the age of 21 years or being a female shall die under that age and without having been married then upon the trusts . . .

The settlement contains further provisions which were mentioned :

> And it is hereby agreed that in case at any time and so long as during the subsistence of the present settlement or of any charge of a jointure created by the exercise of any power hereby given in favour of any person now living or of a portion created by the exercise of any power hereby given which shall not for the time being be raisable and payable there shall be no person in whom the powers of the Settled Land Acts, 1882-1890, shall for the time being be vested it shall be lawful for the trustees in their absolute discretion to exercise over and in relation to the hereditaments hereby settled or for the time being subject to the subsisting uses and trusts of these presents the powers of a tenant for life in possession under the said Acts and all such extended and enlarged powers as are hereby conferred and so that all the provisions of the said Acts which are subsidiary or incidental to or connected with the powers therein contained shall as far as may be apply and take effect with respect to the powers hereby given to the trustees And also that it shall not be necessary for any person intending to exercise any powers conferred by the Settled Land Acts, 1882-1890, in relation to hereditaments for the time being subject to the uses or trusts of these presents to give any notice of such intention to the trustees or to their solicitors And also that it shall be lawful for any person hereby made tenant for life of the said hereditaments with the consent in writing of the trustees to demise for any purpose the settled hereditaments or any part or parts thereof with or without any easements rights or privileges of any nature over or profits *a prendre* issuing out of any part or parts of the hereditaments hereby settled for any term of years to take effect either in possession or within 21 years from the date of the lease and upon such conditions as may be thought proper.

That is followed by a further provision :

> And also at any time by deed either with or without consideration in money or otherwise to release waive or modify either absolutely or otherwise any covenants provisions or conditions contained in any instrument creating a freehold or leasehold rent.

Sched. II specifies the overriding estates and interest to which the settlement is made subject. Para. 1 is :

> All estates and charges prior to and all powers overreaching the estate in tail male of the said Bertram Harry Godfrey Arkwright under or by virtue of the above mentioned will of Robert Arkwright or otherwise including a jointure of £800 per annum payable to Agnes Mary Arkwright the wife of the above named William Arkwright if she survives him for the remainder of her life.

Under para. 2, a jointure of £1,000 a year is payable to Grace Emma Julia Arkwright. The resettlement took effect subject to William's life interest and subject to the jointures of £800 a year and £1,000 a year also referred to in the schedule.

William Arkwright died on Feb. 19, 1925, and thereupon the first defendant, Bertram Arkwright, became tenant for life in possession of the settled estates including the part of the settled estates which had been comprised in the lease to the Stavely Coal & Iron Co., Ltd. On July 13, 1925, he entered into the deed which was made between himself of the one part and the Stavely Co., of the other part. That deed recited that those presents were intended to be supplemental to the antecedent lease of March 25, 1882, that William Arkwright had died on Feb. 19, 1925, and that Bertram, who was described as the lessor was now tenant for life in possession of the hereditaments thereby demised. It was agreed that it would be :

> . . . to the mutual advantage of the lessor and lessees and those claiming under or in succession to them and also to the advantage of the settled land that the antecedent lease shall be varied and the term granted thereby extended in manner hereinafter appearing and it has been agreed that these presents shall be executed in lieu of a surrender of the antecedent lease to the lessor and the execution of a new lease by him to the lessees . . .

The deed then proceeded :

> Now this indenture witnesseth and declareth as follows : The antecedent lease shall as from the date hereof have effect as though the same had been in the same words and figures as the form of lease set forth in sched. III hereto and the clauses provisions and stipulations contained in sched. III hereto shall operate in place of the clauses provisions and stipulations contained in the antecedent lease the intention of the parties hereto being that the term of years granted by the antecedent lease shall not be surrendered nor merge in the term specified in sched. III hereto but shall be merely extended until the expiration of the period specified in sched. III hereto.

Sched. III comprises the form of lease which was to be thenceforth operative in the place of the antecedent lease. The only part of the lease to which I need refer is cl. 10 where the property is expressed to be held by the lessees until Dec. 31, 1984, the term which was thereinafter mentioned. So, in effect, the term was extended from Mar. 25, 1945, which was the term granted in the lease of 1882, until Dec. 31, 1984. It is to be observed that there is no mention of any express powers in the lease under which Bertram Arkwright professed to be acting. The only further date I need mention is July 1, 1942, which was the vesting date appointed by the Coal Act, 1938, under which the royalties were taken over by the Coal Commission.

The first question arises in relation to the period when the first defendant became tenant for life in possession, namely, from Feb. 19, 1925, until July 13, 1925, when he entered into the deed to which I have just referred. The trustees during William Arkwright's life capitalised one quarter of the rents and profits paid by the Stavely Co., and paid only three-quarters to William Arkwright. That was quite plainly right, because he was quite obviously the person who took his estate under the then existing settlement, and the Act of 1877 plainly operated so far as his rights as tenant for life were concerned. But after his death the trustees continued to set aside one quarter notwithstanding that Bertram had then succeeded as tenant for life. Counsel for the defendant, Bertram Arkwright submitted that, although the 1877 Act operated during the lifetime of William, it ceased to have any effect upon his death, because Bertram's life interest, which fell into possession on William's death, was an interest not under the original settlement at all (*i.e.*, under the will settlement), but was under a new settlement, namely, the resettlement of 1916. He says, accordingly, that the position was that in Feb., 1925, Bertram Arkwright succeeded to a life tenancy in property which was already the subject of a mining lease which had been granted by his predecessor under another settlement altogether. He says, therefore, that sect. 4 of the 1877 Act ceased to have any effect and that he was entitled thenceforth to the whole of the rents and profits. Counsel for the infant remainderman said that that was not so because, by reason of the overriding interests, and particularly the jointure to which the 1916 settlement was subject, the result of those interests was that a compound settlement was in existence under which Bertram Arkwright was tenant for life, and that the Act of 1877 did not cease to operate at all.

Counsel for Bertram Arkwright relied upon the principle which was applied in *Re Hall* (1). The head note is :

> The Settled Land Act, 1882, s. 11, governs the distribution, as between the limited owner and the remaindermen under a settlement, of the rents and royalties derived from mining leases granted under the powers of the Act by the person having the limited interest under such settlement, but it does not affect the rights of the limited owner and remaindermen under a subsequent settlement to which mines already demised have become subject, and in such a case those rights are governed either by the provisions of the settlement or by the law relating to open mines. The plaintiff was entitled under his marriage settlement, made in 1886, during his life, to the rents, until sale, of one undivided third part, thereby settled, of certain mines devised and settled by the will of his father. In 1895 and 1902 he joined with the tenant for life of one other third part and the owner in fee of the remaining third part in granting leases of the mines. Subsequently one half of one of the other third shares devolved upon the plaintiff subject to the leases, and being caught by the terms of the conveyance in his marriage settlement became subject to it : Held, that the plaintiff was entitled, during his life or until sale, to receive the whole of the rents and profits derived from the one sixth share in question during the continuance of the leases.

The facts are a little complicated, but I think the headnote sufficiently summarises them for the purpose of the point now in question. The observations of Peterson, J., although expressed under the Settled Land Act, 1882, s. 11, are equally appropriate to sect. 4 of the Act of 1877. In my opinion counsel for Bertram Arkwright is right in contending that that applies to the present case, and it cannot be said that when his client became tenant for life in possession in Feb., 1925, his interest arose under the settlement under which the original lease had been granted ; in other words, he was not the person who, by reason of his estate in the settlement under which the lease was granted, was entitled to receive the rent. I think it necessarily follows that that is so, because the interest in remainder was completely changed ; it was taken out of the settlement altogether and was brought into a new settlement, subject to different limitations and interests, and his life interest was a life interest for that purpose, in my judgment, under the settlement of 1916 ; and the settlement under which the lease was granted was not the settlement under which Bertram Arkwright's life interest arose. It is right to say that there was, for some purposes, a compound settlement. There was from a conveyancing point of view, and the tenant for life under the compound settlement could sell free of the overriding interest ; but I do not think that that affects the matter when one inquires, as I have to inquire in this case, as to the question of whether the present tenant for life's interest is an interest under sect. 4 of the Act of 1877. In my view, it is not ; it is outside it and is conferred solely by the settlement of 1916, with the result that such life interest came into possession at a time after the lease had been granted, and as the tenant for life under the 1916 settlement was free from impeachment for waste, although I am not sure whether that is material, he is entitled to the whole of the rents and profits.

That would cover the period from Feb. 19 to July 13, 1925, when the deed of extension was entered into. It is said that the effect of that deed was to introduce a quite different state of affairs and that, although (having regard to what I have decided on the first point) if this deed had not been entered into and the original lease had remained undisturbed, the tenant for life would have continued entitled to the whole of the rents and profits (subject, of course, to the effect of the Coal Act) by entering into this deed in July, 1925, he lost a quarter of the rents.

The first point taken by counsel for Bertram Arkwright as asserting his continued right was that he was expressly empowered to grant this lease under the power which I read in the 1916 settlement, that it should be lawful, amongst other things, for a tenant for life to vary and extend a lease. He says that he had that power and that, on the true construction of the settlement, it did not need the consent in writing of the trustees, although the power which immediately precedes it did require the consent of the trustees. He admits that if he is wrong on that he cannot rely on this power because he did not in fact obtain the consent in writing of the trustees to enter into this deed of extension. As a matter of construction of these provisions, I think it is reasonably plain that this power to release, waive or modify any covenants, provisions or conditions in a lease does require the consent of the trustees. It is one of a series of powers, the first one being that it shall be lawful for the trustees to exercise, in certain circumstances, the powers of the tenant for life. Then that is followed by a provision :

> . . . that it shall be lawful for any person hereby made tenant for life of the said hereditaments with the consent in writing of the trustees to demise for any purpose the settled hereditaments.

Then that, in turn, is followed by the power which is immediately in question :

> And also at any time by deed either with or without consideration in money or otherwise to release waive or modify either absolutely or otherwise any covenants provisions or conditions contained in any instrument creating a freehold or leasehold rent charge or in a lease.

The words " to release waive or modify " are quite obviously elliptical and one has to fill the gap by referring to what comes before. Where one has found that what goes immediately before is that :

> . . . it shall be lawful for any person hereby made tenant for life of the said hereditaments with the consent in writing of the trustees to demise . . .

it seems to me a matter of necessary inference, or, at all events, reasonable inference, taking it by itself, that one fills the gap in the succeeding provision by inserting the words :

> And also it shall be lawful for any person with the consent in writing of the trustees to release, waive or modify . . .

As a matter of simple construction, I think that one is almost necessarily driven to carry forward what comes before into this additional power. I think that that view is very much fortified by the reflection that, inasmuch as the consent of the trustees is required to demise or, in other words, to lease, it would be curious if the tenant for life could vary, extend or modify a lease without the consent of the trustees at all. In my judgment, that power can only be exercised by the tenant for life with the consent in writing of the trustees ; and, as that was not obtained, it does not apply.

It is secondly suggested on behalf of the tenant for life that the deed is merely an extension of the original term and that it was not, and did not in fact, take effect as a surrender and regrant. On the face of the deed itself that is plainly so, because the parties have gone to great pains, as far as I can see, to avoid any suggestion in the lease of July 13, 1925, that it was in any sense a surrender and regrant, because they say that their intention is that :

> . . . the term of years granted by the antecedent lease shall not be surrendered nor merge in the term specified in sched. III, but shall be merely extended until the expiration of the period specified in sched. III hereto.

That follows a recital that it has been agreed that this deed should be executed :

> . . . in lieu of a surrender of the antecedent lease to the lessor and the execution of a new lease by him to the lessees.

It is said that whatever may be the position as between the lessor and the lessees for the purpose of giving force to that transaction, nevertheless the transaction as between the tenant for life and the remainderman must be taken as it stands, and must be regarded merely as a variation and not as a surrender and regrant. Alternatively, it is said that it ought to be treated as binding the life interest of the grantor, if nothing else. The other defendants, the tenant for life in remainder and the infant remainderman, say that the transaction could, in law, only take effect by surrender and regrant, and that it must be regarded as so operating for all purposes. They say that the extended term to 1984 is that authorised by the Settled Land Act, 1882, which was in force at the time that the deed was entered into, and that sect. 11 of that Act must be taken to apply. Counsel for the infant remainderman further says that unless it operates as a surrender and regrant, it could not operate as a new lease of the added term because it would not be within sect. 7 (1) of the Act, which requires that :

> Every lease shall be by deed, and be made to take effect in possession not later than 12 months after its date.

The effect of a deed varying the lease by extension of the term was considered by MAUGHAM, J., as he then was, in *Re Savile Settled Estates* (2), in relation to the Settled Land Act, 1925, s. 59, which, for the first time, expressly authorised tenants for life to vary, release, waive or modify the terms of any lease, whenever made, of the settled land. That section did not come into operation until Jan. 1, 1926, and it was not in operation at the time when this deed of extension of July 13, 1925, was entered into. But MAUGHAM, J., makes some observations which are of assistance to me. The headnote is :

> The tenant for life under a resettlement executed in 1884 granted two mining leases, in 1924 and 1928, respectively, each for the period of 60 years. On a summons asking for the determination of the question, among others, whether he had power, under the Settled Land Act, [1925] s. 59, or otherwise, to vary the leases by substituting in each of them a term of 100 years in lieu of the term of 60 years : Held, that he had power to vary by deed the terms of the leases, provided that their length after variation should not be more than 100 years from the respective dates of execution. Observations on the effect in law of extending the term of a lease.

It is for those observations that I refer to this case. At p. 215, MAUGHAM, J., says :

> It appears that the tenant for life under this settlement granted certain mining leases for the period that was authorised by the Settled Land Act then in force—namely, 60 years. Two leases in particular are mentioned in the summons, and the tenant for life is desirous now of altering the terms of those leases, by changing them into leases for terms of 100 years each from the date when the leases took effect. The Settled Land Act, 1925, which is in force, contains two sections which are material in considering whether the tenant for life has the right to do this. [MAUGHAM, J., then read sects. 52 and 59 (1).] It is apparent, in my opinion, that sect. 59 (1) is dealing only with a question of form, because it is clear from the final words of sect. 59 (1) that no more is being authorised than what might have been done under sect. 52 (1). The provision in question is that " every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been " granted after a surrender, etc. In my opinion sect. 59 (1) is not limited to cases where the result of the variation, release, waiver or modification will at common law effect a surrender and regrant. This section is conferring a power on the tenant for life to execute documents in a particular form which he could have executed in another form as the result of the surrender or the surrender and regrant of the land previously dealt with. It relates to the widest possible release, variation, waiver or modification, including cases in which only part of the land comprised in the old lease or grant is the subject of those alterations. Speaking generally, I think there is no doubt that the law (as stated in HALSBURY'S LAWS OF ENGLAND, 1st Edn., Vol. 18, s. 1061), is that any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy, and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder ; and I would add that it may result from the mere alteration in the amount of rent payable, as seems to have been held in the case of *Donellan* v. *Read* (3). [That observation must be borne in mind when considering the next case to which I am going to refer, which was decided by CLAUSON, J.] But the section now under consideration is not concerned with that matter at all ; it is only conferring on the tenant for life power to do in a particular form that which might have been done in another way. In my opinion, therefore, the plaintiff, as the tenant for life, has power, with or without consideration in money or otherwise, by deed to vary, release, waive or modify, either absolutely or otherwise, the terms of either of the two leases mentioned in the first paragraph of the summons, including the length of the leases there in question, provided that the leases shall, after the alteration, be leases for terms not exceeding 100 years from the dates when they respectively took effect. I do not propose in the declaration to say that it is done under sect. 59, but I propose to say that the tenant for life has power to execute such documents. I should add that, in my opinion, an alteration of an existing lease so that it will operate for a term extending beyond the original term can operate, in law, only as a surrender of the old lease and a grant of a new one, and I am disposed to think that the wiser course in the circumstances would

be to add, after the declaration that I have mentioned, the statement that "the declaration is made without prejudice to the question whether the leases, as altered, will not at common law operate by way of surrender and regrant."

Then comes *Re Bruce* (4), which is of obvious importance in relation to the question which I have to decide now :

> Under the will of Lord Robert Bruce, who died in 1912, the plaintiff was tenant for life in possession of certain beds of ironstone and other minerals subject to a lease executed in 1908 which bound the testator and persons claiming under him. The lease was for a term of 40 years expiring on March 25, 1947, subject to the payment of the rents and royalties and the covenants on the part of the lessees therein contained. By an order made on July 20, 1916, in the Chancery Division, in the matter of the estate of the testator, it was declared that upon the true construction of his will the then tenant for life in possession was entitled to the whole of the rents and royalties under the lease. By a deed dated March 25, 1931 (hereinafter called the "extension deed"), and made between the plaintiff (who, upon the death in 1917 of his brother without issue, succeeded to the settled estates as tenant for life) as lessor of the one part and the lessees of the other part, pursuant to the Settled Land Act, 1925, s. 59, it was agreed that the lease should operate as if the minerals had been demised for a term commencing on March 25, 1907, and expiring on March 25, 2006 ; and the lessor then demised to the lessees the minerals and mining rights demised by the lease as from March 25, 1931, until March 25, 2006, subject to the payment of the rents and royalties and the covenants and conditions respectively reserved by and contained in the lease as the same were respectively varied by the extension deed. And it was further agreed that the lease should be construed and have effect, as if the term thereby granted had been a term expiring in 2006 and the variations specified in the schedule to the extension deed had been originally comprised in the lease ; and that, except as varied by that deed, the lease and the term thereby granted should be deemed to remain on foot in all respects as if that deed had not been executed. The question was one between the plaintiff and his infant son the first tenant in tail in remainder and was, from what date the latter was entitled to have one-fourth of the rents and royalties capitalised in his favour under the Settled Land Act, 1925, s. 47, regard being had to the order of 1916 and to the question whether the extension deed operated by way of surrender of the original term granted by the lease : Held, first, that, even if the extension deed did operate as a surrender of the original term granted by the lease and a grant of a new term, the provisions for capitalisation made by the Settled Land Act, 1925, s. 47, did not apply to the rents and royalties accruing during the whole of the original term of forty years, as the settlement by the construction placed upon it by the order of 1916 showed a contrary intention within the meaning of that section. Secondly, that, as between tenant for life and remainderman, the former was not estopped from denying that the extension deed operated, against the intention of the parties to it expressed in that deed to keep the original term on foot, as a surrender of that term. Accordingly, that the plaintiff, if and so long as his tenancy for life subsisted under the settlement, was entitled to the whole of the rent and royalties which accrued under the lease as varied by the extension deed during the residue of the original term of forty years ; but that, as from the expiration of that term in 1947, one-fourth of the rents and royalties ought to be capitalised, pursuant to the Settled Land Act, 1925, s. 47.

I think the only further fact which is relevant for present purposes, and which does not appear in the headnote, is that stated on p. 318 :

> By a deed dated Nov. 2, 1923, and made between the plaintiff, who was the person then entitled to the reversion expectant on the term granted by the lease, of the one part and the lessees thereunder of the other part, it was agreed that the method of arriving at the royalties payable under the lease should be varied in the manner therein specified.

It goes on to state the effect of the deed of Mar. 25, 1931, which was the extension deed. If this deed of variation of July, 1925, had been executed after the Settled Land Act, 1925, had come into operation, the decision of Clauson, J., in *Re Bruce* (4) would be in point and would entitle the tenant for life to continue to receive the whole of the rents and royalties on the ground that, as between himself and the remainderman, the extension of the term must be construed as an extension, *i.e.*, in accordance with the intention of the parties, according to its tenor. Clauson, J., says that it is perfectly true that, having regard to the principle that a variation of a lease can in law only operate by its surrender and regrant, if difficulty had arisen between lessor and lessee and the lessee had brought an action against the lessor for a declaration that the purported deed of variation in fact operated as a surrender and regrant notwithstanding the terms in which it was framed and the form in which it was framed, the lessor, the tenant for life, would be estopped as between himself and the lessee from denying that that was its effect. But that is the extent to which this fiction resulting from

estoppel is to be carried. In all other respects, and in particular as between tenant for life and remainderman, the effect of the deed is in accordance with its plain provisions. The deed of extension in *Re Bruce* (4), was in 1931, and sect. 59 of the 1925 Act was then in operation. In the present case, at the date when this deed of July 13, 1925, was executed, there was no statutory provision in force (and I have already held that there was no express provision in force under the settlement) authorising the transaction to take this form. I have,
A however, the guidance of CLAUSON, J., in deciding this case, notwithstanding that in July, 1925, there was no such statutory provision in operation. In *Re Bruce* (4) the tenant for life in 1923 (at which time there was no such statutory provision operating) had entered into a deed modifying the original lease in a way which, as would appear from the observations of MAUGHAM, J., in *Re Savile* (2), could itself only operate in law as a surrender and regrant; and CLAUSON, J., said, although the point was not in issue before him, that it had
B never been suggested that that deed operated as a surrender of the lease and a regrant of the unexpired period of the lease on the modified terms. At p. 325 he said:

> It is quite obvious from the tenor of the deed that to construe the deed as amounting to such a surrender and regrant would be to contradict the intentions of the parties; but it may be that, as between the lessees and the plaintiff, the latter may be estopped
> C from denying that the deed so operated. On this point reference may be made to PARKE, B.'s judgment in *Lyon* v. *Reed* (5). I do not, however, know of any authority for the proposition that any one but the lessee or some one claiming through or under him, could rely on the estoppel as against the plaintiff, and accordingly, had it been suggested that the remainderman could, as between himself and the tenant for life, have relied on this deed of 1923 as a surrender and destruction of the lease of 1908, I should have been prepared to hold the suggestion unfounded.

D That is precisely the position in the present case. A deed has been entered into which, so far as intention is concerned, is quite plainly a deed of variation simply, and not a transaction of surrender and regrant. True it is that, as between the lessor and lessee, estoppel would operate in favour of the lessee so as to prevent the tenant for life, the lessor, from denying that its effect was, as between those two parties, that of a surrender and regrant. But I see no more reason than CLAUSON, J., did in *Re Bruce* (4) in extending the fiction
E arising out of the estoppel in such a way as to entitle the remaindermen to say that the deed is something which it does not purport to be and that one must look to its legal effect for all purposes, and, amongst such purposes, for the purpose of taking away from the tenant for life one quarter of the rents and profits to which he would otherwise be entitled, and handing them over to capital.

F I do not think that the fact that there was no statutory provision for extension until 1926 really makes very much difference, because MAUGHAM, J., pointed out in *Re Savile* (2) that sect. 59 does not purport to vest or to create new powers of dealing with settled land in a life tenant; it merely authorises him to carry into effect old powers which formerly existed, and particularly the powers under sect. 52, in a new form; and it authorises a tenant for life to enter into a transaction the legal result of which must be regarded as operating as surrender
G and regrant by a new form of procedure, namely, by a deed of variation or extension; but the effect in law is precisely the same as it would have been before, namely, it would operate as a surrender and regrant as between lessor and lessee. Be that as it may, I have the considered opinion of CLAUSON, J., on a position which closely approximates to the point before me on this present summons, and I propose to follow it.

In my judgment the deed of July 13, 1925, between Bertram Harry Godfrey
H Arkwright, as lessor, on the one hand and the Stavely Co., as the lessees on the other, may have to be dealt with, should occasion arise, as a surrender of the old lease and a grant of the new one. Nevertheless, I am not bound to hold that it has that effect so as to disturb the respective rights of the life tenant and the remaindermen under the settlement. As between them, the matter must be treated in accordance with the avowed intention of the parties in the deed of extension and in accordance with its form.

Having regard to the view which I have taken on that, it does not become necessary for me to deal at length with the further alternative arguments of counsel for Bertram Arkwright, who submitted that there was, in any case, a contrary intention to be inferred from the 1916 settlement within the meaning of sect. 11 of the Act of 1882. For that he relied upon the provisions of the resettlement, authorising the trustees to enter into the possession of the rents and profits during the minority of a tenant for life and in the event of a life interest being forfeited. The argument of counsel for Bertram Arkwright was that the express provision that the rents and profits of the premises, including the profits of, amongst other things, the mines, quarries or brickfields, would be received by the trustees, who were to use them for the purposes laid down, shows that the whole of the rents and profits of, amongst other things, the mines, were to vest in the trustees, and that the rents and profits to be so received by them must be commensurate with the rents and profits that would be received by the tenant for life in possession if there were a tenant for life in possession. He referred to the principle of such cases as *Re Rayer* (6). I do not take that view of the matter. I do not think it is a permissible or possible construction of the statute. These are common form clauses which are put in and which are to be found almost as a matter of course in such cases as this, and I think it is straining the effect of the language beyond the extent to which it is permissible to give it an effect such as is contended for. The principle in these cases, as I understand it, is that, where you have an express power given to a tenant for life to grant a mining lease, coupled with or followed by a provision that the tenant for life is to take the rents and profits, that is a sufficient contra-intention within sect. 11 of the 1882 Act to displace the limiting or qualifying provisions of that section. I think this case falls far short of that, if only for the fact that there is here no express power at all to the tenant for life to grant mining leases. It appears to me that the power to grant mining leases is an essential ingredient of decisions such as that on which counsel for Bertram Arkwright relied. Were the matter to rest on that, I should not accept that contention but I should arrive at a conclusion which was adverse to the tenant for life. It does not, however, arise, because I decide this point upon the principles which appear to me to have been approved, if not laid down, by Clauson, J., in *Re Bruce* (4), and which appear to me to be applicable to the present case.

Declaration that the tenant for life was entitled to the whole of the mining rents and royalties paid by the lessees until July 1, 1942.

Solicitors: *Field, Roscoe & Co.* (for the plaintiff); *Freshfields, Leese & Munns* (for the respondents).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

HILL *v.* R.

[King's Bench Division (Humphreys, J.), **March 1, 1945.**]

Emergency legislation—War damage—War risk insurance—Business scheme—Insurance broker—Loss of account-books through enemy action—Insurance of "goods"—Documents owned for purpose of business excluded from definition of "goods"—Whether account-books "documents"—War Risk Insurance Act, 1939 (*c.* 57), *s.* 7 (1)—*War Damage Act*, 1943 (*c.* 21), *ss.* 2 (1), 83, 84 (1), (4), 95, 104.

The suppliant was an insurance broker who carried on business under the style of Grenville Hill & Co. In 1940 the suppliant's office, his furniture and other goods, including some 33 account books, were destroyed by enemy action. It was contended on his behalf that these account-books which had been in the suppliant's possession and which were held and used by him wholly or mainly for the purpose of his business, were goods insurable under the business scheme within the meaning of the War Damage Act, 1943, s. 84. It was denied on behalf of the Crown that the books were "goods" within the meaning of that section and it was contended that they were "documents" owned for the purpose of the suppliant's business, and, therefore, expressly excluded from the scheme by virtue of the War Damage Act, 1943, s. 104. :—

Held: since books of account were merely records which furnished evidence of the business done, they were "documents" owned for the purposes of the business, within the meaning of the War Damage Act, 1943, s. 104, and, therefore, expressly excluded from the scheme.

R. v. *Daye* (2) *applied.*

Qu.: whether the books in a barrister's library are "documents" within this provision.

[**EDITORIAL NOTE.** The general point of interest in this case lies in the discussion of the meaning of the word "document." HUMPHREYS, J., finds on derivation that this means something on which things are written, printed or inscribed which gives information. He is supported in this view by the *dictum* of DARLING, J., in *R.* v. *Daye* (2), when he says: "Any written thing capable of being evidence is properly described as a document." Here "evidence" means capable of being produced to assist the court, and not admissible evidence in the technical sense. The popular conception of a document is a writing on paper, but this definition is much wider in scope.

FOR THE WAR DAMAGE ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 334; and FOR THE WAR RISK INSURANCE ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 912.

AS TO DOCUMENTS, see BUTTERWORTH'S WORDS AND PHRASES, Vol. 2, pp. 122, 123 [319].]

Cases referred to;

*(1) *Carew* v. *Carew*, [1891] P. 360; 18 Digest 98, *489*; 61 L.J.P. 24; 65 L.T. 167.
*(2) *R.* v. *Daye*, [1908] 2 K.B. 333; 22 Digest 432, *4484*; 77 L.J.K.B. 659; 99 L.T. 165.
*(3) *Re Alderton's and Barry's Application* (1941), 59 R.P.C. 56.

PETITION OF RIGHT to determine whether journals and ledgers in the possession of the suppliant, an insurance broker, and kept wholly or mainly for the purpose of his business, which had been destroyed by enemy action, were goods insurable under the business scheme within the meaning of the War Damage Act, 1943, s. 84. The facts are sufficiently set out in the judgment.

D. N. Pritt, K.C., and *Patrick Devlin* for the suppliant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *Valentine Holmes* and *R. Boswell* for the Crown.

HUMPHREYS, J.: This petition of right raises a point of construction of the War Damage Act, 1943, s. 104. The facts, which are all agreed, are set out in the petition as follows. The suppliant says:

> At all material times your suppliant carried on business at 6, Lloyds Avenue, in the city of London as an incorporated insurance broker, under the style of Grenville Hill & Co. On Dec. 29, 1940, your suppliant's office, at 6, Lloyds Avenue aforesaid, and his furniture and other goods therein were completely destroyed by war damage.

The war damage being damage within the meaning of the War Damage Act, 1943, s. 2 (1).

> The said goods included 33 books which books were in the possession of your suppliant and held and used by him wholly or mainly for the purpose of his said business.

The particulars set out what the books consisted of. They were account-books or record books of the business, the first being:

> . . . one large daily brokering journal covering all brokering transactions compiled from documents having reference to each transaction.

The others are ledgers and journals of various sorts dealing with different matters and relating to different clients of the business of the suppliant, which was evidently very large and included dealings with people in other countries.

The answer of the Crown, so far as it is necessary to deal with it in this judgment, is this:

> The petition of right is bad in substance and in law on the ground that the books referred to in the petition were not, as appears from the allegations contained in the petition, goods within the meaning of the War Damage Act, 1943.

That is the whole question which is raised, and, therefore, the sole question which I have to determine is whether the account-books, which were admittedly destroyed by enemy action on Dec. 29, 1940, were goods within the meaning of this section of the statute.

The first section to which it is necessary to refer—and there are only three—in this statute is sect. 83, which provides:

> (1) The Board of Trade may operate two insurance schemes (in this part of this Act referred to as " the schemes "), that is to say : (*a*) a scheme, in this part of this Act referred to as " the business scheme," whereby the Board undertake the liability of insuring persons carrying on business against war damage to the goods specified in the next succeeding section as being goods which, in relation to those persons respectively, are insurable under the business scheme.

The next section it is necessary to refer to is sect. 84, which provides :

> . . . the goods insurable under the business scheme in relation to any person carrying on business are all goods . . .[I am leaving out some immaterial words] which are in his possession (whether he owns them or not) and are held or used by him wholly or mainly for the purposes of that business . . .

If the matter remained there, it would appear that this was indeed a very large scheme of insurance being undertaken by the Board of Trade. It would include, apparently, in relation to that class of business men who buy and sell goods, their stock, which is no doubt the most valuable part of the assets of the ordinary business. But the words which I intentionally omitted in reading sect. 84 are these words : " Subject to the provisions of sub-sect. (4) of this section," and looking at that subsection I find these words :

> The following goods shall not, in relation to any person, be insurable under either of the schemes . . . [and " the following goods " include under the letter (*a*)] any goods as respects which that person is, or could be, insured under part II of the War Risks Insurance Act, 1939.

Upon looking at that statute I find that sect. 7, which is the first section of part II, provided that there shall be a scheme of insurance to operate, in the event of war,

> . . . whereby the Board undertake, in relation to persons carrying on business [in the United Kingdom] as sellers of goods, the liabilities of insuring such persons against King's enemy risks in respect of goods insurable under this part of this Act which are from time to time owned by such persons in the course of such business.

It appears, therefore, that the business scheme referred to in the 1943 Act is a very much circumscribed scheme, in as much as it does not include the insurance of any stock at all, and it would seem that the effect of the business scheme is merely to insure those matters which are part of a man's business assets, goods, but which do not include his stock. In the case of an ordinary buyer and seller of goods, an ordinary warehouse or shop, it would apparently include the fixtures, the fittings of the shop or place of business, and no doubt such things as the stock of stationery, the typewriters, probably calculating machines, and matters of that sort, which may be called—it is a very rough sort of expression—the tools of the trade ; that is to say, the things which are necessary for the carrying on of the business as distinct from the articles which are in the business themselves, that is, stock. In the case here, of course, there was no question of stock in connection with an insurance broker. The question is : What is the meaning of " goods " in that section—the goods insurable under the business scheme which are in his possession or held or used by him wholly or mainly for the purpose of that business.

I turn now to sect. 104, the definition section, which runs as follows :

> In this Act, unless the context otherwise requires, the expression " goods " includes all corporeal property . . .

It is " all corporeal property ", but then there is a proviso :

> Provided that the said expression does not include money, negotiable instruments, securities for money, evidences of title to any property or right or [and, I think it must read, evidence] of the discharge of any obligation, or any documents owned for the purposes of a business.

The question I have to decide here is : are the books of account in question in this case documents owned for the purpose of the business ? If they are, they are expressly excluded from the scheme under which *ex concessis* in this case the suppliant is presumed to be insured. In point of fact he was not insured because the scheme had not come into operation at the time of the damage, but that is not a point raised here at all ; he is to be treated as if he was a person insured under the scheme. There is one further thing I have to say. I was asked to take note of the fact that the suppliant had in fact before the war insured his account books for a sum of about £3,000, showing that he attached a very high value to them. I am prepared to assume, in a business such as that of the suppliant's, his books of account were invaluable to him. Without them it would be impossible to carry on the business unless he had duplicates of them.

The other matter which is agreed is that since the words of the section itself clearly include these books, because they are quite plainly corporeal property, and the Crown is seeking to exclude them by reason of the proviso, the onus A is on the Crown to satisfy me that they must be excluded. I agree with counsel for the suppliant, that while the construction of an Act of Parliament must always be a question of law, the court should endeavour in such a case as the present, where the construction involves the right meaning to be given to a word in such common use as the word "documents," to give a construction to that word in this section which would be agreeable to the ordinary educated business man.

B I ask myself: What do I understand by a document in this relation? Whether I throw my mind back to the original meaning of the word "document," which is presumably the English interpretation of the Latin word "*documentum*," or whether I look at the latest decision, which is I think the only decision upon the meaning of the word "document" in recent years, I find that there is one underlying principle which must apply to all documents. I think the meaning C of the word "document" which originates, no doubt, from the Latin word "*doceo*," is that it must be something which teaches you, something from which you can learn something; in other words, something which gives you information. In the dictionaries, some of which have been referred to and some of which were referred to in a case which I am going to mention, the word "evidence" is used repeatedly. It is said that a document must be something which is evidence. In my view it is plain that that word "evidence" is not D used in the sense of being something which is admissible in a court of law, it is used in its strict literal meaning, something which makes evident what would otherwise not be evident. Using the word in that sense, I agree that a document must be something which makes evident, which is not itself evidence of something which it purports to inform you about. Subject to that, I think the form which the so-called document takes is perfectly immaterial so long as it is information conveyed by something or other; it may be anything, upon which E there is written or inscribed information.

That being my idea of the meaning of a document, I have been referred to certain authorities, and I find that STROUD'S JUDICIAL DICTIONARY has a very plain statement about the matter, which is as follows:

> A ledger—including a partnership ledger—is a document within r. 191 of the Divorce Court Rules.

F And the reference is to *Carew* v. *Carew* (1). I venture to think that that is putting it rather too high. I do not think that *Carew* v. *Carew* (1) is really an authority for that proposition. The Solicitor-General might say that *Carew* v. *Carew* (1) is all the more in his favour because the point was never argued there; it was assumed by both sides that the ledger in the case was a document within the meaning of the rules. The rule in question [Divorce Court Rules, r. 191] is this:

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> If he (the registrar) think fit, he shall be at liberty to require the attendance of the husband [it was a case of alimony in the Divorce Court] for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents . . .

The wife had made an application for an allotment of alimony pending the suit, which was referred to the registrar. The respondent husband had filed a H balance sheet of his last year's business showing a deficit. The registrar issued a *subpoena duces tecum* directing the respondent and his partner to produce their books. They attended and produced a ledger relating to the last year's business, but refused to allow it to be inspected. The registrar made an order granting inspection of the ledger, but the respondent and his partner refused to comply with that order or they failed to comply with it, and the result was that counsel for the wife moved for an attachment of those persons as the result of that refusal. The matter was argued by the late Mr. Inderwick and Mr. Bargrave Deane, neither of whom are likely, either alone or in conjunction with one another, to have missed such an obvious point, if they thought it worth arguing, as that the word "document" in the rule did not include the word "ledger," but I do not find that any such argument was put forward. The grounds upon which Mr. Inderwick and Mr. Bargrave Deane argued were these: First of all the partner had no connection with the suit and it would be hard upon him that he should be compelled to disclose his partnership books; there is no power to compel the inspection of documents such as these, and the husband having produced a balance sheet of his accounts, that was all that was necessary. Counsel for the other side argued, and then JEUNE, J., said this at p. 362:

> The doubtful point here is one of discretion and not of law. As a matter of law the registrar undoubtedly has power to order the production of documents. Rule 191 appears to be clear on the subject . . . [he refers to the rule]. Then it is said he cannot order the production of these documents because this is an interlocutory proceeding; but the answer to that is . . . Then the distinction is drawn by Mr. Deane that because this is a question of alimony pending suit and not of permanent alimony this evidence cannot be taken.

Then the judge deals with that point, and with the question of discovery, but nowhere in that decision do I find a statement (and one would not expect to find it because it had never been argued) as to whether in law there could be any doubt that the ledger in question, the account-book of the firm, was a document within the meaning of that rule. So much for *Carew* v. *Carew* (1).

The next case to which I was referred was *R.* v. *Daye* (2). In that case a sealed packet was deposited with a banker by two parties; one party was Messrs. Wernher, Beit & Co., well known owners of diamond mines, and Sir Julius Wernher, who was the senior partner in the firm, and the other party to the deposit was Henri Lemoine. Henri Lemoine was prosecuted afterwards by Sir Julius Wernher in Paris for fraud, Sir Julius Wernher saying that Henri Lemoine had obtained from him the sum of about £20,000 by falsely pretending that he possessed a formula for making diamonds, and that that formula was written; it was in a form which any chemist, given the formula, could understand and make diamonds. The formula was put on a piece of paper and was to be deposited in the joint names of himself and Sir Julius Wernher or his company with a bank. The French court asked, in order that they might have the evidence of what that document, which was deposited in London was, that a *commission rogatoire* should issue, and it did, and at Bow Street Police Court a question was raised by direction of the Home Secretary before the chief magistrate, SIR ALBERT DE RUTZEN, whether the bank should be compelled to produce that. The bank took a very proper objection that the document being deposited with them in joint names, they had no authority to produce it without the consent of both parties. Henri Lemoine was not anxious that it should be produced because in point of fact there was nothing on it at all; it was a blank piece of paper.

That question was raised and it came before the Divisional Court. The Divisional Court had to decide whether that packet should be given up or not, and in order that it should be given up, it had to be a document. The question arose: Was that sealed packet a document? I think the most interesting judgment in the matter, with due deference to the Lord Chief Justice who gave the leading judgment, is that of DARLING, J., who said this, at p. 340:

> On behalf of the bank it has been contended that the sealed envelope and what is inside it does not come within the term "document." I think that it is perfectly plain that the sealed envelope itself might be a document. Nothing but the sealed envelope might be required. But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal. So I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence.

As I have already said, I read that word "evidence" as meaning capable of being produced as a thing which may assist the court, and, therefore, make matters evident. I do not think it means anything more than that, and I think the last words of the judgment of DARLING, J., might have run "in that it furnishes information." I should respectfully entirely agree with that decision. I do not think it is binding upon me because it was dealing with the terms of a different statute altogether, but I respectfully agree with it.

The third case to which I was referred is a patent case, *Re Alderton's and Barry's Application* (3), and was a decision by MORTON, J. The judge expressed considerable doubt whether time machine cards, which were the subject of that patent, were documents at all. It is a very complicated report and deals with many other matters, but, as I understand it, the cards conveyed no information to anybody; they told you nothing at all until you had used them by putting them in a machine, and then a machine printed upon the card information as to, for instance, the time a man had clocked in or clocked out. MORTON, J., giving judgment said this, at p. 60:

> I incline to the view that the assistant comptroller was right in holding that the cards in question are documents, but feel considerable doubt on the point, having regard to the observations quoted above [those were observations by the Solicitor-General sitting as the Appeal Court on patent matters] as the cards may equally well be described as "examples or models of the invention itself." Further, it is true to say that they convey no information at all until they have been put into a time recording machine and have had records of time stamped upon them.

That is, as I understand it, the real point of this part of the decision. The judge had considerable doubt whether they could be called documents at all because they did not convey any information to anybody in the condition in which they were said to be when they were published. He goes on to say:

> In various dictionary definitions the conveying of information is treated as being an essential feature of a document [and then he quotes from the SHORTER OXFORD DICTIONARY: "Something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title deed, coin, etc.]" . . . In WEBSTER'S NEW INTERNATIONAL DICTIONARY (1911) the definition is "An original or official paper relied upon as the basis, proof, or support of anything else; in its most extended sense including any writing, book, or other instrument conveying information . . ." This feature is wholly lacking on the cards in question.

It is sufficient for me to say that I understand the doubt expressed in that case by MORTON, J., was solely on the question as to whether those cards really conveyed any information to anybody. I suppose the same point might be made if one took those things with which some of us are familiar in this war and, indeed, in the last war; the use of what appears to be a blank piece of paper which conveys no information at all until it has been treated in a particular way and then it is discovered that there is upon it what is described as secret writing. I should say myself in the first instance that a blank sheet of paper is not a document at all; it conveys nothing to anybody. I do not think a blank sheet of paper is a document; I do not think a collection of blank sheets of paper is a document, but as soon as you have developed the writing upon them and you find it is now a sheet of paper which gives you a great deal of information, then, I think, that is properly described as a document.

So much for the cases, and I need only refer, I think, to one other argument before saying what my decision is in this matter. The Solicitor-General entirely agreed with the view of counsel for the suppliant that one ought to try and find in this proviso some reason which would appeal to the ordinary business mind as a reason why the Board of Trade should exclude from the right to insure, a man's account-books. The Solicitor-General said that it could be found if all these words were looked at sufficiently closely. The first word which appears in the proviso is the word "money," and there I regret to say that I cannot follow the argument of the Solicitor-General which was that all the words, the last of which is "document," are words which indicate that the things excluded are evidence of something else. I cannot agree that that is true of the word "money." I do not think "money" in this proviso is evidence of something else at all. I do not think the possession of a pound note is evidence that you have got anything at all; I think it is currency and I think it is goods because it is currency. In one sense it may be quite true to say that there is no such thing as money in these days. Bullion is what originally was meant by money. If I examine a one pound note I see that it is an unconditional promise to pay by the Bank of England £1 to the bearer. If you took it to the Bank of England in these days all you would get, in exchange for it, is another unconditional promise to pay. You will not get anything which is of any intrinsic value at all. I do not think I can say that the word " money " is evidence of anything at all.

I think there is a much better reason than that for excluding money from this insurance, and that is that the Board of Trade knew quite well that it is, and always has been, the practice of insurance companies in insuring in the ordinary case of household insurance against burglary, theft, and fire, to exclude money and cash. In other words, no insurance company will accept your insurance for £10,000 upon the contents of your household, of which £9,000 is cash kept in the house. I think the reason is that it is impossible for them to deal with the claim when it comes. How do they know whether you had £9,000 stolen from the house ? There is no way of tracing it. I think that is the reason why money is excluded from this insurance. It is insurance unlimited in value and everybody is required to insure, not only may insure but must insure, but I do not think the Board of Trade were minded at all to insure against the alleged loss of thousands and thousands of pounds.

Then follow words which are always found in connection with the word " money " : " the equivalent of money," and " negotiable instruments, securities for money," and then follow the words as to which I am disposed to agree with the Solicitor-General that they do help this argument, namely, " evidences of title to any property or right or evidences of the discharge of any obligation," and then follow the words " or any documents owned for the purposes of a business." I think it may well be that the Board of Trade are saying : " We are not going to insure under this business scheme any stock at all ; that comes under a different Act, and we will not insure anything except the means by which you carry on your business. If you use paper, pen and ink and they are necessary for that purpose, of course we will insure them, but when it comes to your account books, what are they ? They are merely the records ; they are evidence of the business which you have done. They are purely personal to yourself. They are not like agreements and are of no value to anybody else ; they are your personal records of the business you have done and the business which you hope to do, of the money which you have paid, dates when you hope to receive payments, the names and addresses of people to whom you have to pay money and from whom you expect to receive money. They are the records of your business." I think it is an understandable reason why the Board of Trade intentionally refuse to insure such things as records of the business, and they have done so by the use of that word " document," which in my judgment must include ordinary books of account.

Something was said in argument about the case of the barrister who has lost his law books through enemy action. I do not think it is necessary for the purpose of this judgment to express any opinion as to whether the books of a barrister would come under the same definition of document. They are not books of account ; they are really the tools of his trade. I am not sure that the practice which, I am told, prevails that the Board of Trade will reimburse a barrister who has lost his law books and law library, is at variance with saying, on the other hand : " We will not insure your own personal records of your business." The fee book of a barrister might come within that same rule.

I think the petition of right is bad.

Petition dismissed with costs.

Solicitors : *Edward & Childs* (for the suppliant) : *The Solicitor to the Board of Trade* (for the Crown).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

Re WAKEMAN (*deceased*), *Re* THE TRUSTEE ACT, 1925. NATIONAL PROVINCIAL BANK LTD. *v.* ISABEL FRANCES WAKEMAN.

[CHANCERY DIVISION (Uthwatt, J.), **February 15, 1945.**]

Trusts and Trustees—Trust for sale and conversion—Investments—Direction in will to invest in authorised securities—No power to buy land—Land sold before administration completed—Beneficiary desiring application of proceeds of sale to purchase of land for own use—Whether trustees "trustees for sale"—Law of Property Act, 1925 (*c.* 20), *ss.* 28, 205.

By his will, dated Jan. 27, 1929, the testator appointed the National Provincial Bank, Ltd., to be his executor and trustee and gave his residuary real and personal estate to the bank upon trust for sale and conversion. He directed the bank to pay out of his ready moneys and the moneys arising from such sale his funeral and testamentary expenses and debts and to invest the residue in authorised investments to be held upon trust for his daughter for life, and, after her death, for her children. At the time of his death the testator, in addition to certain personal estate, was the owner in fee of a freehold house. This house was sold by the bank in 1932 before administration had been completed and a title was made by the bank as legal personal representatives. The defendant desired the bank to realise part of the securities representing the sale moneys and apply the proceeds in the purchase of a freehold house for her occupation. It was contended on her behalf that the bank were trustees for sale and that the investments representing the sale price of land sold by the bank as legal personal representatives were proceeds of sale; further, that the trust powers included the power to buy land and that the Law of Property Act, 1925, s. 28, applied so as to confer the power to buy land notwithstanding the imperative trust for investment contained in the will:—

HELD: the bank were not trustees for sale within the meaning of the Law of Property Act, 1925, ss. 28, 205, since they no longer held land on trust for sale, and, as trustees of the testator's will they did not possess any power to buy land.

[**EDITORIAL NOTE.** It is held that "trustees for sale" in the Law of Property Act, 1925, s. 205, is to be construed by reference to the state of facts subsisting at the time the question arises for determination. The expression, therefore, cannot include trustees who held, but no longer hold, land on trust for sale. The object of sect. 28 of the Act being to facilitate dealings with land, there is no ground for extending the foregoing construction to include trustees who hold only the proceeds of sale of land.

AS TO POWERS AS TO LAND, see HALSBURY, Hailsham Edn., Vol. 33, pp. 255-257, paras. 453-456; and FOR CASES, see DIGEST, Vol. 33, pp. 896-903, Nos. 3396-3458.]

ADJOURNED SUMMONS to determine questions arising under the will of Edwin Cleak Wakeman. The testator died on ~~Jan. 27, 1929~~. June, 7, 1932 The facts are sufficiently set out in the judgment.

G. A. Rink for the plaintiffs (trustees).

Wilfrid M. Hunt for the defendant (testator's daughter and sole next of kin).

UTHWATT, J.: By his will dated Jan. 27, 1929, E. C. Wakeman appointed the National Provincial Bank, Ltd., to be his executor and trustee and gave his residuary real and personal estate to the bank upon trust for sale and conversion, and then provided as follows:

> The bank shall out of my ready moneys and the moneys to arise from such sale calling in and conversion of my said real and personal estate pay my funeral and testamentary expenses and debts and shall at the discretion of the bank invest the residue of such moneys in or upon any of the investments authorised by law for the investment of trust funds.

The bank was then directed to stand possessed of the residue and the investments for the time being representing the same upon trust for the testator's daughter, the defendant, for life, and after her death upon trust for her children. There is no ultimate gift in default of children.

The testator died on June 7, 1932, and his will was duly proved by the bank on Aug. 27, 1932. The defendant is unmarried and is the sole next of kin of the testator. At the time of his death the testator in addition to certain personal estate was the owner in fee of a freehold house but owned no other land. This house was sold by the bank on Nov. 26, 1932, for some £1,300. The sale was made before administration had been completed and a title was made by the bank as legal personal representatives. The sale moneys were duly invested and the securities representing them are readily distinguishable from those representing the testator's personal estate. The defendant is desirous that the bank should realize part of the securities representing the sale moneys and apply the proceeds in the purchase of a freehold house for her occupation. It is clear that the bank has no such power unless the transaction is authorised by the Law of Property Act, 1925, s. 28, which so far as material, provides as follows :

> Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 . . .

It is argued that the bank are trustees for sale ; that the investments representing the sale price of the land sold by the bank as legal personal representative are proceeds of sale ; that the powers referred to include the power to buy land ; and that sect. 28 applies so as to confer the power to buy land notwithstanding the imperative trust for investment contained in the will.

I propose to consider first the question whether the bank are "trustees for sale" at all. If they are not, it is unnecessary to deal with any of the other points raised at the hearing. For the purpose of answering that question I will disregard the circumstance that all the testator's land was sold in the course of administration. That fact, if it be material—a matter on which I express no opinion—cannot assist the conclusion that the bank are "trustees for sale." The assumed case is, therefore, that pursuant to a trust for sale contained in a will all land has been sold by the will trustees and that the proceeds of sale arising from an exercise of that trust are in the hands of the will trustees. Are those trustees trustees for sale ? Certain terms used in the Law of Property Act, 1925, are defined in sect. 205 of the Act. The section so far as relevant runs as follows :

> In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them . . . "trustees for sale" means the persons (including a personal representative) holding land on trust for sale . . .

I am of opinion that will trustees in the assumed circumstances are not trustees for sale. The trust contained in the definition does not refer to the terms of any trust instrument. Many trusts for sale of land indeed arise by operation of law. The test refers to a state of facts and, as a matter of language, to a state of facts subsisting at the time when the question arises for determination. The language of the definition is clear and does not in my view allow one to put on the phrase "trustees holding land on trust for sale" a gloss which would make it include "trustees who have held, but no longer hold, land on trust for sale." The question remains whether in sect. 28 the context requires a different meaning to be given to the expression "trustees for sale." The suggestion is that the phrase here includes trustees who, while not holding any land on trust for sale, have under their control proceeds of sale resulting from an exercise in the past of a trust for sale. In my view neither the language used in the section nor the subject matter to which the section is addressed suggest any such extended meaning. The language used is clear. As regards subject matter the main point of the section is not to encourage dealings *in* land but to facilitate dealings *with* land, and to that end powers are given which may be duly exercised if circumstances so require. There is no reason in the nature of things why trustees who have sold all land at any time held by them should remain endowed with powers which find their origin and meaning in land holding and which could if existing be used only as respects proceeds of sale.

It was argued that the construction which I place upon the phrase "trustees for sale" in sect. 28 would produce whimsical results. Upon that construction the retention by trustees of any land—however minute in quantity—would keep alive the powers given by the section as regards the proceeds of sale of all land theretofore sold by them : with the sale of that land all those powers would disappear. That, it was argued, could not have been intended. Again, it was said that on the same construction the powers applicable as regards proceeds of sale of land are under the 1925 legislation less than the powers formerly exerciseable under the Settled Land Acts, 1882-1890, and that this fact was a reason for its rejection. No doubt it is right, where there is used in a statute language which is capable of more than one construction, to consider and to take into account the consequences of alternative constructions and also to take into consideration previous legislation on the same topic. But here the language used is clear and unambiguous and the statute must, therefore, be left to speak for itself. It would be out of place to deal in any detail with the A substance of the statements involved in the two contentions. I would only say upon the first of these contentions that some easily workable definition of "trustees for sale" was desirable and is given, and, conceding the accuracy of the statements contained in the contention, its weight disappears when the general point of the section is borne in mind; and upon the second of them, that I do not think that it is accurate in fact and that the prior legislation as regards lands held on trust for sale proceeds upon a footing entirely different B from that adopted in the 1925 legislation. I accordingly hold that the bank are not trustees for sale within the meaning of the Act, and, as trustees of the testator's will, do not possess any power to buy land.

Declaration accordingly.

Solicitors: *Wild, Collins & Crosse* (for the plaintiffs and the defendant).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

C

ROGERS *v.* HENLYS, LTD.

[COURT OF APPEAL (Scott, Lawrence and Morton, L.JJ.), **February 7, 1945.**]

Workmen's Compensation—Claim by dependants—Fatal accident to workman D *while temporarily employed as lorry driver—Usual earnings not from contracts of employment but from own business of radio engineer—Whether dependants entitled to compensation—"Dependent upon the earnings of the workman at the time of his death"—"Earnings"—Workmen's Compensation Act,* 1925 (c. 84), *ss.* 1, 3, 4 (1), 8, 10 (i)—*Workmen's Compensation* (*Temporary Increases*) *Act,* 1943 (c. 49), *s.* 2 (2).

The deceased workman, Rogers, was in business on his own account E as a radio engineer. On one occasion, he undertook to drive a motor lorry for the appellant company. This special trip was estimated to last 3 days and he was to be paid £3 for it. In the course of this special trip for the appellant company, Rogers was accidentally killed. On a claim under the Workmen's Compensation Act, 1925, brought by Rogers' widow on behalf of herself and her children, the county court judge found that the widow F and children were entirely dependent on the deceased man at the time of his death and awarded them the maximum amount allowable under sect. 8 of the 1925 Act, as amended by the Workmen's Compensation (Temporary Increases) Act, 1943, s. 2 (2). It was admitted by the appellant company that Rogers was a workman within sects. 1 and 3 of the 1925 Act, employed under a contract of service, but it was contended that there was no dependency within the meaning of the Act because dependence G under the Act was limited to dependence on earnings by the deceased workman as a servant under a contract of service, and the widow and children had been dependent upon the earnings of the deceased man in his own business and not in the employment in which he met his death:—

HELD: (i) the word "earnings" was used in two different senses in the 1925 Act. When used in sect. 8 (2) (i) for the purpose of calculating the compensation payable, in the phrase "his earnings in the employment H of the same employer," it was used in the limited sense of earnings in the contract of service by the workman; but when dealing with the question of dependency, earlier in sect. 8 (2) (i), and in sect. 4 (1), it was used in the widest possible sense and meant earnings *simpliciter*.

(ii) the question of dependency was one of fact as to whether the widow and children were dependent upon what the deceased earned in whatever way he earned it, and not merely upon his earnings in the same employment as that in which he was working at the time of his death. Since it was found on the evidence that the widow and children were entirely dependent on the deceased man at the time of his death, they were wholly dependent within the meaning of sect. 4 (1) of the Act, and were entitled to the amount awarded them by the county court judge.

[**EDITORIAL NOTE.** This case lays down the distinction between "wholly dependent on earnings" for the purpose of calculating the amount of compensation and for the purpose of giving a right to compensation under the Workmen's Compensation Act. It is not necessary, in order to give dependants a right to compensation, that they should be wholly dependent upon earnings arising under the contract of service between the workman and his employer, but they must be wholly dependent on money coming from the workman as head of the family.

As to Amount of Compensation in Case of Death, see HALSBURY, Hailsham Edn., Vol. 34, pp. 908-912; and for Cases, see DIGEST, Vol. 34, pp. 408-413, Nos. 3322-3359.]

Case referred to:

(1) *Lysons* v. *Knowles (Andrew) & Sons, Ltd. Stuart* v. *Nixon & Bruce*, [1901] A.C. 79; 34 Digest 423, *3433*; 70 L.J.K.B. 170; 84 L.T. 65; 3 W.C.C. 1.

Appeal by the employers from an award of His Honour Judge Wethered, made at the Bristol County Court and dated Dec. 15, 1944. The claim was brought under the Workmen's Compensation Act, 1925, by the widow of a deceased workman on behalf of herself and her children. The deceased, who was in business as a radio engineer, entered into a contract of employment with the appellant company to drive one of their motor vehicles to a certain destination; he was to be paid £3 for the trip and was given a subsistence allowance and a ticket for the return journey. During this special trip he met with a fatal accident. The county court judge awarded the widow, on behalf of herself and her children, the sum of £700, the maximum amount allowable under sect. 8 of the 1925 Act, as amended by the Workmen's Compensation (Temporary Increases) Act, 1943, s. 2 (2). The employers appealed on the ground that there was no dependency within the meaning of the Act, or, alternatively, that there was no evidence as to the amount of the earnings before the county court judge.

W. H. Duckworth for the appellant company.

R. T. Monier-Williams for the respondent.

Scott, L.J.: The county court judge delivered a very careful judgment, with which I wholly agree. It is conceded that the deceased was a workman within the Workmen's Compensation Act, 1925, ss. 1 and 3, employed under a contract of service within the meaning of the Act. Under sect. 4 (1) it is provided:

> The dependants of a workman entitled to claim compensation . . . are such . . . members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . .

At the date of this workman's death it is beyond question that the judge had evidence before him upon which he could properly find, as he did find, that the widow and children were wholly so dependent; and it is admitted that the accident arose out of and in the course of his employment. On that finding and on those admissions it is difficult to see what question of law there is for this court to decide.

The argument, as I understand it, is based upon what I think is a misinterpretation of the word "earnings" in the fifth line of sect. 4 (1) of the Act. When that subsection says "dependent upon the earnings of the workman at the time of his death," the word "earnings" is, in my view, not used in the limited sense of earnings under a contract of service; it is a compendious way of saying that the members of the family were dependent for their livelihood on money coming to them from the workman at the head of the family. If the mother of the children had been asked whether she had any money of her own at that date or any income of her own, her answer would have been: "No, I got it all from my husband." That is, in fact, the evidence she gave in court before the judge. Interpreting that subsection as I think it ought to be interpreted, it follows that there is no ground for saying that the judge did not have ample evidence upon which he could come to the conclusion of fact, binding on this court, that this family was wholly dependent upon the deceased workman.

I, therefore, go to sect. 8 of the Act in order to dispose of the question of law in regard to the amount of compensation. That section as amended provides, as I have already said, that, whether the dependence is whole or partial, the total for widow and children added together shall not exceed the figure that I have already mentioned. Subsect. (2) deals with the way in which the lump sum is to be calculated; but let me say in advance that on the facts of this case, whatever the detailed figures were, it is conceded that they were well over the maximum overriding limit of £700. Subsect. (2) says:

> The lump sum shall be calculated in accordance with the following rules: (i) If the workman leaves any dependants wholly dependent on his earnings, the lump sum shall be a sum equal to his earnings in the employment of the same employer . . .

In that subsection the word "earnings" occurs in a different reference and is used with a different meaning. In sect. 4, *quoad* dependency, it is used in the widest possible sense. In sect. 8, *quoad* calculation of the *quantum* of compensation, it is used in the limited sense of earnings in the contract of service by the workman.

Sect. 10 deals with the rules for determining earnings for the purpose of calculating compensation. Rule (i) is:

> Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated: Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the 12 months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

The facts of the case were quite shortly thus stated by the county court judge in his judgment. In June, 1944, Henlys, Ltd., were supplying a number of chassis to the Government for war purposes, and had to send them from Bristol to Scotland. They had not sufficient regular mechanics available to act as drivers and asked the officer to the Ministry of Supply to help them in obtaining additional men. Some were obtained from the employment exchange and engaged at £3 wages for the trip, estimated to last three days, at £1 per day, with so much for subsistence. The remainder of the drivers were obtained from various places as volunteers. One of those was the deceased, Rogers, who was engaged on the same terms. On that the judge came to the conclusion that, for the purpose of calculation of the total compensation payable, he could take Rogers' wages at £3 a week, because £3 were to be paid for the 3 days, or £1 a day. In taking that figure he certainly did not exceed the powers that he had under the Act. It may be he could have averaged that up from the three days to a whole week's work; but the £3 was enough to carry his judgment of £700 in total. Therefore, it is unnecessary for us to go into any questions about what the total might have been estimated at by the judge.

Counsel for the appellant employers argued that dependence under the Act means dependence on earnings by the deceased workman as a servant under a contract of service and nothing else; that there was no total dependence in the present case by the widow and children upon the earnings of the workman in that sense, because in the present case the workman was in his ordinary life engaged, not in driving lorries or cars, but in work for which he got remuneration by entering into contracts, not of employment, but for technical advice or by the sale of goods. He argued, therefore, that there was no total dependence by this family upon the workman's earnings. That is, in my view, a fallacy. The widow was wholly dependent, for the reasons I have already given, and the methods of calculation of the *quantum* of compensation payable are wholly irrelevant to the question of dependence.

The grounds of appeal to this court are, in my opinion, limited solely to this question of dependency; but even if any other question could properly have been argued on this appeal, for the reasons I have given I have no doubt that the judge's judgment is quite unassailable. I agree with its reasoning and the conclusion. Two cases have been cited to us in which there were very exceptional facts, but I do not propose to deal with them in detail. They were quite different in their facts, and the question in each was whether there was evidence to support the decision of the county court judge. I do not think they lay down any general principle. There has been some discussion about the meaning of the word "average," but in the result I do not think anything turns on that word. Had it been so, it would have been relevant to consider the effect of the decision of *Lysons* v. *Andrew Knowles & Sons, Ltd.* (1) in the House of Lords, particularly the observations in the opinion delivered by LORD MACNAGHTEN, at pp. 93, 94, indicating that the word "average" is a word to be construed loosely rather than strictly. The only relevance of that decision to the present case is that probably it was the genesis of the sentence at the commencement of sect. 10 (i) of the 1925 Act, that average weekly earnings are to be calculated, roughly speaking, in the best manner the county court judge can calculate them; he has to get at them somehow. The fact that a weekly average rate has to be calculated out of a payment for half a week is no reason, in my opinion, for saying that no weekly average can be calculated. That question is, however, irrelevant in the present case, because even if the weekly wage was £3, *viz.*, what the deceased got for his three days, it is sufficient to carry the award in this case. The appeal must be dismissed with costs.

LAWRENCE, L.J.: I am of the same opinion. It is conceded, as I understand it, that the amount awarded was justified by the figure of £3 which the judge arrived at as a weekly wage. The only point which was open upon the notice of appeal and which was principally argued by counsel for the appellant was the question as to whether the judge could properly arrive at the conclusion that the widow of the deceased and her children were wholly dependent upon the deceased. It was argued that they were not wholly dependent upon the deceased within the meaning of the Act because in fact they had been wholly dependent upon the deceased's earnings in his own business and not in the employment in which he met his death. For the reasons given by SCOTT, L.J., and upon what is to me the obvious interpretation of the Workmen's Compensation Act, 1925, ss. 4 and 8, I think that argument is erroneous. In particular it seems to me that there is the clearest contrast in sect. 8 between the question of dependency and the question of the rules for calculation of the amount of the compensation. Where the section is dealing with the question of dependency it speaks of a dependant upon his earnings *simpliciter*, whereas when it is dealing with the question of the calculation of the compensation it says in terms of subsect. (2) (i), and makes the contrast between the two in three lines:

> If the workman leaves any dependants wholly dependent on his earnings, the lump sum shall be a sum equal to his earnings in the employment of the same employer . . .

You cannot get a clearer contrast between earnings in the employment of the same employer and earnings *simpliciter*. It seems to me, therefore, that the judgment of the county court judge in rejecting the contention which was put before him and which was put before us is clearly right, that the question of dependency is to be decided upon questions of fact as to whether the widow and children were dependent upon what the man earned in whatever way he earned it and not upon his earnings in the same employment as the employment in which he was working at the time of his death. On the other question, which is not, in my view, open on the notice of appeal, I agree with what SCOTT, L.J., has said and cannot see that the county court judge proceeded upon any wrong principle.

MORTON, L.J.: I agree, and on the question whether in this case the widow and children are wholly dependent upon the workman's earnings I do not desire to add anything. With regard to the assessment by the county court judge of the compensation, I would only say this: the materials which the county court judge had before him for this purpose of assessing the compensation were certainly rather limited, but I am quite unable to see that in arriving at the figure at which he did arrive he applied any wrong principle at all. Even if one assumes in favour of the appellant that the question of the calculation of the compensation is open to him upon his notice of appeal, I think his arguments under that heading must fail.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *R. I. Lewis & Co.* (for the appellant company); *Shaen, Roscoe & Co.*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BONHAM *v.* THE ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO., LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Uthwatt, J.), **February 21, 22, 1945.**]

Insurance—Motor insurance—Passenger in private car—Regular voluntary contributions towards expenses—Policy not covering carriage of passengers for hire or reward—"Hire"—"Reward"—Whether carriage for "reward" included a case where there was no legal obligation to pay.

The respondent owned a car insured by the appellants. By the terms of the policy the insurers agreed, *inter alia*, to indemnify the respondents, in the event of an accident, against all sums including costs and expenses which the respondent should become legally liable to pay in respect of the death or bodily injury of any person. It was a term of the policy that the truth of the statements and answers in the proposal form should be a condition precedent to any liability of the insurers to make payments under the policy. To the question whether passengers would be carried for hire or reward or whether the motor car would be let on hire, the respondent had answered "No." The respondent carried regularly three passengers to and from his work, and two of them regularly paid him in return for their carriage amounts equivalent to the cost of railway fares between the two places. On Jan. 28, 1941, the respondent met with an accident as a result of which one of the passengers was killed. In a subsequent action brought by the administrator of the estate of the deceased, judgment was entered against the respondent for £2,015 15*s.* 6*d.* and costs. The respondent claimed indemnity in respect of that judgment. It was found as a fact that the passengers had voluntarily offered him the money and the respondent had accepted it, and that, if the passengers had not paid him anything, the respondent would still have carried them. It was further found that all the expenses for and in respect of the car had been borne by the respondent and that he used his car to travel to and from his work independently of any question of carrying passengers. The main contention of the appellants was that by carrying passengers and receiving payments from them, the respondent had used his car for the purpose of carrying passengers for hire or reward, and that the respondent had, therefore, acted in breach of a condition precedent to the appellants' liability :—

HELD (MACKINNON, L.J., dissenting) : although the payments were made voluntarily and not pursuant to a legally enforceable contract, the passengers were, on the facts of the case, carried for reward on the day of the accident. The respondent was, therefore, not entitled to be indemnified under the policy.

Decision of ATKINSON, J. ([1944] 2 All E.R. 573) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal here reverses the court below, DU PARCQ, L.J., and UTHWATT, J., holding that in the warranty against carrying passengers for "hire or reward" the word "reward" is included in order to bring in cases where there is no obligation to pay. In their view, the daily transport of these passengers, and the daily receipt of a sum equivalent to the railway fare must be regarded on the facts as a carrying for reward. The minority judgment of MACKINNON, L.J., proceeded upon the view that there must be an enforceable contract, which on the facts there was not, nor could one be implied from the course of dealing.

AS TO LIMITATIONS AS TO USE OF THE INSURED VEHICLE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 559, 560, paras. 904-906 ; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217oo-3217xx.]

APPEAL by the insurance company from a decision of ATKINSON, J., dated Nov. 3, 1944, reported [1944] 2 All E.R. 573, where the facts are fully set out.

Serjeant Sullivan, K.C., and *R. O. L. Armstrong-Jones* for the appellants.

F. W. Beney, K.C., and *Gilbert Dare* for the respondent.

MACKINNON, L.J. : This is an appeal from a decision of ATKINSON, J., on a special case stated by an arbitrator. The parties to the arbitration were one Bonham, a working man, and the Zurich General Accident and Liability Insurance Co., Ltd. In Apr., 1939, Bonham, became the hire-purchaser of a small Ford car. It was necessary for him under the Road Traffic Act to get an insurance against liability to third parties and desirable for him to get an insurance upon the car itself. He was misguided enough to apply to some agent of this company and was presented with a document containing an immense number of questions and stipulations which to the best of his ability he had to fill up. Following upon that, there was given to him a policy, also an extremely lengthy document, containing two pages of closely printed matter. The policy recites that Bonham :

> . . . carrying on or engaged in the business or profession of acetylene welder and no other for the purposes of this insurance (see endorsement)

is the insurer. The insurance is upon a Ford 7.96 h.p. saloon car valued by the assured at £95. So far as the policy goes, the material part of the general exceptions is as follows :

> The company shall not be liable in respect of (1) Any accident, injury, loss, damage and/or liability caused, sustained, or incurred while any motor vehicle in respect of or in connection with which, insurance is granted under this policy is (*a*) Being used otherwise than in accordance with the " description of use " endorsement hereon.

The endorsement is :

> Description of use. Use for social domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in the schedule hereto.

And the use for hiring and various other things is excepted.

The facts giving rise to this claim are found by the arbitrator in para. 5 as follows :

> (*b*) That on Jan. 28, 1941, the claimant was driving the said motor car from Northampton to Market Harborough with three passengers, Cunningham, Drage and Clements in it. (*c*) That there was an accident, as a result of which Cunningham was killed.

As a result of that Bonham was sued by the executor of Cunningham, and judgment recovered against him for a considerable amount. It is in respect of that judgment that he is making this claim under the policy, sect. 1, " liability to third parties." Then :

> (*e*) That the claimant was carrying the said passengers on Jan. 28, 1941, from Northampton to his place of work at Market Harborough and that he habitually and regularly carried them or some of them each day. His place of work was also the place of work of each and all of the said passengers. (*f*) That the said Cunningham and Clements [that is excluding Drage] regularly and habitually paid the claimant in return for their carriage at the rate of 1*s*. 2*d*. or 1*s*. 3*d*. per return journey, which payments amounted to approximately 7*s*. 6*d*. per week. The rate was based on and calculated upon the cost of railway fares between the two places. (*g*) That the claimant never asked the said Cunningham or Clements or Drage for the said or for any payment, but that the said passengers voluntarily offered him the money which it would have cost them to travel by railway and he accepted it, and that if the said passengers had not paid him anything, the claimant would still have carried them. (*i*) That he himself would have used and did use the said motor car to travel to and from his said place of work apart from and independently of any question of carrying the said passengers.

Upon that two defences to the claim were raised by the defendant insurance company. The first was that, pursuant to the general exception, the company shall not be liable in respect of any liability while the car is being used otherwise than in accordance with the " description of use " endorsement ; and that the car was not being used according to the endorsed " description of use," :

> use for social, domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in the schedule [that is of acetylene welder] excluding use for hiring.

It was said that on the facts found by the arbitrator, the respondent was not using the car only for his own business, namely, for going to his work, but that he was using it for hiring. It is sufficient to say that upon those facts I am quite satisfied that the car was not upon this occasion being hired by him. I think we are all agreed upon that.

But there was a second and more formidable point raised by the defendant company, and in connection with that they place reliance on No. 7 of the general exceptions. That condition says :

> The due observance and fulfilment of the terms, provisions, and conditions of this policy and of any endorsement hereon in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the

said proposal shall be conditions precedent to any liability of the company to make any payment under this policy.

Upon referring to the proposal form, under No. 5, there are six questions asked. The first and main question is :

> *Q.*—Will the car be used solely for social, domestic and pleasure purposes ? *A.*—Pleasure purposes. *Q.*—If not, will the other uses be (*a*) Solely by you in person for your business or profession ? *A.*—No.

As a matter of fact, the respondent was going to use the car to drive himself to work every day, as has been found, and, therefore, he was mistaken in putting in that "No." But no point was raised about that, because on the terms of the policy, as eventually issued to him, he was allowed to use it for his professional or business purposes in addition to pleasure. Then :

> *Q.*—(*b*) On your business by your employees or other persons ? *A.*—No. *Q.*—(*c*) For the carriage of goods or samples in connection with your trade or business ? *A.*—No. *Q.*—(*d*) For commercial travelling in your business ? *A.*—No. *Q.*— (*e*) In connection with the motor trade ? *A.*—No. [The sixth question is] *Q.*—Will passengers be carried for hire or reward, or will the motor car be let on hire ? *A.*—No.

It is said that upon this occasion and upon a number of occasions before the day of this particular accident the assured was carrying passengers for hire or reward and, therefore, that his answer "No" to that enquiry, whether it would be so used, was untrue, and that by reason of cl. 7 of the general conditions there has been a breach of a condition precedent to the liability of the defendants.

The arbitrator, in his conclusion of law, as I read it, having stated the facts that I have read, says :

> I am of opinion that, upon these facts, Cunningham, Clements and Drage were being regularly and habitually carried in consideration of separate payments made by them, that the payments were made in consideration of the carriage of the three men to and fro between their place of residence and place of work ; that the claimant was regularly carrying them for a *quid pro quo* (recognised as such by him and them) ; and that he was carrying passengers for hire or reward within the meaning of question 6 of the proposal form and the answer thereto. [Then he says] : I am further of opinion that "use for hiring" includes using the car "for the carrying of passengers for hire or reward" and that the claimant was using the car otherwise than in accordance with the "description of use" endorsement on the policy, and that he is not entitled to be indemnified by the respondents.

Then he goes on to propound for the opinion of the court the question, which must be a question of law :

> Am I correct [that is correct in law] in holding upon these facts that the claimant was on Jan. 28, 1941, using the car for hiring and that such use was in violation of the terms and conditions of the policy.

The arbitrator, therefore, on the facts as found, comes to the conclusion in law that the car was being used otherwise than in accordance with the description of use on the back of the policy, in that it was being used for hiring and, secondly, he comes to the conclusion that there was an untrue answer by the assured to the question in the proposal form "Will passengers be carried for hire or reward or will the motor car be let on hire ?"

As I have already indicated, I think it is quite clear that there was no breach of the stipulation in the endorsement "description of use." This car was not being used for hiring on this occasion. But the more difficult question remains whether the answer "No" to the question in the proposal form "will passengers be carried for hire or reward ?" adding "or will the motor car be let on hire," was untrue and whether its untruth entitled the insurance company to avoid any liability pursuant to No. 7 of the general conditions. In my opinion Atkinson J., was right in concluding that the contention of the defendants was not correct. The question is "will passengers be carried for hire or reward ?" and it goes on, as indicating a sort of thing which was in the minds of those who asked the question, and to be considered by the person who has to answer it, "or will the motor car be let on hire ?" I think carriage for hire or reward imports carriage for some monetary or other remuneration pursuant to some form of contract by which the owner of the car would be entitled legally to claim the payment of that monetary reward from the passengers. On the facts as found in this case there was, in my view, no such legally enforceable contract. The arbitrator finds that the payments were on every occasion made voluntarily although the assured accepted them. He finds further that if the passengers had not paid anything the claimant would still have carried them. In my view the connotation of the whole sentence, " will passengers be carried for hire or reward or will the motor car be let on hire ? ," imports a legal right of the assured, when he is carrying the passengers, to demand and exact from them that hire or reward. Of course, I do not overlook the fact that such a contract resulting in a legal right of the owner to demand and, if necessary, recover legally a reward might arise not only by express contract ; it might arise by a course of conduct. But on the facts as found, I am satisfied that the arbitrator had not before him any evidence on which he could find that by any course of conduct a legally enforceable right to these payments by Cunningham and Clements had ever accrued to the assured. It remained, as it is found, a purely voluntary payment and a payment which he could not demand or exact if it was not offered to him as it had been for so many days.

That, in substance, is the ground upon which the judge decided this case, by answering the question put by the arbitrator in this way :

> You are not correct in holding that the claimant was using the car for hire and, therefore, the claimant is entitled to be indemnified and your alternative award in his favour for £2,015 with costs, the amount for which he had suffered judgment in the claim of Cunningham's executor, must be allowed.

The point is a difficult one, but, using the best of my ability, I think that the proper answer was given by the judge. There are other considerations which arise in cases like this. There is the point that this is a defence raised by the defendants upon the interpretation of certain words put forward by them in the proposal form, and if there is any ambiguity about the meaning of " hire or reward," I think those words are to be construed against the insurance company who so put them forward. In my view, the short answer to the case is that " hire or reward " means a hire or reward in respect of which there is a legally enforceable claim. In this case the voluntary payment, however often made and however confidently expected by the owner of the car, did not amount to a claim for hire or reward within the meaning of that clause.

In the result I think that this appeal should be dismissed, but I rather gather that my brethren think otherwise.

du Parcq, L.J. : The facts in this case are very simple and it is difficult to say that it raises any question of law at all, apart from elementary law, other than a question of construction, which, I agree with my Lord, is not quite an easy one. A case of this kind, where the facts are simple and the law does not seem to be difficult, is one in which there is, unfortunately, apt to be a difference of judicial opinion, and I am sorry to think that this should be one of the cases in which there is a difference of opinion. I need hardly say that I am diffident about expressing a view which conflicts not only with that of my Lord (whose experience in these matters is great) but also with that of Atkinson, J., but as I have formed a clear view I must, of course, express it.

I do not intend to refer, and I observe that my Lord has not referred, to authorities. I rather protest against the citation of a number of authorities on a matter of this kind. For myself, I do not think that any assistance is to be gained here by looking at cases dealing with sections of the Road Traffic Act or the law of contract ; nor do I think that words in a policy must necessarily be construed as they would be in a pleading, as counsel for the respondent seemed to suggest at one time. I propose to look at the words here as I think that the ordinary man, not being a lawyer, would look at them, and as I think Bonham must have understood them if he read them. Perhaps he did not. If he read them, he may have understood them and then forgotten them ; that is quite likely. I think one must give them the natural interpretation which the plain man would give them, and that the citation of cases is not helpful. The important words are those in the proposal form. Bonham was asked : " Will passengers be carried for hire or reward or will the motor car be let on hire ? " A distinction is to be drawn between " hire " and " reward ", or the words " or reward " would not be necessary. So we have the question, " Will passengers be carried for reward ? " The policy recites that the proposal form is to be the basis of the contract and is deemed to be incorporated therein ; and then at the end of it, in cl. 7 of the general conditions, comes the condition which has already been read by my Lord. I ask myself whether anybody, having answered that question and knowing that his promise has been incorporated as a term of the policy, could really say to himself: " Having said that I will not carry passengers for reward, I am nevertheless at liberty to carry passengers regularly every day, and to take from them each day over a considerable period a sum equivalent to the cost to them of travelling by the railway, and I shall still be fulfilling my promise. I can carry passengers at 1*s.* 2*d.* a day, which they never fail to pay and I always expect to receive, and, unless they have agreed to pay so that I could sue them, it cannot be said that I am carrying passengers for reward." I do not believe, if Bonham had thought about it (assuming Bonham to be typical of the ordinary reasonable man) that it would have ever entered his head to think he could do anything of the kind. I hope I was not misunderstood in a question that I put to counsel. I said that if, in consideration of something that I did for him, a man promised me that he would not carry passengers for reward and I then found that for eighteen months he had been doing what Bonham did here, I should think that he had not acted honestly, and I asked counsel whether I should be wrong in so thinking. I refer to that now because I do not wish anyone to imagine for a moment that I was suggesting that Bonham was not a perfectly honest man. As I have already said, it is very probable, if he read that question at all, and if (another assumption) he applied his mind to it, that he had completely forgotten it, and I would not make the slightest suggestion against his *bona fides.* His answer is a plain answer, I think, to what seems to me a reasonably plain question, and his answer is incorporated in the policy.

The question in this case, and the only question in this case as I see it, is whether the arbitrator was justified, upon the facts as he found them, in finding that on the day when this accident happened the assured was carrying passengers for reward. I am perfectly satisfied on those facts that the assured was carrying two gentlemen as passengers, and that he intended to accept from them a payment which he expected to be tendered and which they intended to tender, when he had given them their ride in his car. In those circumstances, I find it impossible to doubt that to the mind of the ordinary man—and I think in this the ordinary man would not be making an error as to the meaning of the English language—it would seem plain that the assured was carrying these passengers for reward on the day of the accident. It follows, upon that view, that he was not entitled to be indemnified.

Therefore, with great respect to Atkinson, J., and fully realising that he may be right and I may be wrong, but at the same time feeling in my own mind the conviction that I am right, which forces me to differ from my Lord, I think that the judge was wrong and that he ought to have answered the question in para. 9 of the case in the affirmative with one modification. The question is not, I think, happily worded. It is:

> Am I correct in holding upon these facts that the claimant was on Jan. 28, 1941, using the car for hiring and that such use was in violation of the terms and conditions of the policy?

The answer should be that the arbitrator was right in holding upon these facts that the use by the claimant of the car on Jan. 28, 1941, was in violation of the terms and conditions of the policy. The answer to the question whether the claimant is entitled to be indemnified should have been that he was not. I think that the appellants here ought to have had their costs before the judge, and that the proper order to be made in this court is that the appeal be allowed, that the judgment and order of Atkinson, J., be set aside, and that there be substituted in lieu of it the order which I have suggested, and that the appellants should have their costs of this appeal.

Uthwatt, J.: It is with some diffidence that I disagree with what has fallen from my Lord upon any question and particularly upon a question which arises on the construction of a policy of insurance, a class of document with which I have no familiarity. The point upon which I differ is indeed a very short one and that is the question of the proper construction of the question in the proposal form: " Will passengers be carried for hire or reward "—I may leave out the rest of that question. With everything else that fell from my Lord I agree. The point at issue is whether in that question there is imported the necessity that the reward should be payable under an agreement enforceable at law. My Lord is of the opinion that that is imported: du Parcq, L.J., takes the contrary view and that view, in the circumstances, I share. It appears to me that a distinction falls to be drawn between the word "hire" and the word "reward." The first word necessarily imports, I think, an obligation to pay. The inclusion of the second word is not, in my opinion, merely for the purpose of giving an alternative word to "hire" which means the same thing, but for the purpose of bringing in a subject-matter which does not include hire and including (I do not say it is confined to that) cases where there is no obligation to pay. That, I think, is the only point on which there is a difference between my Lord, on the one hand, and, as I understand, du Parcq, L.J., and myself on the other. If one is right in that view, that an obligation to pay is not necessarily inherent in "reward" used in that clause, it is, I think, quite clear on the facts of this case that this particular man was carrying people for reward on the day in question. Whether he was carrying for reward is a question of fact determined by all the circumstances of the case, including the length of time over which this course of conduct (I do not call it "course of business") has gone on; the nature of the payments made, namely, cash; the exact amount of the payment, 1*s.* 2*d.*, and its correspondence with the railway fare covered by the same journey. Taking all those facts together, it appears to me that in ordinary language (and I do not think my Lord would doubt this) if you leave out the question of the contract, the man was carrying for reward in every sense of the word. In my view, therefore, the appeal should be allowed and the order should go in the form which du Parcq, L.J., has indicated.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *A. E. Wyeth & Co.*, agents for *Sharpe & Millichip*, West Bromwich (for the appellants); *Gardiner & Co.* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

VIGNEUX AND OTHERS *v.* CANADIAN PERFORMING RIGHT SOCIETY, LTD.

[Privy Council (Viscount Maugham, Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Simonds), **January 18, 1945.**]

Privy Council—Canada—Copyright—Musical work—Gramophone performance in restaurant—Radio or gramophone performance in "place other than a theatre"—Owners or users exempted from payment of fees—Canadian Copyright Act, 1921 (*R.S.C.*, 1927, *c.* 32)*—Canadian Copyright Amendment Act,* 1931 (*c.* 8), *s.* 10, 10A, 10B (1), (6) (*a*), (7), (8), (9), (*as amended by* c. 28 *of* 1936, *s.* 2, *and c.* 27 *of* 1938, *s.* 4).

Vigneux were the owners of a business which installed and provided service for electrically operated gramophones which, on the insertion of a coin, performed musical selections from one or other of the records placed in it. Raes, the owners of a restaurant, hired one of these gramophones from Vigneux for a payment of $10 a week. The gramophone might be operated by anyone and was mainly used by the patrons of the restaurant. In May, 1941, a customer in the restaurant inserted a 5 cent coin with the result that a musical composition called *Star Dust* was played on the gramophone. Among the listeners was a representative of the respondent society, who owned the copyright in *Star Dust.* The society brought an action against Vigneux and Raes alleging that they had infringed the society's copyright in *Star Dust.* By an amendment made in 1938 to the Canadian Copyright Act, 1931, it was provided, by sect. 10B (6) (*a*), that, from June, 1938, in respect of public performances by means of radio set or gramophone in any place other than a theatre (as defined) no fees, charges or royalties should be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board should, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers of fees, etc., appropriate to the new conditions produced by the provisions of the subsection and should fix the amount. No amount had, however, been fixed by the Board with regard to payments by gramophone manufacturers. Vigneux and Raes contended that the effect of subsect. (6) (*a*) was to allow a person to give a public performance by means of a radio receiving set or gramophone in the specified circumstances without paying for the right to do so, and, therefore, the playing of *Star Dust* in the restaurant was not an infringement of copyright. The society contended that the subsection merely provided that, in future, it was the broadcasting stations or gramophone manufacturers and not the persons giving public performances by means of radio receiving sets or gramophones, in the specified circumstances, who had to be licensed in order that such a performance might not be an infringement of copyright, and, therefore, since the manufacturer of the gramophone in question had made no payment, the performance of *Star Dust* was an infringement of copyright by Vigneux and Raes. The Supreme Court of Canada, in dismissing the appeal of Vigneux and Raes, agreed with the decision of the Exchequer Court that Vigneux and Raes were not within the class protected by subsect. (6) (*a*) because they were virtually partners in a venture of publicly performing musical works for profit :—

HELD : (i) upon the true construction of subsect. (6) (*a*), the exoneration of owners or users of receiving sets and gramophones from all payments in respect of performances of musical compositions by means of those instruments in the specified circumstances was absolute and unqualified ; the statutory right to perform was in no way conditional upon payment of the charges payable, under the subsection, by broadcasting stations or gramophone manufacturers. Such a public performance was, therefore, a lawful act and no infringement of copyright.

(ii) there was no foundation for the view that Vigneux and Raes were virtually partners in a distinct class of business. Raes hired a machine to attract custom to their restaurant and Vigneux merely supplied the machine in the ordinary course of their business at a fixed rental.

(iii) Raes, as users of the gramophone, were protected by the provisions of the subsection. Vigneux, although legally the owners of the gramophone, did not require to claim the protection of the subsection, since they neither gave the performance of *Star Dust* nor authorised it.

Decision of the Supreme Court of Canada ([1943] S.C.R. 348) *reversed.*

[**EDITORIAL NOTE.** The purpose of the Canadian copyright legislation of 1938 was to protect purchasers of gramophone records and possessors of radio sets, in view of decisions on public performances, such as *Canadian Performing Right Society* v. *Ford Hotel* ([1935] 2 D.L.R. 391 ; Digest Supp.). LYMAN DUFF, C.J., accordingly held in the Supreme Court (dissenting from RINFRET, KERWIN and TASCHEREAU, JJ. on this point) that the Act gives such persons an unqualified statutory right to perform, independently of whether fees have been fixed by the Copyright Appeal Board. The Privy Council agree with the Chief Justice on this point, and reverse the Supreme Court on the ground that the parties were not, as there decided, carrying on a partnership for the public performance of copyright musical works disqualifying them from the statutory protection.

AS TO COPYRIGHT IN MUSICAL WORKS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 543-545, paras. 847-851 ; and FOR CASES, see DIGEST, Vol. 13, p. 187, Nos. 223-226.

AS TO COPYRIGHT IN THE DOMINIONS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 529-532, paras. 832, 833 ; and FOR CASES, see DIGEST, Vol. 13, pp. 162, 163, and Supplement, Copyright.]

APPEAL, by special leave, from a judgment of the Supreme Court of Canada (DUFF, C.J., RINFRET, DAVIS, KERWIN and TASCHEREAU, JJ.), dated May 4, 1943, and affirming, with a variation, a judgment of the Exchequer Court of Canada (MACLEAN, P.), which had granted an injunction against the appellants in respect of the public performance of a musical composition on the ground that the appellants would thereby infringe the respondent's copyright. The facts and the relevant sections of the Canadian Copyright Amendment Acts are fully set out in the judgment of the Board delivered by LORD RUSSELL OF KILLOWEN.

Samuel Rogers, K.C. (of the Canadian Bar) and *Frank Gahan* for the appellants.
Charles Harman, K.C., and *G. H. Lloyd-Jacob* for the respondent.

LORD RUSSELL OF KILLOWEN : This appeal, by special leave, from the Supreme Court of Canada, raises a difficult question under the Canadian copyright legislation. The Supreme Court affirmed a decision in favour of the present respondent which had been pronounced by the Exchequer Court, although as will hereafter appear the reasons for such affirmation were not unanimous.

The present respondent (hereinafter referred to as the society) is a company incorporated under the laws of the Dominion. It carries on in Canada the business of acquiring copyrights in dramatico-musical and musical works or performing rights therein, and deals with or in the issue or grant of licences for the performance in Canada of such works. It owns the copyright in a musical composition called *Star Dust*. On June 19, 1941, the society commenced an action in the Exchequer Court against the present appellants alleging that they had (in the circumstances hereinafter mentioned) infringed the society's copyright in *Star Dust*, and claiming an injunction restraining the defendants and each of them from publicly performing or authorising the public performance of *Star Dust*, and from installing or permitting the installation in any place of a device adapted publicly to perform *Star Dust*. The circumstances in which the public performance took place, which constituted the alleged infringement of copyright, need to be explained. The defendants to the action (the appellants before the Board) were (i) the members of a partnership firm called Vigneux Brothers (hereinafter referred to as Vigneux) and (ii) Rae Restaurants, Ltd., (hereinafter referred to as Raes). The business of Vigneux consists in installing and providing service for electrically operated gramophones, which on the insertion of a coin perform musical selections from one or other of the records placed therein. Raes are the owners of a restaurant on the Lake Shore Boulevard near the City of Toronto. Raes had one of these gramophones in their restaurant, which they hired from Vigneux for a payment of $10 a week. Two representatives of Vigneux attended at the end of each week to receive the $10, and to change the records as required. Any surplus takings beyond $10 were retained by Raes, who would, however, be liable to make up to $10 in the unlikely event of a deficiency. The gramophone might be operated by anyone, and, as might be expected, was mainly operated by patrons of the restaurant, by inserting a 5, 10 or 25 cent coin therein according to the number of tunes desired. On May 21, 1941, a customer in the restaurant inserted a 5 cent coin with the result that *Star Dust* was performed on the gramophone. Among the listeners was a representative of the society, with the result that this litigation was commenced.

These being the circumstances in which the performance (the publicity of which is not in dispute) of *Star Dust* took place, their Lordships now proceed to consider the relevant legislation for the purpose of considering whether Vigneux and Raes or either of them have infringed the Society's copyright. The rights of an owner of a copyright in Canada are purely statutory, and are governed by the Copyright Act as amended from time to time. The original Act was enacted in the year 1921. It came into force in the year 1924, and was very similar in its provisions to the Copyright Act of this country. Sect. 44 enacted that no person should be entitled to copyright or any similar right in any literary, dramatic, musical or artistic works otherwise than in accordance with the provisions of that Act, or of any other statutory enactment for the time being in force. After sundry amendments (irrelevant to this case) the Act appeared as c. 32 of the Revised Statutes of Canada, 1927. Down to that time no provision existed therein in regard to those associations (such as the society) which may be conveniently termed performing rights societies. But in 1931 the Canadian legislature apparently deemed it necessary to introduce legislation dealing with the powers which performing rights societies possessed of controlling public performances of musical and dramatico-musical works. Such legislation was first introduced in 1931, and was amended in the years 1935, 1936 and 1938. It is upon a provision which was introduced in 1938 that this appeal turns, but references must be made to the earlier legislation.

By the Copyright Amendment Act, 1931, s. 10, a performing rights society had to file with the Minister (*a*) lists of all dramatico-musical and musical works in respect of which it claimed authority to grant licences or collect fees, charges or royalties for the performance thereof in Canada, and (*b*) statements of all fees, charges or royalties which the society proposed to collect in compensation for the grant of licences for the performance of such works in Canada. If (after an investigation and report by a commissioner) the Minister was of opinion that a performing rights society unduly withheld the grant of licenses or proposed to collect excessive fees, charges or royalties " or otherwise conducts its operations in Canada in a manner which is deemed detrimental to the interests of the public," then the Governor in Council on the recommendation of the Minister might from time to time revise or otherwise prescribe the fees, charges or royalties which any such society might lawfully sue for or collect. No such society might sue for or collect any fees charges or royalties (i) for licences for the performance of any works not specified in the filed lists, or (ii) in excess of those specified in the filed statements, nor of those revised or otherwise prescribed by order of the Governor in Council. By the Act of 1935, two subsections were added to the above mentioned sect. 10. It is unnecessary to refer to them because by the Act of 1936 the said sect. 10 as amended by the Act of 1935 was repealed, and four sections were substituted therefor, *viz.*, 10, 10A, 10B and 10C. The last mentioned section was a provision of a temporary nature, but sects. 10, 10A and 10B (so far as relevant) are in the following terms :

> 10. (1) Each society, association or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and which deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company claims authority to issue or grant performing licences or to collect fees, charges or royalties for or in respect of the performance of its works in Canada. (2) Each such society, association or company shall, on or before Nov. 1, 1936, and, thereafter, on or before Nov. 1 in each and every year, file, with the Minister at the Copyright Office statements of all fees, charges or royalties which such society, association or company proposes during the next ensuing calendar year to collect in compensation for the issue or grant of licences for or in respect of the performance of its works in Canada. (3) If any such society, association or company shall refuse or neglect to file with the Minister at the Copyright Office the statement or statements prescribed by the last preceding subsection hereof, no action or other proceeding to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such association, society or company shall be commenced or continued, unless the consent of the Minister is given in writing.
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> 10A. (1) As soon as practicable after the receipt of the statements prescribed by subsect. (2) of the last preceding section, the Minister shall publish them in the CANADA GAZETTE and shall notify that any person having any objection to the proposals contained in the statements must lodge particulars in writing of his objection with the Minister at the Copyright Office on or before a day to be fixed in the notice, not being earlier than 21 days after the date of publication in the CANADA GAZETTE of such notice. (2) As soon as practicable after the date fixed in said notice as aforesaid the Minister shall refer the statements and any objection received in response to the notice to a Board to be known as the Copyright Appeal Board.
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> 10B. (1) The Copyright Appeal Board shall consist of three members, who shall be appointed by the Governor in Council. (6) As soon as practicable after the Minister shall have referred to the Copyright Appeal Board the statements of proposed fees, charges or royalties as herein provided and the objections, if any, received in respect thereto, the Board shall proceed to consider the statements and the objections, if any, and may itself, notwithstanding that no objection has been lodged, take notice of any matter which in its opinion is one for objection. The Board shall, in respect of every objection, advise the society, association or company concerned of the nature of the objection and shall afford it an opportunity of replying thereto. (7) Upon the conclusion of its consideration, the Copyright Appeal Board shall make such alterations in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister certified as the approved statements. The Minister shall thereupon as soon as practicable after the receipt of such statements so certified publish them in the CANADA GAZETTE and furnish the society, association or company concerned with a copy of them. (8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid. (9) No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid.

It will be noticed that the obligation to file lists of works and statements of proposed charges remains, but (a new provision) if a performing rights society refuses or neglects to file the prescribed statements it can only enforce any remedy for infringement if the consent of the Minister is given in writing. A new body, the Copyright Appeal Board, is constituted with power to revise and alter the proposed statements, and certify the statements in their ultimate form as approved statements. The charges so certified are the charges which the society may lawfully sue for or collect and no society has any right of action or any right to enforce any remedy for infringement of a performing right in any dramatico-musical or musical work against any person who has tendered or paid to that society the approved charges.

Down to this point and indeed until June 24, 1938, the regulation of the powers of performing rights societies which the Canadian legislature had deemed necessary or advisable in the interests of the public, had taken the form of compelling such societies to publish lists of the dramatico-musical and musical works in respect of which they owned the performing rights, to publish statements of their proposed charges in respect of the performance of its works, and to submit to those charges being altered or revised by a revising authority, being in 1936 the Copyright Appeal Board created by the Act of that year. In addition the societies were subjected to the provisions of sect. 10 (3) and 10B (9). In 1938 an amendment Act was passed which according to its wording produced "new conditions." It came into operation on June 24, 1938, and enacted (by sect. 3) that the Copyright Amendment Act, 1931, as amended by the 1936 Act and by that Act should be read and construed with and as part of the Copyright Act, and (by sect. 4) that sect. 10B hereinbefore set forth be amended by adding thereto as subsect. (6) (*a*) the following:

> (6) (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

It is to be observed that the new conditions are of limited application. They apply only in respect of public performances by means of radio receiving sets or gramophones in places which are not theatres which answer to the description contained in the subsection. It is further to be noted that a duty is cast upon the Board to fix an amount to be paid by broadcasting stations or gramophone manufacturers and so far as possible to provide for its collection in advance. The amount so to be fixed is apparently an amount to be fixed by the Board on its own initiative, not, as in other cases, a sum proposed in a filed statement for the Board's consideration and approval. The new subsection is accordingly appropriately inserted between subsects. (6) and (7), the two subsections which cover the time during which the Board will be engaged in considering the statements already submitted for its approval. Some further facts must now be stated. The approved statement of the society in relation to the year 1941 included no fee for performance by means of gramophones, although the society had in fact in its filed statement provided for an annual licence fee in respect of gramophones including all mechanical instruments other than radio of $7 for each instrument. The approved statement did, however, contain an amount fixed under subsect. (6) (*a*) in relation to receiving sets, *viz.*, a sum of $1,000 to be apportioned among the different broadcasting stations in Canada as therein mentioned. Before the enactment of subsect. (6) (*a*) a tariff of $10 per machine for a one year licence had been approved by the Board in respect of the type of machine here in question.

The main point at issue between the parties can now be stated. It resolves itself into a question of the true construction of the new subsection. The rival contentions are these: The appellants say that the effect of the subsection is to enact that from and after June 24, 1938, a person who gives a public performance by means of any radio receiving set or gramophone in any place (other than a theatre as defined) may do so without paying anything for the right to do so, with the result that the playing of *Star Dust* in the circumstances before mentioned was, by virtue of sect. 10B (6) (*a*) not an infringement of copyright. The society on the other hand contends that the subsection has no such effect; that it merely provides that in future the persons who give public performances by means of radio receiving sets or gramophones in any place (other than a theatre as defined) are not the people to be licensed, but that the persons who have to be licensed, in order that such a performance may not be an infringement of copyright, are the broadcasting stations or gramophone manufacturers, with the result that since the manufacturer of the gramophone in question had made no payment (no amount having been in fact fixed by the Board) the playing of *Star Dust* in the circumstances before mentioned was an infringement of copyright by the appellants. Other subsidiary points were argued, and will be dealt with later. The main contention, however, was as stated.

In the Exchequer Court Maclean, P., granted the injunction asked for in the statement of claim. His judgment was mainly based upon the view that the defendants did not "fall within the class protected by sect. 10B (6) (*a*)." He had previously stated in his judgment that he was satisfied that the idea prompting the enactment was to obviate the collection of fees:

> . . . in cases where the user [of the gramophone] was in a small and rather inconsequential way, and where any direct or incidental profit from such user was small if any at all.

But he excluded the defendants from the protected class on the ground that they were "virtually partners" in a venture of publicly performing musical works purely for profit. He also stated:

> . . . sect. 10B does not purport to take from the owner of a musical work the right to restrain infringement of his copyright where no licence has been granted, or where no definite provision has been made for compensation to the owner for the right to perform his musical work.

The defendant's appeal to the Supreme Court was dismissed, but the injunction was modified by being limited to the public performance of *Star Dust* or the authorization thereof. Sir Lyman Duff, C.J., delivered a judgment in which Davis, J., concurred. Sir Lyman Duff, C.J., traced the history of the special legislation dealing with performing rights societies which before the enactment of subsect. (6) (*a*) had qualified their sole right to perform any particular musical composition in public by vesting in everybody who paid or tendered to the society the notified fee, charge or royalty the right to perform it, a right which Sir Lyman Duff, C.J., described as a statutory licence. The legislature however, he said, considered that this plan did not sufficiently protect purchasers of gramophone records and possessors of wireless receiving sets in view of decisions as to the meaning of "public performance" and other uncertainties as to the law, and accordingly the special provision of subsect. (6) (*a*) was enacted dealing with the owners of gramophones and wireless receiving sets and the use of these instruments in places other than a theatre, as defined. He construed the subsection in accordance with the contention of the appellants, and said:

> It declares in unqualified terms that no fee charge or royalty is to be exacted from the owner of a gramophone [record] or radio receiving set in the circumstances specified, and compensation is provided in the duty imposed upon the Board to make such provision as appears to be appropriate and possible in the circumstances.

He said that there was no discretion vested in the Board in respect of the exaction of fees, charges and royalties from the owners of gramophones or receiving sets and added:

> . . . that is settled by the statute, which in the plainest terms forbids it.

He treated the subsection as implicitly conferring on the owners and users of gramophones and receiving sets in the defined conditions what he called a "statutory licence" for public performance by these instruments which was in no way conditional upon the actual payment of fees prescribed by the Board and payable by gramophone manufacturers or broadcasting stations. Sir Lyman Duff, C.J., however, concurred in dismissing the appeal upon the ground indicated by Maclean, P., *viz.*, that the appellants were not within the protection of subsect. (6) (*a*) because they were carrying on together under arrangements in the nature of a partnership a business of publicly performing musical compositions and dramatico-musical compositions by means of gramophones. He said:

> I do not think the objects of the legislation, as disclosed by the legislation itself, embrace the protection of people engaged in the business in which the appellants are engaged.

RINFRET, J., took a different view as to the construction of the subsection, and his judgment was concurred in by KERWIN and TASCHEREAU, JJ. He referred to subsect. (6) (*a*) as enacting:

> . . . that the fees, charges or royalties to which the society . . . holding the copyright is entitled shall not be collectable from the owner or user of the gramophone (or in the present instance from Vigneux Brothers, the owners of the gramophone . . . and from Rae Restaurants, Ltd., the user thereof); but such fees, charges or royalties are collectable in advance from the gramophone manufacturers. When once those fees, charges or royalties have been paid by the gramophone manufacturers, the owner or user may publicly perform the musical work; and no fees, charges or royalties shall be collectable from such owner or user of the gramophone.

He then proceeded to state that the rights of the copyright holder remained unaffected where the appropriate fee had not been paid by the gramophone manufacturer, that the society had filed its statement of fees, that it was to no purpose to argue that the Board had not provided for the collection in advance from the gramophone manufacturers. He added that no fee charge or royalty had been paid by the appellants " or for them," and that the appellants, therefore, had not acquired the performing right. The society was, therefore, entitled to an injunction against infringement.

Their Lordships, after consideration of the case, find themselves in agreement with the construction of the subsection for which the appellants contended. They agree with the view of SIR LYMAN DUFF, C.J., that the subsection declares in unqualified terms that in the specified circumstances no charge of any kind is to be collected (*i.e.*, exacted) from the owner or user of a radio receiving set or gramophone, compensation to the performing rights society being provided by the appropriate charges, the amount of which the Board has a duty to fix, although as already indicated, their Lordships do not, as at present advised, share his view that the words " so far as possible " qualify that duty in any respect except as regards making provision for collection in advance. They agree, however, with him also in the view that what he terms the statutory licence (or in other words the statutory right to perform) which the subsection confers is in no way conditional upon payment of the charges which the subsection enacts are to be payable by broadcasting stations or gramophone manufacturers. Indeed, such a condition would, far from relieving the owners of receiving sets or gramophones from uncertainties, only add to their doubts and perplexity. The exoneration of owners or users of receiving sets and gramophones from all payments in respect of public performances of musical compositions by means of those instruments in the specified circumstance, is absolute, unqualified and unconditional, and in their Lordships' opinion must necessarily carry with it the consequence that, as from the date of the coming into operation of the subsection, such a public performance was a lawful act and no infringement of copyright.

RINFRET, J., appeared to read the subsection as if it merely shifted the fees payable from the owners or users of the instruments to the broadcasting stations and the makers of gramophones. He even alluded to the fact that in this case no fees " had been paid by the appellants or *for them*." He seemed to their Lordships to give insufficient weight to the actual wording of the subsection, which starts off with a complete exoneration from any payment of the owners or users of the instruments which give the public performance and gives by way of compensation to the owners of the right of performance a different payment, *viz.*, an amount to be fixed by the Board and to be paid by the broadcasting stations or gramophone makers.

So far their Lordships have construed the subsection as entitling those persons who are within its scope to give public performances by means of any radio receiving set or gramophone in any place other than a theatre as defined without paying anything for the right to do so, and without thereby infringing copyright. It remains to consider whether the Raes and Vigneux or either and which of them come within the provisions of the subsection. In their Lordships' opinion

Raes do, as being the users of the gramophone by means of which a public performance of *Star Dust* was given in a place other than a theatre as defined. From another point of view it may be said that the customer, who is no party to these proceedings, was the user. But the point is immaterial, since their Lordships feel no doubt that Raes, who hired the instrument and had it placed in their restaurant in order to attract customers, who enjoyed a combination of food and music, used the instrument as a means whereby public performances of *Star Dust* and other musical compositions were given. In regard to Vigneux, no doubt in law they are the owners of the gramophone. As such they might, if necessary, claim to be protected by the section. But in their case no such claim is necessary, because, as their Lordships think, they neither gave the public performance of *Star Dust*, nor did they authorise it. They had no control over the use of the machine; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not. The only part which they played in the matter was, in the ordinary course of their business, to hire out to Raes one of their machines and supply it with records, at a weekly rental of $10. Their Lordships are unable to accept the view of MACLEAN, P., (accepted by SIR LYMAN DUFF, C.J., and DAVIS, J.) that Raes and Vigneux were carrying on:

> . . . a distinct class of business, a venture of publicly performing musical works purely for profit.

They can see no foundation on which such a view can be based. As stated above, Raes hired a machine which they thought would attract custom to their restaurant. Vigneux supplied the machine in the ordinary course of their business at a fixed rental; they had no interest beyond that. To hold, on those materials, that "they are virtually partners in a distinct class of business," and to decide the case on that ground, cannot, in their Lordships' opinion, be justified.

Some subsidiary points must be referred to. Counsel for the society pointed to the provisions in the Copyright Act and the amending Acts which enacted in specific terms that certain acts should not constitute infringement, the Act of 1938 itself containing one such provision, and argued that if subsect. (6) (*a*) bore the meaning for which the appellants contended, one would expect to find a provision to the effect that the public performances contemplated by the subsection should not constitute infringement. While at first sight there is force in this argument, it loses it when one realises that on the society's construction of the subsection, inasmuch as the Appeal Board has fixed an amount to be paid by broadcasting stations, a public performance by means of a receiving set in a place other than a theatre as defined would not be an infringement. Nevertheless no specific provision to that effect is to be found. It was also contended that it was necessary to find express or clear words depriving the society of rights, and that the wording of the subsection was not sufficiently clear for that purpose. Their Lordships agree with SIR LYMAN DUFF, C.J., that the words are clear; and they would also point out that the subsection provides (by way of compensation) for the payment of an appropriate sum payable "in advance" which apparently means in advance of any public performance, and, therefore, payable whether or not a public performance does in fact take place. Finally it was suggested that there was nothing in the legislation to deprive the society of its rights to an injunction, which was the only relief claimed in the action. If, however, the public performance here in question was made a lawful act by the subsection, and no infringement, the claim to an injunction necessarily fails.

For the reasons indicated, their Lordships are of opinion that this appeal should succeed, the orders of the Supreme Court and the Exchequer Court should be discharged, and an order made dismissing the action with costs in both courts, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of the appeal to His Majesty in Council.

Appeal allowed with costs.

Solicitors: *Charles Russell & Co.* (for the appellants); *Syrett & Sons* (for the respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

CINEMA PRESS, LTD. *v.* PICTURES & PLEASURES, LTD.

[Court of Appeal (Lord Goddard and du Parcq, L.J.), **February 20, March 5, 1945.**]

Practice—Costs—Taxation—Apportionment—Practice since repeal of R.S.C., Ord. 65, *r.* 2*—Defendants awarded costs on the issue of damages after the date of payment into court—Division of items common to both issues—Distinction between division and apportionment.*

The defendants in a libel action brought £25 into court with a denial of liability. The plaintiffs did not take the money out and the action proceeded to trial. The judge found in the plaintiffs' favour on the issue of liability and awarded them £5 damages with costs "save that the costs on the issue of damages after the date of payment of the sum of £25 into court be the defendants." The taxing master decided that the defendants were entitled to nothing under the judge's order. The defendants contended that some part of each of several items (such as discovery, instructions to counsel to advise on evidence, brief fees, etc.) could be attributed to the issue of damages; but the master stated that the costs of an issue were confined to increased costs, and, following *Holloway* (*George*) *& Webb, Ltd.* v. *Crompton* (1) there was no apportionment of costs in issue cases. He could not find that the costs of either party had been increased by the issue:—

Held: (i) although there was no apportionment of costs in issue cases, it was the duty of the taxing master to consider whether there should be a division of items common to each issue but which related in part to one issue and in part to another. The *Medway* case (3), although dealing with the taxation of costs of a claim and counterclaim, was now the governing authority on the matter, there being no difference in principle between a taxation of costs of a claim and counterclaim and one in which the costs of an issue were ordered to be borne by the party to whom the general costs of the action were given.

(ii) the bill must be remitted to the taxing master for reconsideration in the light of the judgment herein.

[**EDITORIAL NOTE.** The history of the point here at issue, as summarised by the Court of Appeal, is as follows. Until 1902 in issue cases Chancery taxing officers allowed apportionment of the general costs of the action, but the common law masters did not. In 1902 an amendment to Order 65, r. 2, had the effect, according to the decision of Sargant, J., in *Holloway* (*George*) *& Webb, Ltd.* v. *Crompton* (1), of abrogating the rule of the Chancery taxing office. In 1928 the *Medway* case (3), which the court here decide is equally applicable to issue cases, decided that in the absence of special direction where both claim and counterclaim succeed or are dismissed with costs there could be no apportionment but there could be a division of some items common to claim and counterclaim. In consequence of this decision, in the view of the Court of Appeal here reported, Order 65, r. 2, was revoked in 1929 as being unnecessary. The *Medway* case (3) is now, therefore, the governing authority and the former practice of the Chancery taxing office is rejected. The court adds that all these difficulties of taxation can be avoided by awarding to one side or the other whatever proportion of the costs the judge thinks fair.

As to Costs after Payment into Court, see HALSBURY, Hailsham Edn., Vol. 26, p. 99, para. 187; and for Cases, see DIGEST, Practice, pp. 874, 875, Nos. 4157-4161. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 366, 367; 1449, 1450.]

Cases referred to:

*(1) *Holloway* (*George*) *& Webb, Ltd.* v. *Crompton*, [1916] 2 Ch. 436; 28 Digest 543, *1504*; 86 L.J.Ch. 364; 115 L.T. 521.

*(2) *Adamson* v. *Birkenhead Corpn.*, [1937] Ch. 279; [1937] 2 All E.R. 221; Digest Supp.; 106 L.J.Ch. 202; 157 L.T. 109.

*(3) *Medway Oil & Storage Co.* v. *Continental Contractors*, [1929] A.C. 88; Digest Supp.; 98 L.J.K.B. 148; 140 L.T. 98.

(4) *Wilson* v. *Walters*, [1926] 1 K.B. 511; 40 Digest 437, *571*; 95 L.J.K.B. 624; 134 L.T. 597.

(5) *Willcox* v. *Kettell*, [1937] 1 All E.R. 222; Digest Supp.

(6) *Christie* v. *Platt*, [1921] 2 K.B. 17; 40 Digest 436, *568*; 90 L.J.K.B. 555; 124 L.T. 649.

Interlocutory Appeal by the defendants in a libel action from an order of Lynskey, J., dated Jan. 30, 1945, refusing an application for a review of the taxation of the costs in that action. The facts are fully set out in the judgment of the court delivered by Lord Goddard.

Gilbert Charles Dare for the appellants.

Valentine Holmes for the respondents.

Lord Goddard [delivering the judgment of the court]: The appellants failed in an application to Lynskey, J., for a review of the taxation of costs in an action in which they were defendants and have appealed to this court against the judge's refusal to make the order. The action was brought for damages for libel. The appellants by their defence admitted publication of the words complained of, denied that the words were published "of or concerning the plaintiff or of them in the way of their business," and said that the words were incapable of any defamatory meaning. Three days after the delivery of the defence, *i.e.*, on July 5, 1943, they brought £25 into court with a denial of liability. The plaintiffs (now the respondents) did not take the money out and the action proceeded to trial. Lewis, J., who tried the case without a jury, found in the plaintiffs' favour on the issue of liability, awarded £5 as damages, and gave his decision as to costs in the following words:

> I will give you [*i.e.*, the plaintiffs] your costs, subject to this, that [counsel for the defendants] is entitled to the costs of the issue of damages after the date of payment in.

The formal judgment was in the following terms:

> Lewis, J., . . . having ordered that judgment be entered for the plaintiffs for the sum of £5 with costs, save that the costs on the issue of damages after the date of payment of the sum of £25 into court be the defendants . . . It is this day adjudged that the plaintiffs recover from the defendants £5 and costs to be taxed, save that the costs on the issue of damages after date of payment of the sum of £25 into court be the defendants.

It was not suggested by either party that the formal order was not correctly drawn up and, indeed, it seems apparent that it accurately reproduces the language of the judge. The taxing master came to the conclusion that the defendants were entitled to nothing whatever under the order which awarded them the costs of the issue of damages after the date of payment in. The defendants carried in objections, in which they pointed out, under the headings of discovery, correspondence, instructions to counsel to advise on evidence, instructions for brief, drawing brief, brief fees, transcript of the judgment, that some portion of each of these items could be attributed to the issue of damages. The master, answering the objections, observed as follows:

> The costs of an issue are confined to "increased costs". There is no apportionment of costs in issue cases. See *Holloway (George) & Webb, Ltd.* v. *Crompton* (1).

He added that, after hearing the parties and carefully perusing the papers in the action, he could not find that the costs of either of the parties had been increased in any way by reason of the issue. He accordingly overruled the objections.

The case on which the master founds his ruling was decided by Sargant, J., in 1916. We think that counsel for the respondents is right when he says that the order as to costs in that case and the order in the present case are in substantially the same form; that is to say, there is, for our present purpose, no distinction to be drawn between the two orders. Sargant, J., based his decision, as he was bound to do, on R.S.C., Ord. 65, r. 2, as amended in 1902 by the addition of a paragraph after the general direction that costs of issues should follow the event, which had previously constituted the whole of the rule. The paragraph which was added in 1902 was as follows:

> And an order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the court or judge, if the whole costs of the action . . . are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine.

This addition, as Sargant, J., pointed out (at p. 441), reversed what had been the practice of the Chancery Division, by which:

> If a party was not ordered to pay or was given the costs of a particular issue he was relieved of or given, as the case might be, not only the costs of that particular issue, but also an apportioned part of the general costs of the action.

Owing, and solely owing, to the alteration in the rule, Sargant, J., (at p. 442) held himself to be :

> . . . bound . . . to read and construe this part of the order as excluding from the costs of the action to be taxed in favour of the plaintiffs that amount only by which the costs have been increased by the particular claims in question.

He added :

> . . . this being so, the correlative part of the order as to the costs to be taxed in favour of the defendant must necessarily be read as relating in its turn only to the increased costs occasioned by the same claims.

It is convenient to refer next to *Adamson* v. *Birkenhead Corpn.* (2), decided by Bennett, J., 20 years after the decision of Sargant, J., There the order made as to costs was that the defendants should recover their costs of defence, excepting such costs as were attributable to one issue which was specified in the order. No doubt had ever been thrown on the correctness of the decision of Sargant, J., but an event had occurred which necessarily shook its authority, for R.S.C., Ord. 65, r. 2, had been revoked by R.S.C., (No. 3), 1929. On what then could the decision of Sargant, J., be said to rest ? Bennett, J., solved this formidable problem by having recourse, at pp. 285-287 ([1937] 2 All E.R., at pp. 225, 226), to the history of what, if his view is right, may be said to have been one of the decisive battles of the law. Until 1902 the Chancery Taxing Office had proceeded on the principle which, as Sargant, J., held, the amendment of R.S.C., Ord. 65, r. 2, in that year had abrogated. The practice of the masters who taxed costs of actions in the King's Bench Division had long been to follow the rule to which the 1902 amendment gave statutory force. True it was that R.S.C., Ord. 65, r. 2, had disappeared, taking the amendment with it, but, none the less, what may be called the common law rule of taxation was left in possession of the field, by reason of R.S.C., Ord. 61, r. 1B, added in 1903, which had the effect of amalgamating the Chancery Taxing Office with the Central Office of the Supreme Court. The practical effect of this amalgamation seems to have been that the rule which the Chancery taxing officers had observed and kept alive till 1902 had no life left in it when, in 1929, its destroyer was itself destroyed. At p. 286 ([1937] 2 All E.R. at p. 225), Bennett, J., said :

> The effect of these changes in the rules seems to me to have been to establish one taxing office, the masters of which taxed bills of costs of actions tried in the Chancery Division and the King's Bench Division, and to abolish the Chancery taxing office, and in taxing costs under such a judgment as the present to establish the principles of taxation theretofore applied in such cases by the common law masters.

This, however, affords no explanation for the revocation of the rule. In our opinion, the reason why it was revoked, in all probability, was because, after the decision of the House of Lords in *Medway Oil & Storage Co.* v. *Continental Contractors* (3) it was regarded as unnecessary. That decision was given on Oct. 30, 1928, and the rule was revoked by R.S.C. (No. 3), 1929. The *Medway* case (3) related to the taxation of the costs of a claim and counterclaim but in our opinion there is no difference in principle between a taxation in such a case and one in which the costs of an issue are ordered to be borne by the party to whom the general costs of the action are given. There may be cases in which the claim and counterclaim raise substantially the same issue, as in *Wilson* v. *Waters* (4), where each party accused the other of negligent driving and the issue, therefore, was which of the two was to blame. In the *Medway* case (3) the issues raised by claim and counterclaim were different ; and we can see no difference for this purpose between a case where the plaintiff succeeds on his claim and loses on the counterclaim and one in which he succeeds on one issue on his claim and is defeated on another. Therefore, it seems to us that the true rule of taxation in these cases is to be found in the *Medway* case (3), which no doubt gives effect to the principles formerly applied by the common law masters. That case decides that, in the absence of special directions, such as were given by Clauson, J., in *Willcox* v. *Kettell* (5), where both claim and counterclaim succeed or are dismissed with costs there is to be no apportionment ; and it follows from what we have already said that this applies equally to a case where one party is given the costs of the action, except those relating to an issue or issues, or where he is not only deprived of those costs but they are given to the other party. But this is not an end of the matter. While the House of

Lords held that there was to be no apportionment, they held that there could and ought to be a division of some items which were common to both claim and counterclaim. VISCOUNT HALDANE said, at p. 100:

> . . . the distinction between division and apportionment may in certain circumstances be a thin one.

But he went on to say that it was "fundamental."

The distinction will be found stated in SETON'S JUDGMENTS AND ORDERS,
A 7th Edn., vol. 1, p. 250, in these terms:

> When the court gives part of the costs of the action it may do so in two ways: the one will involve an apportionment of the whole of the general charges; the other will extend only to the excess of expense incurred in consequence of the particular matter directed to be excepted.

Then it is said that, according to the settled practice of the Chancery Division, the former direction carries:

B
> . . . a portion of the costs of every general proceeding in the action.

It is this that the *Medway* case (3) prohibits being done in the future; but VISCOUNT HALDANE points out that there may be items which on their face are single but are in reality double—*i.e.*, which in part relate to the claim and in part to the counterclaim; and, we may add, in part to one issue and in part to another. In such cases he says that there must be a division. The most
C frequent instance would, no doubt, be the fee on the brief and the charges for instructions for brief, and the division referred to by VISCOUNT HALDANE can easily be understood by an illustration. Suppose an accident case, in which both liability and damage were in issue and in which the defendant made a payment into court with denial of liability. To establish liability it may be that the plaintiff has to call a large number of witnesses, including expensive experts. To prove his damage he may only have to call one doctor. The
D defendant also brings an array of witnesses on liability. In the result, the plaintiff establishes liability, but fails to recover as much as was paid into court. If the judge gives the defendant the general costs, but gives the plaintiff the costs of the issue on which he succeeded, it would clearly be wrong if no division of the brief fee were made. The fee has been marked for counsel to argue and contest both issues and in the case supposed most of the time and labour will have been spent on liability. It seems to us that in such a case the taxing master
E must consider what would have been a fair fee to mark had the only issue been liability. Or it may be that on the issue of damage several doctors and surgeons were called on either side. Here, again, the fee ought to be divided and it might well be that in a particular case the right view would be that more was attributable to the medical aspect than to that of liability and so a smaller proportion of the fee only ought to be allowed. A very similar state of affairs
F arose in *Christie* v. *Platt* (6). The House of Lords did not criticise the result reached in that case, which involved the division of certain items, though they considered that the Court of Appeal had in some degree failed to recognise the distinction between apportionment and division.

Equally, of course, there will be cases (and this may be one) where in fact no division is called for. Where, as often is the case in defamation cases, no particular evidence is given as to damage and no particular difficulty arises as to
G assessment, the taxing master may well consider that no part of the brief fee could fairly be attributable to that matter. The fee might well, and probably would, be the same if counsel were instructed to state that he was not asking for more than nominal damages. The same is true in many other cases. In a case of breach of contract, say, for failure to accept goods, there may be little or no question as to the measure of damage once liability is established. On the other hand, there are often cases where by far the most difficult and lengthy
H part of the case is as to the true measure or as to the proof of the damage that the plaintiff has suffered.

While the answer of the master in the present case, "that there is no apportionment of costs in issue cases," is correct as far as it goes, this does not deal with the question as to whether there are not some items which must be divided, nor would it appear that he has applied his mind to that question. Though it may well be that the result in this case will be trifling, for, as I have already said, it is possible that there will be no division of brief fee and instructions for brief, this case is of some general importance as calling attention to the fact that it is the *Medway* case (3) that is now the governing authority and taxing officers must in these cases consider the question of the division of certain items common to both issues in the light of that decision, as distinct from apportionment in accordance with the former, but now rejected, practice of the Chancery Taxing Office. The court has not read the briefs or instructions and nothing that we have said is to be taken as meaning that in this case there can be no division. Whether there should be, the master will consider in the light of this judgment. It also seems that some other items to which our attention has been called, such as discovery and correspondence, may also have to be reconsidered, and accordingly the bill must be referred back to the master for reconsideration.

This case is another illustration of the difficulty that often arises where special orders as to costs are made, involving taxation of those relating to particular issues. Considering that the judge only awarded £5 where £25 had been paid into court, it is likely that in making the order that he did he intended the defendant to get some real benefit from it, in consequence of his having made the payment into court. In the view that the master took, he got nothing and, as a consequence of this review, it may still be that he will get very little. These difficulties and complicated taxations can be avoided by awarding to one side or the other what proportion of the costs the judge thinks fair. There is no doubt as to his jurisdiction to do so and anything which works in favour of simplicity in these matters is desirable. It is too much to expect that judges and counsel, to whom questions of taxation are unfamiliar, will always be conversant with the many and by no means easy cases on the subject; nor can solicitors instruct counsel in advance on a matter such as this, as they cannot know how the judge will exercise his discretion or in favour of which party it will be exercised. We may be allowed to conclude this judgment by quoting the closing passage of LORD BLANESBURGH's speech in the *Medway* case (3), at p. 112:

> . . . this appeal will not be without permanent utility if it brings home to learned judges the necessity, in cases like these, of adjusting critically their orders as to costs if these orders are not sometimes to produce results at once unintentional and unjust.

We would add that the simplest way is to award costs in such proportions as the judge thinks fair.

The order of the court will be that the appeal is allowed; the bill must be remitted to the taxing master for him to tax again in the light of this judgment. When this has been done the appeal will be restored to the list and the court will then deal with the question of costs.

Appeal allowed; bill remitted to the taxing master for reconsideration.

Solicitors: *H. S. Wright & Webb* (for the appellants); *King Hamilton & Co.* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

Re AN ARBITRATION BETWEEN THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF WILLESDEN AND MUNICIPAL MUTUAL INSURANCE, LTD.

[COURT OF APPEAL (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **March 15, 1945.**]

An appeal from the decision of ATKINSON, J., dated Oct. 27, 1944, on a special case stated by an arbitrator for the opinion of the High Court, was dismissed. The facts are fully set out in the judgment of ATKINSON, J., reported in [1944] 2 All E.R. 600.

H. D. Samuels, K.C., and *John H. Bassett* for the appellants.

F. W. Beney, K.C., and *R. T. Monier-Williams* for the respondents.

Solicitors: *William Charles Crocker* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *W. T. Pirie*, Town Clerk, Willesden (for the respondents).

Re A SOLICITOR.

[COURT OF APPEAL (Scott, Lawrence and Morton, L.JJ.), **February 12, 13, 14, 15, 16, March 2, 1945.**]

Solicitors—Professional misconduct—Accident cases—Instructions from organisation making claims in accident cases—Failure of solicitor to make reasonable inquiry before accepting instructions—Suspension of solicitor from practice for two years—Solicitors Act, 1932 (*c.* 37), *s.* 8—*Solicitors Act,* 1933 (*c.* 24), *s.* 1—*Solicitors' Practice Rules,* 1936 (*S.R. & O.,* 1936, *No.* 1005), r. 4 (C).

(i) The Solicitors' Practice Rules, 1936 (S.R. & O., 1936, No. 1005), r. 4 (C), imposes a duty on a solicitor to make reasonable inquiry before accepting instructions from anybody in respect of an accident claim, and failure to make such inquiry involves a breach of the rule, whatever might have been the result if reasonable inquiry had been made.

(ii) On a re-investigation of the Disciplinary Committee's findings of fact, the Court of Appeal applies the general principle upon which the House of Lords acts in regard to appeals from concurrent findings of fact of the two lower courts, *viz.*, unless such findings are vitiated by some error of law, the House will very rarely interfere with the findings of the first court.

[**EDITORIAL NOTE.** Two important matters relating to the disciplinary jurisdiction over solicitors are here dealt with. In the first place, the case indicates the very high standard of duty laid upon solicitors, in order to protect the public from what is popularly known as "ambulance chasing," a duty of inquiry which can only be neglected at the solicitor's peril. In the second place, it is held that on a second rehearing by the Court of Appeal of the Disciplinary Committee's findings of fact the court will adopt the rule of the House of Lords towards concurrent findings of fact. The Disciplinary Committee is a specialised tribunal designed to make solicitors masters in their own house, in the words of LORD HEWART, L.C.J., in *Re A Solicitor* (1), and proceedings before it are not criminal or quasi-criminal.

AS TO DUTY TO MAKE REASONABLE INQUIRY, see HALSBURY, Hailsham Edn., Vol. 31, p. 312, para. 345; and FOR CASES, see DIGEST, Supp., Solicitors, Nos. 4420-4660a.]

Cases referred to:

(1) *Re A Solicitor* (1928), 72 Sol. Jo. 368.
(2) *P. Caland & Freight* (*Owners*) v. *Glamorgan S.S. Co., The P. Caland,* [1893] A.C. 207; 36 Digest 268, *128*; 62 L.J.P. 41; 68 L.T. 469.
(3) *McIntyre Bros.* v. *McGavin,* [1893] A.C. 268; 36 Digest 268, *129*; 69 L.T. 389.
(4) *Mendip Range Steamship* v. *Radcliffe,* [1921] 1 A.C. 556; 36 Digest 269, *135*; 90 L.J.P. 209; 124 L.T. 706.

APPEAL by a solicitor from the decision of the Divisional Court (VISCOUNT CALDECOTE, L.C.J., HUMPHREYS and BIRKETT, JJ.), made on Nov. 3, 1944, affirming the decision of the Disciplinary Committee of the Law Society suspending him from practice for two years on the grounds of professional misconduct and breach of the Solicitor's Practice Rules, 1936 (S.R. & O., 1936, No. 1005), r. 4 (C). The material facts and arguments are set out in the judgment of SCOTT, L.J.

Gilbert Paull, K.C., and *H. J. Astell Burt* for the appellant.

Cecil Havers, K.C., and *H. Brown* for the respondents.

SCOTT, L.J. [delivering the judgment of the court]: This is an appeal by the appellant from the decision of the Divisional Court in Nov., 1944, upon an appeal to it by him under the Solicitors Act, 1932, s. 8, from an order dated May 12, 1944, of the Disciplinary Committee of the Law Society, a tribunal originally created by the Solicitors Act, 1888, s. 12, and now reconstituted by and exercising jurisdiction under the Solicitors Acts, 1932-1941.

There were six separate charges of professional misconduct, the first five of which alleged breaches of the Solicitors' Practice Rules, 1936 (S.R. & O., 1936, No. 1005). The fifth charge was for breach of r. 4 (C), *viz.,* for failing to make reasonable inquiry before accepting instructions for the purpose of proceedings. The sixth was for accepting instructions from third parties to act for various named clients without making adequate inquiries. This charge was not expressed to be in breach of any statutory rule. The Rules of 1936 were made by the council of the Law Society, and approved by LORD WRIGHT, M.R., under the Solicitors Act, 1933, s. 1, and, therefore, have statutory force. The Disciplinary Committee found that the first four charges were not substantiated, but that the fifth and sixth were ; and that the appellant had thereby been guilty of professional misconduct. The Disciplinary Committee sat on four days to hear the case. By its order dated May 19, 1944, the Committee directed that the appellant be suspended from practice for two years and pay the costs of the proceedings ; but, on the application of counsel for the appellant at the public reading of the report, the committee further directed that pending appeal the order should not be brought into operation by filing.

The right of appeal to the High Court is given by sect. 8 of the 1932 Act ; and the statutory rules made thereunder require the appeal to be to the King's Bench Division (r. 1), and be by way of rehearing (r. 8). The Divisional Court, consisting of Viscount Caldecote, L.C.J., Humphreys, and Birkett, JJ., dismissed the appeal. There is no statutory limitation on the right of appeal from the Divisional Court to the Court of Appeal, and the appeal before us has therefore also been by way of rehearing. The notice of appeal to this court sets forth the same seventeen grounds of appeal (the last, No. 20, being, as below, in the alternative as to sentence only), and adds three more Nos. 17, 18 and 19 by way of complaint against the decision of the Divisional Court.

It is convenient to deal first with the questions which arise as to the construction of the Solicitors' Practice Rules, 1936, r. 4, and, in particular, as to the construction of r. 4 (C). How far the Practice Rules of 1936 were a codification of unwritten rules of the profession, previously obtaining, or how far they enlarged or altered the unwritten law is immaterial in our consideration of the Disciplinary Committee's finding that the appellant was guilty of a breach of the written terms of r. 4 (C). The essential characteristic of the rules is that they are mandatory : r. 4 (C) imposes a positive duty. Counsel for the appellant contends that no breach is proved of " the duty . . . to make reasonable inquiry before accepting instructions " unless it is proved (i) that the appellant failed to make reasonable inquiry and (ii) that if he had made reasonable inquiry he would have ascertained that the acceptance of the offered instructions would involve a breach of r. 4 (A) or of r. 4 (B). We do not agree. It seems to us that r. 4 (C) imposes a duty to make reasonable inquiry before accepting instructions in respect of a particular type of claim, and that failure to make such inquiry involves a breach of the rule, whatever might have been the result if reasonable inquiry had been made. All three parts of r. 4 are carefully limited in their purview to contentious business of a particular description, namely to " claims arising as a result of death or personal injury including claims under the Workmen's Compensation Acts, 1925 to 1934." We will call them compendiously " accident claims " and substitute that phrase in our reading of the rule. Omitting immaterial words and inserting two or three implications and explanatory expressions and punctuating the language, r. 4, will then read thus :

> (A) A solicitor shall not . . . act [either (i)] in association with any organisation or person (not being a practising solicitor) whose business . . . is to make, support or prosecute [accident] claims . . . in such circumstances that such person or organisation solicits or receives any payment, gift or benefit in respect of such claims [or (ii)] . . . in respect of any [accident] claim for any client introduced to him by such person or organisation.
>
> (B) A solicitor shall not with regard to any . . . [accident] claim knowingly act for any client introduced . . . to him by any person or organisation whose connection with such client arises from solicitation in respect of the cause [accident] of any such claim.
>
> (C) It shall be the duty of a solicitor to make reasonable inquiry before accepting instructions [*sc.* from anybody] in respect of any . . . [accident] claim for the purpose of ascertaining whether the acceptance of such instructions will involve a contravention of the provisions of subsect. (A) or (B) of this rule.

The plain meaning of r. 4 (C) appears to us to be that every solicitor is imperatively required, before he accepts instructions from anybody in respect of an accident claim, to make all reasonable inquiry, in order to satisfy himself that he will not thereby find himself guilty of a contravention of (A) or (B). The word " reasonable " has in law the *prima facie* meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know. This very proper limitation upon the duty to inquire excludes from the ambit of the rule the many cases where the known facts obviously preclude the necessity of any such inquiry : but it leaves under the duty of inquiry the solicitor, who does not know enough to make him substantially certain that there is no risk of mistake ; and unless he has reasonable certainty of such knowledge, he comes under the positive obligation of r. 4 (C). Still more does he come under that obligation in a case, where he already has in fact reason to suspect the person or organisation introducing the client, of wittingly or unwittingly putting him in danger of himself contravening (A) or (B) : and *a fortiori* is this so, if he has already had a past warning from the Law Society, the official guardians of the profession's conscience, that his relations with such other persons or organisations are dangerously near to or even over the border line of professional propriety. If the sub-section plainly means this, or even if it is impliedly based upon such a view of the professional danger, it seems to follow necessarily that a breach can be established without any proof either (i) that the acceptance of instructions would in fact involve a breach of subsect. (A) or (B), or (ii) that the solicitor (who *ex hypothesi* has failed to make reasonable inquiry) actually expected that the acceptance of instructions would, or probably might, result in a breach of subsect. (A) or (B). The evil aimed at by r. 4 (A) is the association of the solicitor with anybody, whether individual or an organisation, who for reasons of business (as distinct from, for example, charity) is interested in accident claims, but is not a solicitor. It does not matter for the purpose of the prohibition whether such a person or organisation actually obtains such business advantage or merely " solicits " it ; and that word there means " asks for " or " seeks." The evil aimed at by r. 4 (B) is different. " Touting " for clients is, like advertising, fundamentally inconsistent with the interest of the public and with the honour of the profession. The function of a solicitor is to advise or negotiate or fight for a client, but only if retained. The client may seek him, but he must not seek the client. And this rule of conduct must be made a reality, and not evaded by the subterfuge of getting some laymen to do the touting for him. To ensure the success of this fundamental policy of the profession, in the case of accident claims, where in practice the danger is greatest, a veto is laid down in r. 4 (B) against accepting clients who have been brought to him by lay touts. The construction which we have placed upon r. 4 (C), and the admission to which we must now refer, render any prolonged investigation of the facts of this case unnecessary.

The admission arose in the following circumstances. Mr. Hempson, who conducted the case on behalf of the Law Society before the Disciplinary Committee, had made an affidavit sworn on Aug. 30, 1943, in which he set out the facts upon which the charges against the appellant were based. Paras. 8 to 25 inclusive in that affidavit set out the facts of nine cases in which it was alleged the appellant committed a breach of the 1936 Rules. At the beginning of the second day of the hearing before the Disciplinary Committee, counsel for the appellant agreed, in effect, that the evidence contained in these paragraphs should be accepted as correct, subject to two minor alterations. The result is that it is unnecessary for the purposes of this judgment to set out the facts in these nine cases, as they are all recorded in these paragraphs of the affidavit. It is sufficient to say that in each of the nine cases the appellant received instructions from one Ernest Clothier, a member of a body called the Ex-Regulars Association, to act for a named person who had sustained an accident, and accepted such instructions. The issue which was decided against the appellant on the fifth charge was an issue of fact —did he make reasonable inquiry before accepting instructions in each of these nine cases ? On that issue counsel for the appellant quite properly availed himself to the full of his right to a rehearing, and he took us through a large part of the evidence given before the Disciplinary Committee, both oral and documentary. He had not personally represented the appellant at either of the previous hearings, but before us he respectfully complained that the Divisional Court had unduly curtailed the rehearing of the facts of the case. Having regard to these submissions we thought it right to hear him at length on the facts as well as the law ; but he wasted no time and we are indebted to him for his careful review of the evidence. In the result, however, we agree with the Divisional Court's conclusions : the rehearing before us, in our opinion, entirely justifies their endorsement of the Disciplinary Committee's finding that the appellant failed to make reasonable inquiry.

It is important to consider the attitude which the Court of Appeal ought to adopt towards a second re-investigation of the Disciplinary Committee's findings of fact. There are two reasons for special caution. In the first place the Disciplinary Committee of to-day is a "specialised tribunal," created by Parliament to deal with questions of professional duty peculiarly within the knowledge of the profession itself, and for that reason constituted of members of that profession specially selected for their knowledge, experience and position by the Master of the Rolls (who in one sense is the head of that profession), or in his absence by the Lord Chief Justice. As Lord Hewart, L.C.J., in *Re A Solicitor* (1), said, at p. 269: A

> The purpose and policy of that legislation was undoubtedly to make solicitors as far as possible masters in their own house.

The second reason is that we ought to apply the general principle, upon which the House of Lords acts in regard to appeals from concurrent findings of fact of the two lower courts, *viz.*, that unless such findings are vitiated by some error of law, the House will very rarely interfere with the findings of the first court. In considering the scope of the first principle, we see no reason why the conclusions of fact reached by the statutory tribunal for solicitors should be given any less weight than the decisions on fact of a judge of the high court sitting without a jury. In regard to the second principle it is enough to refer to three decisions of the House of Lords. In *The Owners of the P. Caland* v. *Glamorgan S.S. Co.* (2), at p. 215, and *McIntyre Bros.* v. *McGavin* (3), at pp. 275, 276, Lord Herschell, L.C., held that it was not the practice of the House on appeal by way of rehearing to differ from concurrent findings of fact in two courts below, unless both courts "have so distinctly erred as to justify their Lordships in saying that the concurrent findings of fact ought not to stand." That view was again affirmed in the House of Lords in the case of *S.S. Mendip Range* v. *Radcliffe* (4): see Lord Atkinson's opinion at pp. 575, 576. In the present case counsel for the appellant has failed to satisfy us that there was any error in the findings of the Disciplinary Committee, in spite of his careful review of what he told us were, in his submission, the most important parts of the evidence, oral as well as written. B C D

It is right for us to deal with certain objections raised by counsel for the appellant to the proceedings before the Disciplinary Committee. In the first place counsel for the appellant pointed out, quite rightly, that there were two mis-statements of the facts, in the printed findings and order of the Disciplinary Committee. In para. 9 there is a mis-statement as to the date on which one Bell died, and in para. 11 it is stated that a Mrs. Beasley did not reply to a letter sent to her by the appellant's firm. In our opinion, however, even if the Disciplinary Committee proceeded on the footing that these mis-statements were correct statements, it is impossible to suppose that their decision would have been different if the correct facts had been before their minds. Moreover, we, having the corrections brought to our attention, are satisfied that there was a breach of r. 4 (C) by the appellant in each of the nine cases. E F

Next, counsel for the appellant complained that in para. 6 of the printed findings and order the Disciplinary Committee set out as facts certain matters relating to a call by Clothier upon one Hart, which were not proved by any evidence. This criticism is perfectly correct, but in our view it supplies no reason for differing from the findings of the Committee. The case of Hart was not one of the nine cases already referred to, and the really important point is that a letter was written to the appellant by the secretary of the Law Society, on Sept. 14, 1939, drawing his attention to the manner in which Hart was approached by Clothier after he (Hart) had met with an accident; this letter was one of the matters which ought to have led the appellant to be particularly careful to make inquiry before accepting any instructions which came through Clothier. G

Next counsel for the appellant submitted that Mr. Hempson should not have put to the appellant, in cross-examination, a notebook alleged to have been written up by Clothier, and alleged to contain a list of cases sent by Clothier to the appellant. We agree that it was unfortunate that a book was put to the appellant which he had never seen before and which was said to be kept by a man who was not called as a witness. We are quite satisfied, however, that the questions put with regard to that book cannot have affected the ultimate result. We think it most unlikely that this passage in the evidence had any effect upon the Committee, and we have completely disregarded this passage in the H evidence for the purpose of forming our conclusions.

This brings us to a contention, most strenuously argued by counsel for the appellant, that proceedings before the Disciplinary Committee are governed by the rules of criminal law, or that such proceedings are at any rate quasi-criminal. On this footing he suggested that the proceedings were irregularly conducted in certain respects. Whether the proceedings can properly be described as quasi-criminal or not, in our opinion there is nothing in the statutes or rules which binds the Disciplinary Committee to the rules of criminal law. Even if the Committee were so bound, we are satisfied that no miscarriage of justice has been occasioned by any of the matters referred to by counsel.

The next complaint was that the Disciplinary Committee, in the penultimate paragraph of their findings, referred to an order of the Committee dated Apr. 28, 1939, whereby the appellant was ordered to pay the costs of proceedings in respect of alleged breaches of the 1936 Rules. In that case the Committee had found that the alleged breaches had not been substantiated, but they considered that the appellant had himself to blame for the allegations being made against him. Counsel for the appellant suggested that this previous order of the Committee was introduced into the proceedings at a time when the appellant was unable to give an explanation, and further that this paragraph was wholly irrelevant to the matters in question. In our view this complaint is not well founded. In the first place, this incident was put to the appellant in cross-examination, and his counsel availed himself of an opportunity to explain the facts in his final speech. In the second place, we think that this matter was relevant for the purpose of showing that the appellant had a warning in 1939 which brought to his attention the necessity of making reasonable inquiry before accepting instructions in respect of accident cases.

These are, we think, the only criticisms which need to be mentioned in this judgment, and we desire to say that in our view Mr. Hempson discharged a difficult task with fairness and skill, and the Disciplinary Committee carried out their duties with great care and efficiency. The facts of the case were somewhat complicated, and in our view the findings and order of the Disciplinary Committee is an admirable document, notwithstanding the small errors to which we have already referred.

On the question of sentence, on which counsel for the appellant made a powerful appeal, we have had some difficulty. So far as it is possible to judge by a transcript, the appellant seems to have given his evidence on the whole candidly and with little prevarication: but the tribunal who heard him were in a better position to judge than either appellate court could be, because they saw the appellant in the box. Whether or not r. 4 (C) imposed in 1936 a duty upon solicitors, for which there was no unwritten prototype, he evidently gave it critical attention in 1936 before it came into operation, for he conducted a considerable correspondence with the Law Society, and eventually asked and got a "waiver" under r. 5. That waiver was only conceded by the Law Society upon the basis of his detailed representations about his relations with the Ex-Regulars' Association as one of the bodies for which he acted as "Honorary Solicitor." In his letter to the Law Society of Nov. 6, 1936, he wrote:

> Instructions to act in common law actions are received from such members who are able to satisfy the organisation that there exists a *prima facie* case requiring assistance. In such cases the members produce a letter of introduction and proceedings are commenced upon their instructions. The organisation concerned ascertains the extent to which a member is able to provide for our profit costs in addition to the provisions made by the organisation for our disbursements and such profit costs are paid by the members. In the case of the Ex-Regulars' Association, we receive nothing more than a retaining fee which is based on the work done and disbursements incurred on behalf of its members, having regard to such costs and disbursements as the member himself has been able to meet. The members are referred to us by the organisation concerned and we accept no instructions without the approval of such organisation.

By a letter of Feb. 3, 1937, the secretary of the Law Society wrote to him:

> The reason why you require a waiver under the rule is because these associations offer your services to their members, and this infringes the provisions of the Solicitors' Practice Rules, 1936, r. 1.

On Mar. 24, 1937, the Council of the Law Society granted the appellant a waiver in respect of "the work of the Ex-Regulars' Association for a term of three years from to-day's date, upon the express condition that you notify them (the

Council) immediately of any alteration in the terms of your employment." Of this incident the material aspect consists of the appellant's express statements in his letter of Nov. 6, 1936, as to how clients in accident cases within r. 4 came to him. Those statements show how the need of inquiry into how clients came to him through the Ex-Regulars' Association must have been present to his mind from the start under the terms of the waiver. But his memory was thereafter refreshed by three important warnings. In Nov., 1938, charges were made by the Law Society against him under r. 1 in connection with certain Oxford accident claims, ignorantly but perhaps charitably, introduced to him by a brother. On Apr. 28, 1939, the Disciplinary Committee made the order to which we have already referred. They took the view that before taking up the cases the present appellant " should have made further inquiries " and that in not so doing " he was culpable," and he was ordered to pay the costs of the proceedings. Again in Sept., 1939, the Law Society wrote to him about his conduct in regard to the claim already mentioned by us, which he had started to prosecute for one Hart, in Nov., 1938, without any proper authority, on the introduction of Clothier purporting to act for the Ex-Regulars' Association. The Law Society thereupon revoked their waiver. With all the knowledge of his duty and his dangers thus acquired long before 1941, when the first of the breaches of r. 4 (C) of which he was found guilty occurred, we find it impossible to believe that he was not guilty of wilful blindness to his duty under r. 4 (C) during the whole period covered by the affidavit of charges in the present case : for he never made any attempt to ascertain whether the persons for whom he acted or tried to act as a solicitor were even members of the Ex-Regulars' Association : still less whether they had voluntarily sought the assistance of that Association's solicitor.

So much for his personal deserts. But there is a wider aspect. For the sake of the public it is of the utmost importance to enforce on all solicitors the high standard of duty which rests upon them to make such full inquiries as will really safeguard the poorer and more ignorant members of the public from being exploited for gain by unscrupulous men at times of their distress. " Ambulance chasing " is an opprobrious slang term, but it describes an abuse, and r. 4 (C) is directed to the prevention of that abuse by insisting on the regular duty of " reasonable inquiry " in advance. By the time to which the first of the present charges in these proceedings relates, the rule was already five years old. In addition the appellant was keenly alive to the defects of character and conduct which on his own confession made Clothier a dangerous " introducer " within the meaning of r. 4 (B). The mere existence of r. 4, put forward by the Law Society and passed into law at their request under the 1933 Act by the approval of Lord Wright, M.R., shows that there is a real danger of some solicitors, whether intentionally or only negligently, shutting their eyes to the danger to the public of touting in its many forms, and fools often do as much harm as knaves. Comparable danger had to be dealt with by legislation in the case of moneylenders (*e.g.*, the Moneylenders Act, 1927, s. 5 (3)).

After anxious thought we feel bound for the above reasons, including that of the deterrent value of exemplary punishment, to dismiss the appeal for reduction of sentence ; but, whilst adhering to the two years for the sake of deterrence, we would let the sentence be deemed to have run from the date of the Divisional Court's order. The fact that the Divisional Court with all its experience as members of the Court of Criminal Appeal took so serious a view is to our minds a very strong reason for our not differing from them.

One further point remains to be noted. Counsel for the appellant argued that the sixth charge was, as he put it, " bad for duplicity " in that it was merely a repetition, in somewhat different words, of the fifth charge. He also objected that the sixth charge was not based upon any of the 1936 Rules and he suggested that the Disciplinary Committee, having found against the appellant on charges 5 and 6, might have given him a heavier sentence than they would have given him if he had only been convicted of one charge. In our view the sixth charge is based upon the same facts as those which gave rise to the fifth charge, and it would appear that the sixth charge is not based upon any of the 1936 Rules, but is based upon the general rules of professional conduct which ought to be observed by solicitors, apart from any statutory provisions. However that may be, and assuming in favour of the appellant (without deciding the point) that the sixth charge should not have been made, we cannot think that the existence of that charge, or the finding of the Committee in respect of it, in any way affected the sentence which was passed by the Committee. That which was culpable was the failure of the appellant to make reasonable inquiry in the nine cases to which we have already referred, and it is in respect of that breach of the 1936 Rules that the Committee imposed the sentence. We cannot believe that the sentence was any more severe by reason of the fact that this one offence was charged in two different ways. The appellant must pay the costs of this appeal.

Appeal dismissed with costs. Suspension to run as from Nov. 3, 1944, *the date of the judgment of the Divisional Court. Leave to appeal to the House of Lords refused.*

Solicitors: *Arthur Dolland & Co.*, (for the appellant); *Hempsons* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HICHENS *v.* HICHENS.

[COURT OF APPEAL (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **March 12, 1945.**]

Husband and Wife—Legal proceedings—Summary proceedings as to property—Order referring matter to registrar for inquiry and report—Marriage dissolved by decree absolute before termination of inquiry—Dissolution of marriage no bar to completion of inquiry—Married Women's Property Act, 1882 (c. 75), *s.* 17.

In a divorce suit, after pronouncement of a decree *nisi* in favour of the petitioning wife, the husband applied to the judge for an order that questions between the parties, concerning the title to certain property, should be dealt with summarily under the Married Women's Property Act, 1882, s. 17. An order was made accordingly, directing the registrar to hold an inquiry and to report. Before the registrar had made the report to the judge, the marriage between the parties was dissolved by decree absolute. The registrar, thereupon, refused to continue the inquiry on the ground that, after the decree absolute, he had no jurisdiction to proceed with the matter. The husband then applied to the judge who made an order that the inquiry should proceed. The wife appealed against the order, contending that the court had no jurisdiction to try the questions under sect. 17, since the marriage was dissolved:—

HELD: since the court had power, at the time when the marriage still subsisted, to direct an inquiry under the provisions of the Married Women's Property Act, 1882, s. 17, such inquiry must proceed, notwithstanding the dissolution of the marriage by a decree absolute; but the court, on receiving the report of the registrar, might take into account the fact that there had been a dissolution of the marriage by decree absolute.

[**EDITORIAL NOTE.** This is an interesting practice point arising under the Married Women's Property Act, 1882, as to which there is no previous authority. It is held that where an application by a husband under sect. 17 has been followed by a reference for inquiry and report the fact that the marriage is dissolved is no bar to proceedings on the report. There is no longer a husband and wife, but the time for this relationship to exist is when the order of reference is made. The inquiry once commenced, it may go on, subject to the power of the judge to take into consideration the existence of the decree absolute.

AS TO SUMMARY PROCEEDINGS AS TO PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 740,741, paras. 1211, 1212; and FOR CASES, see DIGEST, Vol. 27, pp. 260, 261, Nos. 2296-2303.]

APPEAL by the husband, the respondent in the divorce proceedings, from an order of DENNING, J., made on Feb. 19, 1945, directing the registrar to proceed with an inquiry and report under the Married Women's Property Act, 1882, s. 17, concerning questions between husband and wife with regard to the title to certain property. The relevant facts are set out in the judgment of LORD GODDARD.

D. Armstead Fairweather for the appellant.

W. Harvey Moore for the respondent.

Lord Goddard: This is an appeal from an order of Denning, J., directing the registrar to proceed with an inquiry between the parties in a divorce suit under the Married Women's Property Act, 1882, s. 17.

The facts are these. The decree *nisi* was pronounced on May 14, 1943, and on June 28, 1943, Hodson, J., dealing with an application by the husband, who had asked that questions between him and his wife with regard to the title to certain property should be dealt with under the Married Women's Property Act, 1882, s. 17, made an order referring the matter to a registrar for inquiry and report. No one did anything on that order for a very long time. The husband did not give an appointment to proceed with the inquiry, nor did the wife; nor did the wife ask that the order should be discharged for want of prosecution. On Mar. 14, 1944, a decree absolute was made at the instance of the husband, the respondent to the suit, as the wife had not applied to make the decree absolute. He then obtained an appointment before the registrar under the original order of Hodson, J., to proceed with this inquiry. When the matter came before the registrar the registrar refused to continue the inquiry on the ground that, a decree absolute having been made, the parties were no longer husband and wife, and he considered, I suppose, that he had no jurisdiction. The husband then applied to Denning, J., who made an order on Feb. 19, 1945, that the inquiry should proceed. The objection that is taken before us by way of appeal against that order of Denning, J., is that the registrar was right, that, as the decree absolute dissolved the marriage, there was no longer a husband or a wife and, therefore, they could not proceed under sect. 17.

In my opinion, after careful consideration of this matter (which is not easy, perhaps, at first sight, and as to which there is no authority) this appeal fails. It is a very technical matter in any event, and certainly considerations of convenience would be in favour of allowing the inquiry to proceed and the matter to be dealt with under sect. 17, if there is power to do it. It is, therefore, necessary to see exactly what sect. 17 provides. It provides that:

> In any question between husband and wife as to the title to or possession of property, either party . . . [I omit certain words] may apply by summons or otherwise in a summary way to any judge . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit . . .

So that the judge can make an order at once when the application is made or he can make an order as a result of the inquiry. In the King's Bench Division the inquiry is held before the master and, although until an alteration of the rules the master could only make a report and the court had to make the order itself, the master now has power to make an order. In the Divorce Division the judge directs an inquiry to the registrar and on the registrar's report the judge makes the order, and, I have no doubt still does, although, as I say, there has been an alteration in the practice in the King's Bench Division.

It seems to me that the answer to the question is this. If the parties are husband and wife when the question arises they can apply to the court, and once they have applied to the court the court can, if it sees fit, order an inquiry. These questions are really independent of the action. For instance, if a simple dispute arises between a husband and wife—I cannot believe it would arise if they were living together, but if they were merely separated or living apart—the matter is begun by an originating summons in the appropriate Division, whichever Division the parties choose to go to, the King's Bench or the Chancery Division. It seems also that, where there is a divorce suit pending, they can apply in the Divorce Division. If at the time when they apply the parties are husband and wife, as they were in this case, then it seems to me that the court has power to do that which the section gives it power to do, that is to say, either to make an order at once or to direct an inquiry. If it does direct an inquiry, then the inquiry should proceed, and I do not see that there is anything which forces us to say that that inquiry comes to a standstill if a decree absolute intervenes. The inquiry is on foot, it can be carried out, and if when the inquiry has taken place the parties come back to the court for the court to make an order, the court would no doubt take into account, or might have to take into account according to what the report is, the fact that there had been a complete dissolution of the marriage by the decree absolute. I can well understand that a judge might say: " Well, the registrar's report is " so and so, " and that would be a very proper thing so long as the tie of husband and wife remains." As everybody knows, it is often difficult to decide questions of property between husband and wife according to their strict rights. The matter very often comes up with regard to wedding presents, which in one sense are given to both spouses, and very often you have to solve the matter by saying that if a present is given by a friend of the wife or a relation of the wife the property should be given to the wife, and that it should be given to the husband if it was a present by a relation or friend of the husband. I do not see that that would make any difference if there had been a decree absolute. With regard to the title, for instance, to money in the bank, it cannot make any difference, one would suppose, or one could not visualise any case in which it would, whether there had been a decree absolute or whether there had not. I can also see that if there has been a decree absolute between the time of the making of the order directing the inquiry and the report, on the inquiry coming before the court the court might refuse to make an order altogether. There is nothing to compel the court to make an order. The court might say that, in the circumstances, it will leave the parties to their remedy at law. On the other hand, I think as the court has jurisdiction to become seised of the case and seised of this matter when the application was made, it must be that the court has got power to carry it to a conclusion. That, I think, seems to have been the view of the judge below, and I think it is the right view. The court had power on the application of the husband at a time when the marriage still subsisted to make this order. It has directed an inquiry and the inquiry can go on, and when the inquiry has finished the case can go before the judge who will then, of course, if there are matters which call for it, take into account the fact that there has been a decree absolute which may or may not have some bearing on the decision which he ultimately gives. For those reasons, I think the appeal fails and should be dismissed; but in all the circumstances of the case the court does not see fit to make any order as regards the costs of the appeal.

MACKINNON, L.J.: I agree.

DU PARCQ, L.J.: I also agree.

Appeal dismissed. No order as to costs.

Solicitors: *John B. de Fonblanque* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HOPWOOD *v.* MUIRSON.

[COURT OF APPEAL (Lord Goddard, du Parcq, L.J., and Uthwatt, J.), **March 12, 1945.**]

Libel and Slander—Statements reflecting on a person in the way of his trade or profession—Solicitor—Statement regarding testimonial given by solicitor in personal and not professional capacity.

The respondent was approached by F. with regard to the tenancy of some premises and was shown a reference given by the appellant. The appellant was a solicitor and a personal friend of F. On previous occasions he had acted professionally for F., but was not doing so on this occasion. Ill-feeling existed between the respondent and the appellant and on being shown the reference, which had the word " solicitor " after the appellant's signature, the respondent said to F.: " You have got one [a reference] from that pimp H. [the appellant]. It is quite worthless. His very calling as a solicitor makes him write whatever suits his clients best. Damn it, he would sue his grandmother for 7*s.* 6*d.* " The appellant brought an action for slander in respect of these words alleging that they were spoken of him in the way of his profession as solicitor and in relation to his conduct as such. No special damage was alleged:—

HELD: the appellant gave the reference in a personal and not in a professional capacity, and the statement was a slander on the appellant as a man and not in the way of his profession. The slander, therefore, was not actionable *per se.*

[**EDITORIAL NOTE.** The relationship of solicitor and client can only arise in relation to specific pieces of contentious or non-contentious work. The expression " A. is my solicitor " means no more than that A. is habitually employed from time to time. The giving of references is no part of the duties of a solicitor, and it is accordingly held here that defamatory words relating to the giving of such a reference by a solicitor were not spoken of him in his calling so as to be actionable without proof of special damage. It was not enough that they should have a tendency to injure him professionally (*Doyley* v. *Roberts* (6)). The Court of Appeal hold, differing from the trial judge, as they are entitled to do, that the words in issue are capable of a defamatory meaning, A but, upholding the court below, that they are not actionable *per se*.

As to Statements Actionable *per se*, see HALSBURY, Hailsham Edn., Vol. 20, pp. 412-414, paras. 496-501 ; and for Cases, see DIGEST, Vol. 32, pp. 37-40, Nos. 333-402.]

Cases referred to :

*(1) *Jones* v. *Jones*, [1916] 2 A.C. 481 ; 32 Digest 28, *177* ; 85 L.J.K.B. 1519 ; 115 L.T. 432. B

*(2) *Lumby* v. *Allday* (1831), 1 Cr. & J. 301 ; 32 Digest 43, *457* ; 148 E.R. 1434 ; *sub nom. Lumley* v. *Allday*, 9 L.J.O.S.Ex. 62.

*(3) *Dauncey* v. *Holloway*, [1901] 2 K.B. 441 ; 32 Digest 37, *339* ; 70 L.J.K.B. 695 ; 84 L.T. 649.

*(4) *De Stempel* v. *Dunkels*, [1938] 1 All E.R. 238 ; Digest Supp. ; 158 L.T. 85 ; *affd. sub nom. Dunkels* v. *De Stempel* (1939), 55 T.L.R. 655, H.L.

(5) *Capital & Counties Bank* v. *Henty* (1882), 7 App. Cas. 741 ; 32 Digest 21, *121* ; 52 L.J.Q.B. 232 ; 47 L.T. 662. C

(6) *Doyley* v. *Roberts* (1839), 3 Bing. N.C. 835 ; 32 Digest 37, *338*.

Appeal by the plaintiff from a decision of Hallett, J., dated Nov. 2, 1944. The facts are fully set out in the judgment of Lord Goddard.

Serjeant Sullivan, K.C., and *Valentine Holmes* for the appellant.

John Morris, K.C., and *E. Holroyd Pearce* for the respondent.

Lord Goddard : This is an appeal from Hallett, J., who dismissed the D action brought by the plaintiff for slander, alleging that the words complained of were spoken of him in the way of his profession as a solicitor and in relation to his conduct therein. As I understand the judge's reasons, what he has found is that on a fair and reasonable interpretation the words were not defamatory of the plaintiff. They related to a reference which the plaintiff had given to a third party who desired to become a tenant of the defendant, and in the opinion E of Hallett, J., the defendant did no more than express, in a boorish and ill-mannered way, as everyone would agree, an objection to a reference given by any solicitor. It is necessary, therefore, to examine the facts.

An officer in the Fleet Air Arm, Lieut. Finlay, wished to become tenant of a house at Alresford belonging to the defendant, who was not easy to please in the matter of references as to the character and suitability of prospective tenants. Lieut. Finlay knew the plaintiff, and was in fact a close friend of his. F The plaintiff had acted professionally for him on previous occasions, but was not at the time of the alleged slander acting in the matter of the tenancy. This, in my opinion, is an element which is not without importance in the case. Had Lieut. Finlay been accepted as a tenant, he would have asked the plaintiff to act for him in approving the lease or agreement, but at the material time there was no retainer, and it is perhaps worth remembering that there is no such thing G as one being another's solicitor except in relation to some actual piece of work, contentious or non-contentious, and if one speaks generally of so-and-so being " my solicitor " or " my doctor ", it means no more than that the person mentioned is the solicitor or doctor whom the speaker would usually consult. Thinking, no doubt, that a reference from a member of a responsible profession would be acceptable, Lieut. Finlay procured one from the plaintiff, who added the word " solicitor " after his signature. Unfortunately ill-feeling, at least H on the defendant's part, existed between the plaintiff and the defendant ; and when Lieut. Finlay called on the defendant he permitted himself to use words relating to the plaintiff which were not only offensive but entirely without excuse. What the judge found he said is :

> You have got one [that is a reference] from that pimp Hopwood. It is quite worthless. His very calling as a solicitor makes him write whatever suits his client best. Damn it, he would sue his grandmother for 7*s*. 6*d*.

In his judgment Hallett, J., said :

> The question is, does that reasonably convey any imputation of impropriety or misconduct in relation to or in connection with the plaintiff's profession as a solicitor or unfitness to carry on his profession in a proper and satisfactory manner ?

I agree that this is the question in the case, and at the close of the hearing, when there was a discussion as to costs, the judge referred to the action as one which failed for lack of proof of special damage. But the judge does not appear to have decided the case on that ground, for he went on to say A that he regarded the words as meaning no more than that the defendant did not care about references given by solicitors ; that he did not want one given as a matter of business but as a social obligation. He says :

> To my mind the words were an objection to a solicitor's reference.

Were that the case, the words were not only not defamatory of the plaintiff but were incapable of being defamatory of him. If defamatory at all, they would only be so of solicitors as a class for which no individual solicitor could sue. B On this matter I cannot agree with the judge, The opening words and the concluding words were aimed at the plaintiff, and he was mentioned by name. I agree it would be possible in temperate language to express an objection to a reference given by a solicitor without defaming solicitors as a whole or any particular named solicitor.

But obviously the defendant intended to defame the plaintiff and, in my C opinion, amply succeeded, and he must have been very surprised when told that he had failed. The only meaning I can attribute to the words is that the plaintiff is a man who will say anything by way of reference that he thinks will suit clients, without regard to whether what he writes is true or not. On this point I am unable to agree with the judge. Whether or not words are capable of bearing a defamatory meaning is always for the court and is, therefore, to be regarded as a question of law. A court of appeal not infrequently D differs from the trial judge on such a question. Whether they are in fact defamatory is a question for the jury, or for the judge, at the trial, if he is sitting alone, but if he takes the view that the words are incapable of a defamatory meaning so far as the plaintiff is concerned, and this court takes a different view, this court can also say whether they are in fact defamatory of him, though had the trial been with a jury it would be a matter for a new trial.

But now comes the very much more difficult question whether the words E are actionable *per se*. The cases in which the law will infer damage in actions of slander are clear enough ; with regard to three of them, imputation of crime punishable by imprisonment, of unchastity in a woman since the Slander of Women Act, and imputation of certain diseases, at the present day hardly heard of as a ground of action, there is seldom any difficulty. It is when we come to the fourth class, words spoken of a person following a calling and spoken of him in that calling, which impute to him unfitness for, or misconduct in, that F calling, that one is faced with a number of authorities not always easily reconcilable and depending often on very fine distinctions, and from which it is hard indeed to extract any principle. I do not propose repeating what has often been said before as to the artificiality of the law relating to oral defamation. To look for a principle in the law of slander, said LORD WRENBURY, in *Jones* v. *Jones* (1), is an idle quest. The language I have used in describing the fourth G class of words actionable *per se* are, of course, those of LORD SUMNER in *Jones* v. *Jones* (1). It is not enough that the words are spoken of a plaintiff in his calling ; they must also impute to him unfitness for, or misconduct in, that calling. Counsel for the plaintiff, in a lucid and attractive argument, submitted that oral defamation is actionable if it is defamation touching the profession. But that leaves the question, what is meant by touching the profession ? He put it thus : if it is alleged that in the way of his calling he does an act which H in truth is not an act of his calling, it is defamation in the way of his calling. With all respect, I do not find this satisfactory. If the act criticised is not an act of his calling, the criticism of it is not criticism in the way of his calling. To impute generally dishonest or dishonourable conduct to a professional man is certainly not enough. The only case which could ever have supported so wide a proposition is *Lumby* v. *Allday* (2), and the statement to that effect was criticised by LORD HALDANE in *Jones* v. *Jones* (1). If the passage to which I have referred is to be supported at all, it can only be where the words are spoken of a trader and are such as would naturally reflect on his credit. Nor is it enough that the plaintiff's profession or calling should be referred to in the defamatory statement. In *Dauncey* v. *Holloway* (3) the defendant spoke of the plaintiff as "the lawyer in Orchard Street," but that did not make the words actionable. If two persons are discussing the action of a third in relation to his private affairs and it were said: "Well, what could be expected, the man is a lawyer, it is the result of the narrow legal mind," or "the man is a soldier with a rigid military mind," this would have nothing to do with his fitness or conduct as a lawyer or a soldier.

Here we are considering a case where a solicitor has given a reference to a friend; in so doing he was not acting in a professional but a private capacity. It is said that the reference to clients makes all the difference. In this respect one may say that clients are to a solicitor what customers are to a tradesman, and if it were said of a reference given by a grocer to his customer: "Oh, well, that is worthless, that grocer will always say what he thinks will please a customer," that is no reflection on the goods he sells or his fitness to conduct a grocery business. It reflects on his personal honesty, but not on his conduct or capacity as a grocer. The present case seems to me exactly parallel. If the plaintiff had been acting professionally for Lieut. Finlay, and in the course of his professional duty had made a statement with regard to the character or ability of his client, a suggestion that it was given recklessly or dishonestly would, I think, have been actionable *per se*. It would have been a reflection on the plaintiff's professional honour in the conduct of professional business. In the present circumstances I can only regard it as a slander on him as a man, his professional training being given as a reason for his having acted as he did.

I will add a few words with regard to *De Stempel* v. *Dunkels* (4), as that was a case on which counsel for the plaintiff relied. The actual decision in that case, in my opinion, was that, if one speaks words to a man's employer attributing something to him which would indicate to the employer, who knows all the circumstances, that the employee is unfit for his occupation, those words are actionable *per se*, though they might not have been had they been addressed to others who had not the same knowledge. This is no more than was laid down in *Capital & Counties Bank* v. *Henty* (5). The words in that case were published only to persons to whom facts were known which would not have been known to the general public and were, therefore, held incapable of a defamatory meaning, though it was expressly said that it would have been different had they been published broadcast over Chichester.

For the reasons which I have endeavoured to express, I have come to the conclusion that these words are not actionable *per se*, and, accordingly, that the appeal fails and must be dismissed with costs.

DU PARCQ, L.J.: In this case the plaintiff failed in his action for slander because HALLETT, J., who tried the case, held that the words spoken of him by the defendant were not actionable without proof of special damage, and no special damage was proved or alleged. The plaintiff is a solicitor, and the only question in the case is whether the judge was justified in holding that the words which were proved to have been spoken were not defamatory of him in the way of his profession. The facts have been fully stated by my Lord, and I will not repeat them.

The judge put to himself the question founded on the judgment of SMITH, M.R., in *Dauncey* v. *Holloway* (3), at p. 444:

> Do the words reasonably convey any imputation of impropriety or misconduct on the part of the plaintiff in relation to or in connection with his profession or business, or of unfitness to carry on his profession or business in a proper and satisfactory manner?

The judge answered that question in the negative. He said:

> I think that the reasonable meaning of this outburst was: "I do not regard a solicitor's reference as a satisfactory reference at all. What I want is a reference from somebody who does not give the reference as a matter of business, but someone who gives it as a social obligation." To my mind the words were an objection to a solicitor's reference for this purpose.

Rightly, as I think, the judge refused to put upon the words of the foolish insult which rounded off the slander the meaning ascribed to them by an ingeniously framed but unconvincing innuendo.

The judge's paraphrase of the defendant's language is perhaps open to the criticism that it furnishes but a pale reflection of the matter, as well as the form, of that gentleman's utterance. The calm and almost judicial appraisement of the value of a solicitor's reference into which the defendant's abuse is translated could hardly be said to be defamatory of the plaintiff, either in the way of his profession or at all, but I cannot doubt that the words in fact spoken were spoken of the plaintiff and were at least capable of a defamatory meaning. The words of stupid and vulgar abuse which introduced and con- A cluded the substance of the slander indicated that the attack was aimed at the plaintiff as an individual. It was his reference which the defendant was rejecting as worthless, on the ground that in the circumstances it was likely to be unreliable, Whether the words were not only capable of a defamatory meaning, but were in fact defamatory of the plaintiff, is a question which I do not find it necessary to answer. I think that a jury might have said either " Yes " or " No " to it without incurring the rebuke that their verdict was one which twelve reasonable B men could not have given.

But even if the words were defamatory of the plaintiff it does not follow that they are actionable without proof of special damage. As to this the judge applied the right test. The words which he took from the judgment of SMITH, M.R., in *Dauncey* v. *Holloway* (3) were in substance repeated by LORD WRENBURY, with special reference to solicitors, in *Jones* v. *Jones* (1), at p. 507, C and in the latter case LORD SUMNER, when he concisely classified words actionable *per se,* stated the same test in his definition of the fourth class, at p. 500 :

> When words are spoken of a person following a calling, and spoken of him in that calling, which impute to him . . . misconduct in that calling.

The plaintiff follows the calling of a solicitor : Were the defamatory words spoken of him in that calling ? Did they impute to him misconduct in that calling ?

D I have no doubt at all that if a jury, properly directed, had returned a verdict for the defendant, stating that in its view the slander did not touch the plaintiff in his calling, this court could not have set it aside. A judge, however, is not the constitutional tribunal for the decision of such a question in the sense in which a jury may be so described. His decision is open to review in this court, although I think that, if the slander is reasonably capable of more meanings than one, we ought to be slow to adopt a meaning which the judge has rejected E after seeing and hearing the parties and their witnesses. It is at least as desirable in the case of actions for slander as in other branches of the law that there should be an end of litigation, and, if in such an action the judge is compelled by circumstances to do the work of a jury, I think that an appellate court ought not to be too ready, in the capacity, as it were, of a second jury, to say that he was wrong. In the end the question is not one on which a lawyer is F better qualified to pronounce a view than a jury would be, and, if this court differs from the judge, it is not correcting any error of law. Judges are fitted to decide such questions, not by their knowledge of the law, but by their knowledge of the world, and will be the first to admit that canons of construction which are properly applicable to contracts and statutes are a very unreliable guide to the reasonable interpretation of angry and ill-chosen words.

I have ventured to make these observations for two reasons : first, in order G to justify my opinion that the question for us is not whether it would be possible to put upon the words now under discussion a meaning which would involve an imputation on the plaintiff in, and touching, his calling, but whether the judge's conclusion that such was not their natural meaning is shown to be wrong ; secondly, because I am of opinion that great weight ought to be given in this court to the judge's view, provided always that he did not wrongly apply the law or, in the customary phrase, " misdirect himself." H I have already said that, in my opinion, HALLETT, J., applied the right rule, and, far from being satisfied that his conclusion was wrong, I am of opinion that in substance it was right.

I do not propose to speculate as to the divers meanings which this or that juryman might have put on this slander within the limits of reason. In my judgment the sting of the words lay in the suggestion that the plaintiff, rather than risk offending those who were, or were likely to become, his clients, would give them better references than the facts, as he knew them, fairly justified. It is no doubt the duty of everyone who gives a reference to state no more than he knows or believes and, so far as his knowledge is relevant, all that he knows, and to express no opinion which has not a solid foundation of fact. This is a moral and a special duty which is owed by all, and in so far as it is a legal duty it is binding upon all. To say of a solicitor that a reference from him is worthless, and that his very training makes him, in common with all other solicitors, likely to fail in this general duty, is to charge him with misconduct, not as a solicitor, but as a citizen and a man. A man who is persuaded through moral weakness or a desire for profit to rate too highly the financial standing and general reputation of a client or customer is not thereby guilty of misconduct in his calling, in the sense in which that phrase is rightly to be understood. It is true that right minded persons will not think well of a man who gives misleading references, and that their disapproval of him is likely to affect him adversely in his calling, but this consideration does not entitle us to regard words spoken of a solicitor in relation to conduct outside his profession as "spoken of him in his calling." It is not enough that the words have a tendency to injure him professionally. (*Doyley* v. *Roberts* (6).) It is unnecessary to deal at length with this aspect of the case since it was the subject of a full exposition in *Jones* v. *Jones* (1): see especially per LORD HALDANE, at pp. 491, 492; per LORD SUMNER, at pp. 498, 499; and per LORD WRENBURY, at pp. 507, 508. The fact that the defendant when uttering the slander referred to the plaintiff as a solicitor, in my opinion, has no importance when it is seen that the misconduct alleged was not anything done in the way of his profession.

During the argument reference was made to the decision of this court in *De Stempel* v. *Dunkels* (4). In my opinion the decision in that case throws no light on the present problem. Counsel for the plaintiff drew our attention to the passage in the judgment of GREER, L.J., in which the opinion is expressed that *Jones* v. *Jones* (1) would have been differently decided if the defendant had gone to the plaintiff's employers and said to them: "Mr. Jones is an unfit person to be a teacher because he has committed adultery with the wife of the caretaker." I am very ready to assume the accuracy of any opinion which was expressed by GREER, L.J., and I will assume this *dictum* to be accurate, though without finally committing myself to acceptance of it. I would observe, however, that, however much importance is to be attached to the fact that Lieut. Finlay had been, and intended again to become, a client of the plaintiff, nothing was said by the defendant which is in any way analogous to the words "Mr. Jones is an unfit person to be a teacher." Whatever may be thought of the defendant's language, it is surely impossible to interpret it as meaning that, in his view at any rate, the plaintiff was unfit to be a solicitor. So far as the issue of slander was concerned, *De Stempel* v. *Dunkels* (4) did not, I think, lay down any new principle of law. All that was decided on the special facts of that case was that to allege of a diamond broker that he was a Jew hater was not merely to attribute to him an evil and uncharitable disposition but (what was more to the immediate purpose) to impute to him an antipathy which, besides being discreditable, rendered him unfit "to carry on his business in a proper and satisfactory manner."

For the reasons I have given, I am of opinion that the decision of HALLETT, J., was fully justified, and that the appeal should be dismissed.

UTHWATT, J.: I agree. I do not think that the peccant phrase—finding its place between two distinctly personal references to the plaintiff—can be properly regarded merely as a generalisation relating to the worthlessness of references given by solicitors. Its point lay in its application to the plaintiff. I disagree, therefore, with the meaning attributed to it by the judge. The slander as a whole is contemptuous of the plaintiff, and his profession is referred to as the reason for his liability to deviate from the truth. I read the phrase as meaning: "The plaintiff, because he is a solicitor, will give any reference that suits the interests of a client, be it true or false."

The question is whether these words rationally understood convey an imputation upon the plaintiff in his profession as a solicitor. In my opinion they do not. The giving of references for prospective tenants is no part of the avocation of a solicitor, though, through the standing of the profession, solicitors are often asked to supply references. In giving references the solicitor is not acting as a solicitor and that is none the less so where the person, in respect of whom the reference is given, habitually employs him as solicitor. That person would indeed say that the giver of the reference was his solicitor, and that he was the solicitor's client. But the habitual employment of a particular solicitor by an individual does not result in the creation of a status of "solicitor and client," with the result that any acts done by the solicitor for the individual are acts done by him in the course of his profession. The subject-matter dealt with on any particular occasion and the relation between the parties on that occasion have to be considered. Bearing these general considerations in mind, I fail to see that the words used convey an imputation upon the plaintiff in his profession as a solicitor. The slander was upon the solicitor as a man; not upon the man as a solicitor.

Appeal dismissed with costs.

Solicitors: *Shirley Woolmer & Co.* (for the appellant); *Beachcroft & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CUNLIFFE v. BANKES.

[LIVERPOOL WINTER ASSIZES (Singleton, J.), **February 5, 1945.**]

Nuisance—Damage caused by trees—Tree growing near highway fell owing to diseased condition—No neglect on part of owner.

A tree growing on the defendant's estate fell, owing to its diseased condition, across a highway running beside the estate. The plaintiff's husband was riding a motor cycle along this highway when, without any negligence on his part, he collided with the tree and died of his injuries. The plaintiff's action based on negligence and nuisance, was brought under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. It was found as a fact that the defendant had taken all reasonable steps to ascertain the condition of the tree and that he could not have realised that it was likely to fall:—

HELD: (i) upon the evidence the defendant had not been negligent.

(ii) a person is not liable for a nuisance constituted by the state of his property unless (*a*) he causes it; or (*b*) by the neglect of some duty he allows it to arise; or (*c*) when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he became or ought to have become aware of it. Therefore the defendant was not liable.

Noble v. *Harrison* (1) *followed.*

[**EDITORIAL NOTE.** There is little authority on the question of liability for accident caused by trees falling on the highway from adjoining property. In *Noble* v. *Harrison* (1), decided in 1926, the fallen tree had extended over the highway, and SINGLETON, J., here follows the view of ROWLATT, J., expressed in that case that the same principle is equally applicable to a tree standing clear of the road, which falls across it. The dangerous condition of the tree was difficult of detection owing to the disease existing being the honey fungus, which attacks the roots, and the judgment contains a useful review of evidence relating to the duty of inspection necessary in order to avoid an imputation of negligence. On this point reference may be made to the judgments in *Shirvell* v. *Hackwood Estates* ([1938] 2 All E.R. 1).

AS TO DAMAGE CAUSED BY TREES, see HALSBURY, Hailsham Edn., Vol. 24, pp. 49, 50, para. 86; and FOR CASES, see DIGEST, Vol. 36, pp. 187-189, Nos. 311-316.]

Cases referred to:

*(1) *Noble* v. *Harrison*, [1926] 2 K.B. 332; 36 Digest 189, *316*; 95 L.J.K.B. 813; 135 L.T. 325.

(2) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg. S.C. sub nom. Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; *revsg.* (1865) 3 H. & C. 774.

(3) *Barker* v. *Herbert*, (1911) 2 K.B. 633; 36 Digest 197, *374*; 80 L.J.K.B. 1329; 105 L.T. 349.

ACTION under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, to recover damages on the grounds that the negligence of and a nuisance committed by the defendant caused the death. The facts are fully set out in the judgment.

A. E. Baucher for the plaintiff.

H. I. Nelson for the defendant.

SINGLETON, J.: This case arises out of a most unfortunate and tragic accident which occurred on Thursday Jan. 6, 1944. The young man, Horace Cunliffe, lived in the neighbourhood of Wigan and he worked at the Speke Royal Ordnance Factory, so that he had a journey of some 20 miles each morning to work. On the morning of Jan. 6 last year he left home somewhere about 5.40 a.m., upon his motor cycle and he met with an accident when he had gone about 2 miles.

His course lay along Pemberton Road in the direction of Windy Arbor, A and Pemberton Road lies alongside the estate wall of George Bankes, who is the defendant in this case. The estate wall is 6ft. high and inside the park land, on the landside of the wall, there were a number of growing trees; indeed, there was a belt of woodland. Some time before Cunliffe rode along that road on the Thursday morning a tree had been blown down. There may be a question as to whether it had been blown down or fallen down, but it came down across the wall. B

It was an elm, some 50 years old and some 40ft. in height, growing at a position about 20ft. inside the wall and it fell across the wall, 20ft. of the tree being inside the park and the 20 or 21ft. across the roadway. The precise time at which it fell no one knows. A little before 6 a.m. a bus driver of the Wigan Corporation had to drive his bus along the road and he noticed something looming up in front of him. He pulled up and found branches of a tree by his windscreen and he avoided an accident. C

He explained to me that the tree was well above road level. No doubt it was kept up to some extent by the wall over which it had fallen and to some extent by its branches. It was about 6ft. above road level where it struck the wall and about 3ft. above road level at its extreme end. He said his lights went under it, but he avoided an accident. As he was looking round for the cause of the trouble he heard groans. He went further and found Cunliffe about D 6 or 8yds. beyond the tree, and the cycle some 15 or 20yds. beyond the tree. Cunliffe was very badly hurt and he died a week later in the infirmary.

It is quite clear that he had been driving along that road towards his work, that he had caught his head upon the tree and had been carried on a little way and his bicycle had gone further still. I think it is reasonably clear that he had not as much chance of seeing the tree as might be expected because the tree was some distance above the ground. E

Mrs. Cunliffe is just over 30 years of age. She and her husband were much the same age. She had at the time of this accident three children and another was born a day or two after the accident, so that there are four children with whom she is left. She claims damages in this action both under Lord Campbell's Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act, 1934, alleging that the accident was caused either through negligence on the part of the defendant or by reason of a nuisance created by him for which he is F responsible in law.

It is quite obvious that if she is entitled to damages for herself and for her children she is entitled to a considerable sum of money, for the husband was a young, healthy man earning £6 a week.

The real difficulty in the case is to determine what the facts are with regard to the tree which fell in order to see whether or not liability upon the defendant G is established. This is indeed a most important case, important to the widow but important too, to all the persons who have land with trees growing upon that land close to the road. There is not very much authority upon the position.

The plaintiff called before me Ingham, the agent of the Huntroyde Estate in East Lancashire. Ingham is a Fellow of the Chartered Surveyors' Institute and a member of the Land Agents' Society, and I suppose he must have some experience of trees, as the ordinary land agent has, and he looks after a consider- H able and well known estate, well timbered.

Ingham told me that he saw portions of this tree, which portions were produced before me in court, and that he saw them on Dec. 11, 1944, that is 11 months after this accident took place. He said that he visited Wigan and made an inspection of the exhibits, of which the larger piece was at the police station and other portions were at the offices of the defendant's solicitors. He described this tree as an English elm type, about 50 years old, and he said probably it was a sucker, the original growth having gone and this new growth having grown up on the old roots. He said:

> This tree has died in my opinion as the result of an attack by honey fungus and it is in an advanced state of decay.

He further said:

> I find evidence of honey fungus under the bark. It spreads from one tree to another underground and it then develops this white mycelium as shown on the root portion. When it gets to this advanced state in my opinion it should have been noticed.

A He added:

> I should say the tree has been in a decayed state for some years, I should say five years. Evidence of decay has been visible for anything up to five years.

Then he described the fungus as eating into the inner bark and the bark sheds off and leaves the trunk bare. He said there was a certain amount of damage B by the elm bark beetle but that was a secondary cause following the other. He said further that the disease would be evident to an agent; it would be evident that the tree was dying or dead and ought to be removed. He said more trees died of this disease of honey fungus than any other and the disease ought to be observable by anyone making an examination.

It is to be noticed the complaint with regard to this elm tree was not that of which one has heard and read a good deal, the ordinary elm disease, but it was C a disease which attacked many trees, called honey fungus, and that, as became apparent in this case, is a disease which strikes from the roots upwards, and at some time after the disease has attacked the trees the position becomes such that the sap ceases to run upwards, so that the tree ceases to have any leaves upon it.

In cross-examination Ingham agreed that all that an agent could do was to inspect the trees, and the proper time for inspection was in the summer when the D trees were in leaf. A reasonable inspection then would disclose to the inspector any tree which was seriously affected by any such disease, because there would be a lack of foliage if it was so affected. I gathered from Ingham's evidence that his view of the duty of an agent was that he should make such an inspection each year when the trees were in foliage, and he said if an agent did so he was performing his duty in that respect.

He said, "The best time to examine is in the summer time when the trees E are in leaf." He added:

> You can easily tell then, and I am not in a position to contradict the agent if he says he found nothing wrong on inspection in the summer. I only saw these exhibits and am not in a position to contradict the agent if he says all was right in the summer.

I have not given his exact concluding words because I have not got them. He added again:

> F It would be perfectly true to say the trunk was in good order. It was the roots that had gone and the roots were not visible. If the bark had not gone an outside examination would not show anything wrong with the trunk.

Then he pointed out to me upon a portion of the trunk a place where the bark had come off and he said, "I do not know when the bark came off." Again it became clear that if a tree, particularly an elm tree, does become attacked by G a disease of this kind, the disease spreads up between the trunk of the tree and the bark, and the bark becomes affected in time.

I have other evidence as to the condition of the bark upon this tree and as to the condition of the trunk at the time the tree came down, and I think that evidence points quite clearly to the fact that the bark was all right so far as could be seen when the tree fell. During the time that a portion of it has been preserved in the police station or in the solicitor's office there has been a drying H up process as well, may be due to some advance of the fungus, and in one particular place the bark has come off. It was easy for the witness Ingham to point out there what was happening but, as he told me, if the bark was on the tree an outside examination would not show anything wrong with the trunk.

I asked Ingham if it was possible to say with any certainty how long it takes for this sort of ancillary disease from which this tree was suffering to develop, and he said, "No, my lord, it is not. A tree can die in one season." I asked him, "You cannot tell whether it will go quickly," and he answered, "No. It depends upon the vitality of the fungus. It is a fight between the sap and the parasite." He told me some more about the roots and then I said to him:

> What I am wondering really is whether it is possible to form any view either way by the state of the foliage the previous summer, bearing in mind that the tree may go very quickly?

He answered:

> There is that about it, that that little bit of sapwood might be keeping the tree alive. That is why I cannot contradict.

He meant he could not contradict the proposition which counsel for the defendant put to him if the agent gave evidence a certain way.

I said to him further, "It is impossible to say?" and he said, "No, it is not possible." Then I asked him:

> Certain conditions in it look as if they may have existed for some time, but there was a space through which the sap could get so that there might not be as much foliage as there should be on a tree of that size?

The conclusion which I have formed with regard to the evidence of the witness is that he was right in his view that the tree was advanced in disease coming from the honey fungus, but furthermore there was, prior to the tree falling, nothing to show so far as that witness can say that the disease was present. His impression is that the disease had been there for some years but, as he said, when he examined the tree, and when he looked at it in this court there is a portion of that tree which is quite sound still through which sap could get. It is the fight between the sap and the parasite; he cannot tell when the one overcame the other. The trouble really was in the roots.

The plaintiff also called on this matter a police constable who saw the tree just after it had fallen, and he said, "In my opinion it was perished at the roots" but I think he never saw the tree in daylight. The plaintiff called too a witness who is a park foreman for the Wigan Corporation and he saw the tree, or part of the tree, the roots really, about two and a half months after it had fallen, at the Orrell police station. He said:

> My opinion is that the tree was dead before it fell and I think it had been dead for two years at least, probably more. Decay took place from the roots upwards. I would not have allowed it to remain in my park.

When he was cross-examined he said:

> The disease strikes up from the roots, but inside and it is very rapid. You could have yellow sickly foliage one year and none the next year. There would be signs that it had been dead for a number of years if it had been dead.

That was the plaintiff's evidence upon this matter.

The defendant's evidence consisted of two witnesses, one of whom was Bradley, the agent for the estate, and who has been agent since 1938. He too is a member of the Chartered Surveyors' Institution and he has some experience of estate management. He became agent in 1938, and he had been two years with the gentleman who was agent for the estate for 42 years, I think, before him.

Bradley told me the estate is a very heavily wooded estate of some 5,000 acres only a few miles from Wigan, or close to Wigan. I think there are two things which are clear about this estate as far as I have heard from the evidence. One is that the owner or life tenant of the estate at the time when he is in the neighbourhood in the summer takes an interest, a keen interest, in his estate, though he is getting on in years. The second is that one at least imagines that a new estate agent would not be appointed on an estate of this kind without the advice of the old agent who had been there for 40 years, and I should think in the ordinary course Bankes must have consulted the retiring agent before he appointed Bradley in 1938, Bradley having been for 2 years assistant to the agent.

He was given charge of this estate by Bankes, and he had at any rate learned his duties. He told me that each year in the summer he made an inspection of the wooded parts of the estate and if he saw any trees which were showing signs of disease or decay, he marked them. He said, and rightly said, that the proper time for this examination is when the trees are in foliage. I gather from that that he inspected at the proper time, and I have no reason to think that his inspection was not a proper and full inspection. Then he added:

"In this part where there is a belt of trees I did a casual inspection more frequently than my yearly inspection." I am not sure why he did that, but it may well be that the trees were fairly close to this country road and he thought there was some additional responsibility, so he made those examinations.

I believe him in the evidence which he gave and I accept it from him. He said that when he inspected he found nothing wrong with this tree, not meaning thereby that he inspected this tree individually, but that when he inspected, if this tree had been without foliage or if it had very indifferent foliage he would have noticed that, and he saw nothing such. That is his evidence. He said:

> If I considered a tree dangerous, I would have it felled. The owner leaves it to me to determine a matter of that sort, and I have the tree marked and felled pretty quickly.

He told me what fellings he had, and he told me he had other odd fellings as well. He agreed with Ingham, the agent from Huntroyde, that in this case the roots had been attacked by honey fungus. He said that disease starts from underground, but he does not agree that that condition could have been seen for a long period. He said the trouble was underground and that could not be seen.

He added, as Ingham said, that this fungus may have a very rapid action. He said he had had fellings in that part since, but some of the trees in the woodland remained still; not a large proportion had been felled yet. In 1943 he found some trees in the neighbourhood which required felling; some were diseased in a more advanced state and some were not able to obtain nourishment from the soil.

> They were felled because I considered them diseased or dangerous. I do not agree that this tree shows evidence of long disease. I cannot agree it shows five years.

He said it was very difficult to tell. If it had been diseased for 5 years the whole of the trunk would be rotten and dead. He pointed out that the trunk was not rotten and he said, "In parts it still appears sound to-day." There were not many elms in that neighbourhood. Most of the elms had been felled earlier because they were diseased or dying.

He said he examined that tree when he made his annual inspection to the best of his ability, and he would have noticed if there was anything wrong with the tree at this point. He did not agree with the evidence given for the plaintiff by Elliott, the Wigan Corporation park-keeper. In re-examination he said, "If a tree is diseased I have it felled in a week or so."

Then I had another witness who was almost as important, from the defendant's point of view. That was Hughes, a man getting on in years, who lives 200 yards away from where this accident happened. He used to be a woodman on the Winstanley estate and he was employed there until 1937. After the tree was found to be down he was asked to saw it up, whether by the police or by the estate I do not know. He said, and I believe this:

> The bark looked quite healthy. On the very top of the tree a piece had been broken off when it fell and it showed there was some trouble on the top. The top two or three feet were perished.

He had to cut up the tree trunk in about seven places, in order that it could be thrown over the park wall or moved somehow, and he said "Everywhere I cut that tree was sound apart from the small piece which had broken off on the top." He added in cross-examination, "The ball of the tree was good, the roots were deteriorating."

There was a man who was not employed at this time upon the estate, but he knows something about trees, and he told me two things which I think were of great importance. The first was the bark looked quite healthy. If that was so, and I say I accept it, there was nothing to show on inspection in winter time that the tree had gone. Hughes said further, "Everywhere I cut the tree was sound." Now if that disease of honey fungus had been existing in this tree a long time I think, as one witness told me, there would have been far more signs of the results of that disease showing in the trunk of the tree itself. There are some now. At the time Hughes cut it up everywhere he cut was sound. I think that points to a disease which had not been existing so long as it was thought by Ingham on his examination, made a long time afterwards.

I think further it shows sap was able to get up through that trunk almost to the top, and that the foliage is likely to have been all right the summer before the tree fell. That is how it occurs to me and that is my judgment upon the facts of this case.

Now what is the law ? There is one case which was cited to me, *Noble* v. *Harrison* (1). That was an appeal to the Divisional Court from the judgment of a county court judge, and the facts are these :

> A branch of a beech tree growing on the defendant's land overhung a highway at a height of 30ft. above the ground. In fine weather the branch suddenly broke, fell upon the plaintiff's vehicle which was passing along the highway and damaged it. In an action by the plaintiff claiming in respect of the damage to his vehicle the county court judge found that neither the defendant nor his servants knew that the branch was dangerous and that the fracture was due to a latent defect not discoverable by any reasonably careful inspection, but he held that the defendant was liable as for a nuisance.
>
> Held, reversing the decision of the county court judge, that the *Rylands* v. *Fletcher* (2) principle had no application inasmuch as a tree was not in itself a dangerous thing, and to grow trees was one of the natural uses of the soil, and that the mere fact that the branch overhung the highway did not make it a nuisance seeing that it did not obstruct the free passage of the highway, and although the branch proved to be a danger the defendant was not liable, inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence.

The judgment of the county court judge was set aside by the Divisional Court, which consisted of Rowlatt, J., and Wright, J., as he then was. In the judgment of both those judges there are passages which apply to this case and which put the law as clearly as it could be put on a matter of this kind. Counsel tell me that there are no further authorities of help, but I am inclined to think that one does not need in a matter of this kind, to look further than the combined judgments of Rowlatt and Wright, JJ.

To deal with that case, the first point which is clear is that there was no negligence proved against the owner of the overhanging branch or the occupier of the land upon which the tree was so that the plaintiff's case rested entirely upon nuisance. In the present case counsel for the plaintiff relies both upon negligence and upon nuisance, for which in his submission the landlord or occupier of the estate is responsible. As to negligence he puts his case in this way. He argues that the owner of an estate which has trees upon it is under a duty to the public to examine any of those trees which are near the roadway, and if there is a danger of one of those trees falling upon the roadway, and possibly hitting someone who is upon the roadway, it is the duty of the owner of the estate to have that tree removed which is found to be dangerous. That duty is not challenged by counsel for the defendant.

As to nuisance counsel for the plaintiff submits that again if the occupier of an estate has a tree upon his land which is in a dangerous condition from disease, and if he does not take care of that tree and that tree falls upon the road, a nuisance is created, and that nuisance is created in circumstances in which the occupier of the land is responsible by reason of the neglect of his duty in allowing a nuisance to arise. I wondered at one time if in these circumstances it could be argued that the owner of this estate performed his duty if he appointed a competent agent to watch his trees and to take all proper steps, it being remembered that that which is being dealt with is the natural growth of a tree or trees upon the land, a natural user of land. Counsel for the defendant told me very frankly that that at least could not be any answer to a claim based on nuisance, nor did he think it would be in a claim based on negligence, but in any event he would not like to take such a point as he felt sure the owner of the estate would regard himself responsible if in fact an accident of this sort happened by reason of the negligence of his employee, the agent he had appointed.

What has to be determined in this case is the same thing, whether the claim be in negligence or in nuisance. I think what I have said perhaps disposes of the claim in negligence because so far as I can find there is nothing like certainty that any examination would have disclosed in the previous summer that this tree was affected by honey fungus. Indeed the onus is upon the plaintiff, and is accepted by the plaintiff, of showing that there was something wrong with the tree of such a kind that the occupier or his agent either knew it or ought to have known it. I do not think, as I have said, that the disease was apparent the previous summer, and in so far as any negligence is concerned it was agreed by the main witness called for the plaintiff, Ingham, that if there was an inspection made in the summer by the agent that was what would be expected, and more would not be expected. That I take to be the effect of Ingham's evidence.

Now as to nuisance counsel for the plaintiff cited *Noble* v. *Harrison* (1) to me and pointed out a passage which appears in the judgment of ROWLATT, J., at p. 377 :

> It was next contended that as the tree in fact fell it was, before it fell, dangerous and was, therefore, a nuisance. This way of putting it is independent of the circumstances that the bough overhung the highway. The argument, as was admitted by the A learned counsel who employed it, would be equally applicable to a tree standing clear of the road but which fell across it. The point is, however, whether the defendant can be made liable when he neither knew nor ought to have known of the actual danger. That the answer to this must be in the negative is clear, I think, though the circumstances were very different, from the judgment in *Barker* v. *Herbert* (3). The result of that and the other cases cited to us is that a person is liable for a nuisance constituted by the state of his property (i) if he causes it, (ii) if by the neglect of some duty he allowed it to arise, and (iii) if, when it has arisen without his own act or default, he B omits to remedy it within a reasonable time after he did or ought to have become aware of it.

That portion of the judgment covers this case, for ROWLATT, J., said it would be equally applicable to a tree standing clear of the road but which fell across it. Of the three headings or divisions taken by ROWLATT, J., in that passage the only one under which it is sought to put the plaintiff's case C is (ii) "If by the neglect of some duty he allowed it to arise." It is not said that defendant caused the nuisance, that he caused the tree to fall, nor is it said that he omitted to remedy the nuisance within a reasonable time after the tree had fallen. The real question is "Did the defendant by the neglect of some duty allow that nuisance to arise ?"

Again I think that is answered by my finding expressed already that there was no negligence on the part of the defendant's agent in this matter. Unless D there was something to warn him that this tree was diseased or that it had been attacked by honey fungus it cannot be said that he neglected his duty. He made the examination which, according to the plaintiff's evidence, he should make. On the admissions of the plaintiff's witnesses and on the evidence of the defendant's witnesses I do not think there was present at any time when reasonable examination should be made anything to show that this disease was in the tree and that the tree was consequently dangerous.

E It is, of course, extraordinarily difficult to prove a case of this kind. The fact that the tree is down and the fact that the roots are rotten carry the plaintiff a certain way towards the end that she seeks, but they do not carry her all the way. She has to show that the defendant was guilty of the neglect of some duty in allowing that position to arise. The plaintiff's evidence with regard to that, if it were taken merely as the result of examination in chief, carries her quite a considerable way but when the evidence is examined as a whole I cannot be satisfied F that there is any neglect of duty by the landlord in the circumstances of this case.

The case is, as I have said, one of importance. Those who have property of this kind have to realise there is a duty to the public. I have no reason to think that was not realised in this case, because the agent told me he examined the trees in this park not only once a year but from time to time, but the duty G is there. I think the duty was performed in this case. The result of that is that I must give judgment for the defendant, sorry though I am for the widow and her children who are left in these circumstances.

Judgment for the defendant. Leave to mention the question of costs upon future instructions.

Solicitors : *Vincent & Co.*, Wigan (for the plaintiff) ; *Peace & Ellis*, Wigan (for the defendant).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

WESTMINSTER BANK, LIMITED *v.* RICHES.

[Chancery Division (Evershed, J.), **March 28, 1945.**]

Money –Interest –Agreement to divide equally profit of share transaction—Fraud—Death of fraudulent party—Action for account against judicial trustees of fraudulent party's estate –Judgment for admitted half share of profit made—Exercise of court's discretion in favour of defrauded party—Award of "interest" —" Element of wrongdoing "—Whether " interest " so awarded in truth and substance award of damages—Liability to income tax—Civil Procedure Act, 1833 (*c.* 42), *ss.* 28, 29—*Income Tax Act,* 1918 (*c.* 40), *Sched. D, para.* 1 (*b*), *All Schedules Rules, r.* 21—*Law Reform (Miscellaneous Provisions) Act,* 1934 (*c.* 41), *s.* 3.

In 1936 one Ridsdel made a large profit on the purchase and resale of certain shares, and, pursuant to a previous agreement made between him and the defendant, he was liable to pay to the defendant one half of such profit. Certain sums were paid by Ridsdel which the defendant accepted in full satisfaction of his claim on the faith of Ridsdel's representation that the sums in question represented one half of the profit made. In 1943, after Ridsdel's death, the defendant brought a successful action against the present plaintiffs, as the judicial trustees of Ridsdel's estate, for an account of his half share of the true profit and for consequential relief, and he became entitled to judgment for the sum of £36,255, the admitted difference between one half of the actual profit made and the aggregate of the sums previously paid to him by Ridsdel. The judge further exercised his discretion in favour of the present defendant by awarding to him an additional sum of £10,028, being the equivalent of interest at 4 per cent. per annum from June 14, 1936, to May 14, 1943. The plaintiffs then paid over to the defendant the principal amount due under the judgment; as regards the amount of £10,028, included for interest, the plaintiffs paid over £5,014, or one half only. Contending that that sum of £10,028 was " interest of money " within the meaning of the Income Tax Act, 1918, Sched. D, and that, in the circumstances they were bound to deduct tax therefrom at the standard rate in force for the year 1943-44, the plaintiffs brought the present action for the determination of the question whether or not the item of £10,028 was subject to the charge of income tax. It was contended on behalf of the defendant (i) that it was established by authority that awards of " interest " on money claims under the Civil Procedure Act, 1833, s. 28, which was repealed by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, were, in spite of the use of the word " interest " in the section, in truth and substance awards of damages and, therefore, not liable to income tax; (ii) that, notwithstanding the difference of the language, the true effect of the 1934 Act, s. 3, was considerably to enlarge the scope of the relevant section of the 1833 Act, but not to affect or alter the quality of the awards contemplated which remained awards of damages, or in the nature of damages, under either Act; (iii) that sums awarded in the exercise of the discretion conferred by the material sections of either Act, being damages or in the nature of damages, were not taxable as interest of money where the exercise of the court's discretion depended on the finding of an " element of wrongdoing " in the detention of money claimed by the party to whom " interest," *i.e.*, damages, had been awarded; (iv) that the sum awarded under the 1934 Act could not be termed " interest of money " within the meaning of the Income Tax Act since it had not the quality of recurring, or liability to recur, nor did it have any existence antecedent to the date of the award:—

Held: (i) the proposition that interest was awarded as damages or by way of damages imported the justification for the award or for the rate awarded, but did not affect the quality of interest as such. The Civil Procedure Act, 1833, s. 28, introduced no new principle affecting the quality of " interest " awarded in respect of money claims; it merely enlarged the class of cases where interest could be awarded at all.

Cook v. *Fowler* (1), *Webster* v. *British Empire Mutual Life Assurance Co.* (2) *explained.*

(ii) the principle that the basis and justification for awards of " interest " lay in giving to a claimant compensation for the non-payment of his debt, but did not affect the quality of interest as such, applied to awards on debts under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3.

London, Chatham and Dover Ry. Co. v. *South Eastern Ry. Co.* (11) *explained and distinguished.*

(iii) the element of "wrongdoing" in the debtor was *prima facie* irrelevant to the question of the quality of the sum awarded for interest, but might be relevant to the question whether the claimant was entitled to "interest" or compensation at all. An award of "interest" made in exercise of the discretion of the court because the other party had acted fraudulently did not convert the quality of interest into damages for wrongdoing and no rule or principle had been established which qualified such award under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, so as to regard it as damages by way of interest.

Inland Revenue Comrs. v. *Ballantine* (12), *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Comrs.* (13), *Simpson* v. *Maurice's Exors.* (14), *Southport Corpn.* v. *Lancashire County Council* (15) *distinguished.*

Schulze v. *Bensted* (*Surveyor of Taxes*) (16), *Sweet* v. *Macdiarmid* (*or Henderson*) (17), *Re National Bank of Wales, Ltd.* (19) *not followed.*

Inland Revenue Comrs. v. *Barnato* (18) *applied.*

(iv) the words of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, ". . . there shall be included in the sum for which judgment is given . . ." did not have the effect of so merging the subject matter of the award under the section with the debt that the former lost its individuality and quality. An award of interest on a debt under the section remained "interest" properly so-called and "interest of money" within the terms of the Income Tax Act. Since it was awarded as compensation to the injured party it might be described and justified as interest "by way of or in the nature of damages."

Moss' Empires, Ltd. v. *Inland Revenue Comrs.* (20) *explained.*

Qu: whether, as regards liability for income tax, a different answer might have been given, and might still be given, in the case of an award of "interest" in respect of a sum of damages for tort from that appropriate to an award of "interest" on a money claim.

[**EDITORIAL NOTE.** This case decides a novel and interesting point as to which there is no previous authority, namely, whether a sum of money awarded for interest under the Law Reform (Miscellaneous Provisions) Act, 1934, and included in the total sum for which judgment is pronounced is liable to assessment for income tax as "interest of money" within Sched. D. It is argued that on a proper analysis such a sum is really damages or in the nature of damages, and so not subject to charge. The *prima facie* rule of English law is that money claims do not carry interest, a rule apparently originating in the ancient disapproval of usury. The justification for awarding interest, apart from statute, then, appears to be the idea of providing compensation or damages to the claimant, but this does not affect the quality of the interest. Nor is that quality affected by any element of wrongdoing by the debtor in withholding money, although this may be a justification for the award, for it is neither rational nor logical that the liability of the plaintiff to income tax should depend upon the existence or degree of moral turpitude in the defendant. The court holds that neither the Civil Procedure Act, 1833, nor the Law Reform (Miscellaneous Provisions) Act, 1934, introduced any new principle affecting the quality of interest and an award of interest on a debt is therefore assessable as "interest on money."

It should be noted that the court was here dealing with a money claim. EVERSHED, J., points out the difference in language in the Civil Procedure Act, 1833, which in sect. 28 speaks of "interest upon debts" and in sect. 29 speaks of "damages in the nature of interest," and suggests that a different conclusion might be reached in the case of interest upon a sum of damages for tort, unless the wider terms of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, have concluded the matter. The point remains open for future decision.

AS TO INTEREST ON MONEY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 174-180, paras. 253-260; and FOR CASES, see DIGEST, Vol. 35, pp. 177, 178, 182-185, 190, 191, Nos. 64-74, 117-142, 188-193.

AS TO INCOME TAX PAYABLE ON INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, pp. 178-180, 232-236, paras. 372-376, 471-475; and FOR CASES, see DIGEST, Vol. 28, pp. 63, 64, Nos. o.-t., Digest Supp., Income Tax, 373a, 428a.]

Cases referred to:

*(1) *Cook* v. *Fowler* (1874), L.R. 7 H.L. 27; 35 Digest 177, *67*; 43 L.J.Ch. 855.

*(2) *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch.D. 169; 35 Digest 184, *140*; 49 L.J.Ch. 769; 43 L.T. 229.
(3) *Mounson* v. *Redshaw* (1668), 1 Wms. Saund. 185.
(4) *Price* v. *Great Western Ry. Co.* (1847), 16 M. & W. 244; 10 Digest 1192, *8457*; 4 Ry. & Can. Cas. 707; 16 L.J.Ex. 87.
(5) *Re Roberts, Goodchap* v. *Roberts* (1880), 14 Ch.D. 49; 35 Digest 197, *245*; 42 L.T. 666.
(6) *Cameron* v. *Smith* (1819), 2 B. & Ald. 305; 35 Digest 178, *72*; 106 E.R. 378.
(7) *Page* v. *Newman* (1829), 9 B. & C. 378; 35 Digest 179, *85*; 4 Man. & Ry. K.B. 305; 7 L.J.O.S.K.B. 267.
(8) *Bond* v. *Barrow Haematite Steel Co.*, [1902] 1 Ch. 353; 35 Digest 177, *69*; 71 L.J.Ch. 246; 86 L.T. 10.
*(9) *Ryley* v. *Master, Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q.B. 674; 35 Digest 191, *191*; 61 L.J.Q.B. 219; 66 L.T. 228.
*(10) *Wilks* v. *Wood*, [1892] 1 Q.B. 684; 35 Digest 191, *192*; 61 L.J.Q.B. 516; 66 L.T. 520.
*(11) *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, [1893] A.C. 429; 35 Digest 183, *123*; 63 L.J.Ch. 93; 69 L.T. 637.
*(12) *Inland Revenue Comrs.* v. *Ballantine* (1924), 8 Tax Cas. 595; 28 Digest 63, t.
*(13) *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Comrs.*, [1922] S.C. (H.L.) 112; Digest Supp.; 12 Tax Cas. 427.
*(14) *Simpson* v. *Maurice's Exors.* (*as executor of Edward Kay*) (1929), 45 T.L.R. 581; Digest Supp.; 14 Tax Cas. 580.
*(15) *Southport Corpn.* v. *Lancashire County Council*, [1937] 2 K.B. 589; [1937] 2 All E.R. 626; Digest Supp.; 106 L.J.K.B. 609; 157 L.T. 63.
*(16) *Schulze* v. *Bensted* (*Surveyor of Taxes*) (1915), 7 Tax Cas. 30; 28 Digest 63, q.
*(17) *Sweet* v. *Macdiarmid* (*or Henderson*) (1920), 7 Tax Cas. 640; 28 Digest 63, r.
*(18) *Inland Revenue Comrs.* v. *Barnato*, [1936] 2 All E.R. 1176; Digest Supp.; 155 L.T. 211; 20 Tax Cas. 455.
*(19) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629; 28 Digest 71, *373*; *sub nom. Re National Bank of Wales, Cory's case*, 68 L.J.Ch. 634; *on appeal, sub nom. Dovey* v. *Cory*, [1901] A.C. 477.
*(20) *Moss' Empires, Ltd.* v. *Inland Revenue Comrs.*, [1937] A.C. 785; [1937] 3 All E.R. 381; Digest Supp.; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264; [1937] S.C. [H.L.] 35.

Action by Westminster Bank, Ltd., as the judicial trustees of the estate of one Ridsdel, for the determination of the question whether a sum of money awarded for interest pursuant to the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, and included in the total sum for which judgment was pronounced in favour of the defendant against the plaintiffs in another action between the same parties, was, or was not, "interest of money" within the meaning of the Income Tax Act, 1918, Sched. D, and, as such, subject to the impost of tax. The judgment in favour of the present defendant, the plaintiff in that action, was given by Oliver, J., dated May 17, 1943, and reported, on a point of practice, [1943] 2 All E.R. 725. The facts and arguments of the present case are fully set out in the judgment.

T. N. Donovan for the plaintiffs.

F. Grant, K.C., and *N. E. Mustoe* for the defendant.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* as *amici curiae* for the Crown.

Evershed, J.: The short point raised in this action is whether a sum of money awarded for interest pursuant to sect. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, and included, as provided by the same section, in the total sum for which judgment was pronounced in favour of the defendant against the plaintiffs in another action between the same parties, is or is not "interest of money" within the meaning of the Income Tax Act, 1918, Sched. D, and subject, as such, to the impost of tax. Although the power for a judge or a jury in an action for debt to award "interest" has existed under the 1934 Act, s. 3, or under the somewhat similar provisions of the Civil Procedure Act, 1833, s. 28, for over a hundred years, it does not appear that the point now raised has ever before come before the courts.

The material facts may be shortly stated. In 1936 one Ernest Bramwell Ridsdel made a large profit on the purchase and resale of certain shares, and pursuant to a previous agreement between Ridsdel and Riches, the present defendant, the former was liable to pay to the latter one half of such profit. Certain sums were paid by Ridsdel to the defendant who accepted them in full satisfaction of his claim on the faith of Ridsdel's representation that such sums constituted in fact one half of the profit made. After Ridsdel's death, the defendant brought an action in the King's Bench Division of this court against the present plaintiffs, the Westminster Bank, as judicial trustees of Ridsdel's estate, for an account of his half share of the true profit made on the transaction and for consequential relief. The bank, by way of defence, relied upon the defendant's acceptance of the sums paid to him in full settlement of his claim, to which defence the defendant pleaded in reply that his acceptance had been induced by the fraudulent representation of Ridsdel that the sums so paid in fact constituted one half of the full amount of the profit. At the trial of the action before Oliver, J., the judge found in favour of the defendant on his plea in reply, thereby disposing of the defence of settled account. The defendant became accordingly entitled to judgment for the sum of £36,255, which was at the trial admitted to be the difference between one half of the profit in fact made by Ridsdel and the aggregate of the sums previously paid by him to the defendant.

Counsel for the defendant then invited Oliver, J., in exercise of his power under sect. 3 of the 1934 Act, to award to the defendant interest on the sum for which he had been held entitled to judgment from the date on which such sum ought to have been paid over until the date of the judgment—a period of approximately seven years ; and after hearing argument on both sides Oliver, J., exercised his discretion in the defendant's favour by awarding to him an additional sum of £10,028, being the equivalent of interest at 4 per cent. per annum from June 14, 1936, to May 14, 1943. The material part of the judgment in the action, dated May 17, 1943, is in the following terms :

> It is . . . adjudged that the plaintiff recover from the defendant £36,255 with £10,028 interest making together the sum of £46,283.

I have seen the transcript of the shorthand note taken of the argument on the defendant's application under the 1934 Act, and it is clear that Oliver, J., was mainly influenced to exercise his discretion in the defendant's favour by the circumstance that, as he had found, the defendant had for seven years been deprived of his due share of the profit made by Ridsdel by the latter's fraud.

> This gentleman [said the judge of the defendant] has been cheated . . . [and later] the view I have taken is that this very large sum of money has been kept away from the defendant, to whom it ought to have been paid.

The bank has paid over to Riches the amount due under the judgment, with the important exception that, as regards the amount of £10,028, included for "interest," the bank has paid to Riches £5,014, or one half only, claiming that such sum of £10,028 is "interest of money" within the meaning of the Income Tax Act, 1918, Sched. D, para. 1 (*b*), and that in the circumstances they were bound under the All Schedules Rules, r. 21, to deduct income tax therefrom at the rate of 10*s*. in the £ and account therefor to the Crown. The defendant having been given leave by the order of Oliver, J., to levy execution in default of payment and having threatened so to do unless the full sum of £10,028 (which he claimed and claims not to be liable to any deduction for income tax) were paid to him, the bank have instituted the present action for the purpose of having determined by the court the question whether or not the item of £10,028 included in the judgment of Oliver, J., is liable to income tax. The Crown, being interested in the question raised, was invited to attend the hearing, and I have had the advantage of hearing argument on behalf of the Crown by the Attorney-General and Mr. Hills as *amici curiae*.

One other matter of fact must be stated. In respect of the year 1943-1944 (which, upon the footing that the sum of £10,028 is liable to the charge of income tax, is the material year) the profits or gains of the bank, as judicial trustees of Ridsdel's estate, brought into charge amounted to approximately £10,000. In respect of the same year the annual payments of the bank in the same capacity were over £21,000, inclusive of the amount of £10,028 here in question. It is, therefore, conceded that, if the sum of £10,028 is subject at all to the charge of income tax, the proper rule applicable to its collection is the All Schedules Rules, r. 21. Rule 19 is, on the facts I have stated, excluded.

The Law Reform (Miscellaneous Provisions) Act, 1934, is by the material part of its title described as "an Act . . . as to the awarding of interest in civil proceedings." Sect. 3 is in the following terms :

> (1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment . . .

Then there follow provisos, the first prohibiting the "giving of interest on interest" and the second excluding the application of the section to any debt on which "interest is payable as of right whether by agreement or otherwise." Subsect. (2) repeals the Civil Procedure Act, 1833, ss. 28, 29.

If the matter rested merely upon the language of the 1934 Act, s. 3, I confess I should feel no difficulty in concluding that the language used meant what it said, that "interest" meant interest and that the sum awarded, being interest on the principal sum of £35,255 at 4 per cent. per annum from June, 1936, to May, 1943, was interest of money within the meaning of the Income Tax Act, Sched. D, para. 1 (*b*), and the All Schedules Rules, r. 21.

But it has been argued, and argued forcibly by counsel for the defendant, that the matter is not so simple as at first appears, and that the sum awarded, being upon a proper analysis damages or in the nature of damages, is not interest of money so as to be subject to the charge of income tax. It, therefore, becomes necessary for me to examine this argument, each stage of which, it is contended, is sustained by authorities binding upon me.

The first stage of the defendant's argument consists of the proposition that awards of "interest" on money claims under the Civil Procedure Act, 1833, s. 28 (which was repealed and replaced by the 1934 Act, s. 3), have been held, in spite of the use of the word "interest" in the section, to be in truth and substance awards of damages, or at the least in the nature of damages, for the detention of the debt after the date when it should have been paid.

In the second stage of the argument, counsel for the defendant claim that, notwithstanding the difference of language, the true purpose and effect of the 1934 Act, s. 3 was considerably to enlarge the scope of the relevant section of the 1833 Act, but not to affect or alter the quality of the awards contemplated, which remain awards of damages or in the nature of damages equally under the 1934 Act as under the 1833 Act.

Thirdly, it is contended that sums awarded in the exercise of the discretion conferred by the material sections of the two Acts, being damages or in the nature of damages, are not taxable as interest of money, or at least are not so taxable where the exercise of the discretion has depended upon the finding of an "element of wrongdoing" in the detention of the money successfully claimed by the party to whom "interest" (that is, damages) has been awarded.

There is a fourth contention on the part of the defendant substantially independent of the arguments I have already mentioned, and referred to by counsel for the defendant as subsidiary thereto, which is to the effect that the sum awarded under the 1934 Act is in any event not interest of money within the Income Tax Act as not having the quality of recurrence or liability to recur or of any history or existence antecedent to the date of the award.

Before proceeding to a consideration of the authorities relied upon in support of the first stage of the defendant's argument, it will be convenient—particularly in view of the second stage of the argument—to refer to the language of the material sections of the Civil Procedure Act, 1833.

It will have been observed that the 1934 Act, s. 3 (1) comprises awards of "interest" in respect both of claims for debt and of claims for damages, that is, in respect of claims both in contract and in tort, in terms making no distinction between the two. In the Civil Procedure Act, 1833, the two classes of case were distinctly treated in separate sections, 28 and 29, differing materially in language. The present case is one of a money claim to which, under the defendant's argument, only the 1833 Act, s. 28, is directly relevant. As appears later in this judgment, it is possible that, as regards liability for income tax, a different answer might have been given, and may still be given, in the case of an award of "interest" in respect of a sum of damages for tort from that appropriate to an award of "interest" on a money claim. In this action I am only concerned with an instance of the latter category, to which, under the law from 1833 to 1934, sect. 28 of the Civil Procedure Act, and not sect. 29, would have been applicable. By the 1833 Act, s. 28, a jury was empowered "to allow interest upon debts." This language is in marked distinction to that of sect. 29, which says "the jury may give damages in the nature of interest." The wording of the sections is as follows:

> (28) Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law. (29) The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

It will be observed that sect. 28 was subject to certain limitations in scope which are inapplicable to sect. 3 of the 1934 Act—for example, in the case of debts not payable at a time certain it was necessary that there should have been a demand in writing giving notice that interest under the section would be claimed.

I now turn to the authorities relied upon in support of the first stage of the defendant's argument, and particularly to *Cook* v. *Fowler* (1), and *Webster* v. *British Empire Mutual Life Assurance Co.* (2). In the first case the appellant Cook claimed as a creditor of one Bevan, whose estate was in process of administration by the Chancery Court. Bevan had, as security for moneys advanced, given to Cook a warrant of attorney the defeasance clause of which provided for payment of the sums advanced, with interest thereon at the rate of 5 per cent. per month, on June 2, 1864, judgment to be entered forthwith but not to be executed unless default was made in payment of the principal and interest mentioned. Judgment had never been entered in fact, and Cook did not produce his warrant of attorney for some time after Bevan's death. Accounts having been taken, the matter came on a summons to vary the chief clerk's certificate before Stuart, V.-C., who fixed the rate of interest after June 2, 1864, at 4 per cent. per annum. The appeal to the House of Lords was from this order of Stuart, V.-C., and the only question before the House was whether the proper rate of interest after June 2, 1864, was that mentioned in the warrant, namely, 5 per cent. per annum, or the rate fixed by Stuart, V.-C., namely, 4 per cent. per annum. In deciding as they did against the appellant's claim to the larger rate specified in the warrant their Lordships considered the basis on which interest is awarded and its rate fixed in the case of a simple contract to pay a sum of money on a fixed day with interest at a fixed rate up to that day, the contract being silent as to any rate of interest or otherwise in the event of default of payment on the due date. Each of the noble Lords observed that the award of interest in such a case and the determination of its rate was to be justified as constituting damages or compensation to the claimant for non-payment of his debt.

One citation, from the speech of Lord Cairns, L.C., will suffice, at p. 32:

> . . . according to the well known principle which has been referred to in many cases and which may be taken most conveniently from a note to the case of *Mounson* v. *Redshaw* (3), any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

One other point arises on the case of *Cook* v. *Fowler* (1) which is, in my judgment, important. In their argument for the respondents counsel are reported as referring to sect. 28 of the 1833 Act; and counsel for the defendant argued that the case was an authority directly upon that section. I am, however, far from clear that Stuart, V.-C., had purported to exercise jurisdiction under the 1833 Act. The Act is not mentioned in any of the speeches in the House of

Lords. On the contrary, Lord Hatherley intimates, at p. 37, that the Vice-Chancellor had applied "the ordinary rule of the court of Chancery."

In my judgment, the noble Lords in *Cook* v. *Fowler* (1) were stating a general principle in regard to interest not limited to the application of the Civil Procedure Act. This seems to me to be clear from the Lord Chancellor's reference to the note of *Mounson* v. *Redshaw* (3), at p. 201, before the date of the Civil Procedure Act, in which it is pointed out that in the case of a deed of covenant which is silent as to interest after default in payment on the due date, interest after that date must be claimed not as part of the debt but as damages for its detention. And the same rule appears to have applied (apart from the 1833 Act) equally in the case of a mortgage which makes no provision for the payment of interest after the redemption date. (See, for example, *Price* v. *Great Western Ry. Co.* (4), and *Re Roberts* (5)). At least, if the right of the mortgagee to recover interest after the redemption date rested upon implied contract, the principle was applied in fixing the rate, as it was likewise applied in the case of commercial contracts. (See *Cameron* v. *Smith* (6)).

The emergence of the principle to which I have referred owes its origin to the rule of English law that *prima facie* money claims do not carry interest. To this rule there were exceptions, of which claims under contracts providing for interest by express terms or necessary inference, including the necessary inference of mercantile usage, were illustrations. And the courts of equity provided their own exceptions, based, for example, upon the relation between the parties affected. An analysis of the exceptions may be found in Halsbury's Laws of England, 2nd Edn., Vol. 23, pp. 174-178, paras. 254-257, Mayne on Damages, 10th Edn., pp. 151-158, and Seton on Judgments and Orders, 7th Edn., pp. 1344-1346. The existence of the general rule is, however, clearly established. It was authoritatively stated by the court of King's Bench in *Page* v. *Newman* (7) where, I observe, it is pointed out that its application is not affected by the circumstance that the withholding of the claimant's money was unjustifiable or wrongful.

Although I have not been able to find any satisfactory statement of the origin of the rule, there seems little doubt that it was closely connected with the ancient disapproval of usury. According to Blackstone, Commentaries on the Laws of England, Book II, ch. 30, p. 454:

> . . . when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called interest by those who think it lawful, and usury by those who do not so. For the enemies of interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle, that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution . . .

It is, indeed, significant that the word "interest," derived from the mediaeval Latin "*interesse*" and "*id quod interest*," signifies the notion of loss or damage suffered by the claimant as opposed to the usurious conception of reward for money lent—c.f., the definitions of "interest" in the Encyclopaedia Britannica and the Oxford Dictionary, and the French phrase "*dommages et interets*."

From these considerations I conclude that, save in cases where the payment of interest was provided for by the terms of the contract expressly or by implication and thereby incorporated in the debt, the justification for its award was founded upon the conception of providing compensation or "damages" to the claimant: and even in cases where, by trade usage or otherwise, it was to be inferred that the parties intended that interest should be paid, its rate was fixed upon the like conception.

In my judgment, therefore, the proposition that interest is awarded as damages or by way of damages, as in *Cook* v. *Fowler* (1) imports the justification for the award or for the rate awarded, but does not affect the quality of interest as such or distinguish, so far as relevant to the present inquiry, the interest so awarded, as for example in the case of a mortgage silent as to interest after the redemption date, from the interest in terms stipulated in the contract, for example, stipulated interest up to the redemption date in a mortgage.

I further conclude that, as a matter of general principle, the element of "wrongdoing" in the debtor is *prima facie* irrelevant to the question of the quality of the sum awarded for interest, though it may well be relevant to the question whether, in justice, the claimant is entitled to any "interest" or compensation at all.

Finally, I think that the Civil Procedure Act, 1833, s. 28, introduced no new principle affecting the quality of any "interest" awarded in respect of money claims, though I think it clearly enlarged the class of cases in which it was competent for a court or jury to award any interest at all; and to that extent I venture respectfully to doubt the correctness of the suggestion made by Thesiger, L.J., in *Webster's* case (2), at p. 178 (the second of the cases relied upon by counsel for the defendant), in argument and in the course of his judgment, that the section was merely declaratory of existing practice—a suggestion which appears to have been adopted in Mayne on Damages, 10th Edn., at p. 154.

The material facts in this second case, *Webster* v. *British Empire Mutual Life Assurance Co.* (2) were that a life policy issued to A had been charged by him in favour of B, but no notice of the charge had been given to the insurers nor had there been any assignment of the policy. After A's death the chargee claimed payment of the policy moneys, but neither he nor any other person had taken out legal representation to the estate of the assured. In these circumstances the insurers—who had put the policy money in a separate account—claimed that they were unable to pay over the money in the absence of any hand able to give an effective receipt. The chargee sued the company for the policy moneys, asking at the same time that legal representation be dispensed with, and at the trial Sir George Jessel, M.R., made the order dispensing with legal representation and further ordered payment by the insurers to the plaintiff of the policy moneys, together with interest (by virtue of his discretion under the 1833 Act) from the date when A's death had in fact been proved. The appeal of the insurers was limited to the award of interest, and the decision of the Court of Appeal upon that matter was that, since the withholding of payment by the company was attributable to the absence of any properly constituted representative of the assured—an absence for which responsibility lay rather with the plaintiff than the defendants—no damage had been suffered by the plaintiff for which the defendants were responsible, and, accordingly, no interest or compensation ought to be awarded in the plaintiff's favour.

In my judgment, the observations of the members of the Court of Appeal in *Webster's* case (2), having regard to the facts of the case as I have stated them, are wholly consistent with the view I have already expressed. I refer particularly to the language of Cotton, L.J., who, after referring to the fact that the contract contained no stipulation whatever that the company should pay interest, proceeds, at p. 175:

> Interest, therefore, is no part of the debt. . . . If it can be recovered, it must be in the nature of damages. . . . In the case of a policy of assurance subsequently to the Act, as much as in a case before the Act as regards other instruments, where no stipulation appears for payment of interest but where it was left to the jury that they might grant interest or not as they thought fit, they would grant it by way of damages.

After referring to the decision on *Cameron* v. *Smith* (6), which I have already mentioned, Cotton, L.J., proceeds, at p. 176:

> . . . the only damages, as a rule, given for the improper detention or refusal to pay money, are interest; loss of interest being the damage which the law supposes a man suffers, except under special circumstances, for non-payment of money to him.

In my opinion, therefore, the explanation of an award of interest, whether under the 1833 Act or otherwise, in cases where payment of interest is not part of the contract, as being by way of or in the nature of damages, amounts to no more than a statement of the meaning of the word "interest" as defined, for example, in the passage in Halsbury's Laws of England already quoted, or by Farwell, J., in *Bond* v. *Barrow Haematite Steel Co.* (8).

There is, no doubt, a valid distinction between interest on a debt, which is part of the debt, and interest awarded in respect of a debt which is not part of the debt; and the distinction may (though not necessarily must) correspond with the distinction between the conception of interest as a reward for the use of money and the conception of interest as compensation for the deprivation of money. But the distinction, if valid, appears to me to have no relevance to the question of the quality (particularly the quality for tax purposes) of interest as interest or interest of money. In reference to this question it is, in my judgment, impossible to say that interest is interest when it is part of the debt but is damages and, therefore, not interest when not so part. Equally, it seems to me impossible to find any logical or sensible ground for classifying, save by reference to the special facts of the cases, some awards of interest by way of compensation as being in truth interest and others as being in truth something else, and for saying, for example, that interest allowed after the redemption date in a mortgage or interest allowed by the court of Chancery on unpaid legacies or awarded against a trustee is interest properly so-called and that interest awarded under the Civil Procedure Act, 1833, s. 28, or under the 1934 Act, s. 3, on a money claim is not interest at all but damages.

The other two cases cited by the defendant's counsel in support of this part of their argument were *Sheba Gold Mining Co.* v. *Trubshawe* (9) and *Wilks* v. *Wood* (10). In both the point decided was the same, namely, that the addition on a specially endorsed writ to a money claim of a claim for interest claimable only under the 1833 Act, s. 28, was outside the terms of Order III, r. 6, in its then form and invalidated the special endorsement. The ground of the decisions was that interest could not in the circumstances be regarded as part of the debt but was claimable as unliquidated damages. The reasoning is wholly in accord with and necessarily follows from the principles I have attempted to state above, but, in my judgment, nothing in either of the cases expands or affects those principles in any way.

In reference to the second stage of their argument, counsel for the defendant cited *London, Chatham and Dover Ry. Co.* v. *The South Eastern Ry. Co.* (11). The question in that case was whether the appellant company could recover interest under the 1833 Act, s. 28, on the balance owing by the respondents on the taking of certain accounts under a joint traffic agreement. It was held by the House of Lords that the claim for interest could not succeed under the Act, because the appellants could not on the facts satisfy the limiting conditions of sect. 28, apart from the Act, because of the long established rule of the common law to which I have earlier referred. It is true that Lord Herschell, L.C. expressed the opinion, at p. 440, that the conditions of the 1833 Act, s. 28, confined its operation within too narrow limits, and it is also true that the 1934 Act, s. 3, not being so limited, may be said to have remedied the grievance expressed by Lord Herschell. But the later enactment is not a codifying enactment, and in language is so widely different from the two sections of the Civil Procedure Act which it repealed that it would be difficult to justify a strained construction of the wording of the 1934 Act merely by reference to the terms of the earlier statute. I am, however, content to assume (and it must, I think, be assumed) that the principles which I have already stated continue to apply to awards on debts under the 1934 Act, that is, that the basis and justification for such awards lies in giving to a claimant compensation for the non-payment of his debt. To that extent it remains true that such awards of interest are by way of or in the nature of damages.

I come now to the third stage of the defendant's argument, founded on a number of decisions in tax cases, though in none of them, as I stated at the beginning of this judgment, has the question of liability to tax arisen directly in reference to an award under the material sections of the Acts of 1833 and 1934. A reference to these cases must still be made, notwithstanding the interpretation I put upon the authorities cited in support of the first stage of the defendant's argument, in order to see whether I am bound by any of those decisions to hold that interest, if awarded by way of compensation, is not taxable or that the answer is affected by the presence or absence of what has been called an element of wrongdoing in the conduct of the party ordered to pay interest. But I venture to observe first that, if it be right that interest awarded by way of compensation is free from liability to tax, then awards of interest at the current rate of 4 per cent. or 5 per cent. per annum during the period of detention would appear to be excessive as assuming that the claimant, had he had the use of his money at the proper time, would not have had to pay income tax upon its earnings. Second, I observe that the dependence of the claimant's income tax obligations in respect of awards of " interest " on the existence or degree of moral turpitude on the part of the person ordered to pay interest would appear to me neither rational nor logical. Third, I point out that, generally speaking, in the tax cases the real points decided were matters of fact depending upon the particular circumstances of the particular cases.

It is not necessary for me to travel *seriatim* and in detail through all the cases cited, which were very fully debated in the course of the arguments. My third observation above is well illustrated by the *Ballantine* (12) and *Glenboig* (13) cases, the decisions in both of which turned, in my judgment, upon the finding of fact that the sums in each described as " interest " were in truth damages or compensation properly so-called, the element of " interest " being introduced merely as a convenient and appropriate method of fixing the sum awarded. Thus in the *Glenboig* (13) case the question related to the compensation awarded to the Glenboig Company by a railway company for the sterilisation of a bed of fireclay, and the amount awarded was arrived at by reckoning two and a half years' profits of working. Such an award was held not in truth and fact to be profits, though calculated on that basis. It may, indeed, fairly be said to have been no more profits in quality than is the price paid for a reversion or any other kind of property calculated upon so many years' purchase, that is, by taking the sum of the estimated profits or returns for that number of years. In *Ballantine's* case (12) the sum of money concerned was an amount described as " interest " included in an arbitral award upon a claim by a contractor for " additional costs, loss and damage." The interest appears to have been taken from a purely arbitrary date, namely, the date of an amendment of the claimant's claim. The Court of Session in Scotland affirmed the findings of the special commissioners, that the sum in question was in fact an integral part of the total of costs and damages awarded, the LORD PRESIDENT (CLYDE) observing, at p. 612, that the result would have been otherwise if the award had taken the form of a lump sum of £x with interest thereon from the date of the award until the date of payment.

The same reasoning applies, in my judgment, to *Kay's* case (14), and to *Southport Corpn.* v. *Lancashire County Council* (15), in each of which the conclusion of fact (that is, that the sum called " interest " had not in truth that quality) was strongly supported, if not compelled, by the circumstance that the tribunal making the award (in the former case the Mixed Arbitral Tribunal established under the Versailles Treaty and in the latter an arbitrator acting under the powers of the Local Government Act, 1929) had no power to award interest and could not, therefore, have purported or intended so to do.

On the other side of the line are the cases of *Schulze* (16) and *Sweet* (17), both Scottish cases, and the English case of *Barnato* (18).

The *Schulze* case (16) arose out of the circumstance that in other proceedings in Scotland the representatives of one Dun, a deceased trustee, had been made liable to make good to the continuing trustees a principal sum together with interest thereon at 3½ per cent. per annum from a past date ; and the question was whether this sum of interest was interest of money within the Income Tax Act. This question the Court of Session answered in the affirmative. The LORD PRESIDENT, at the beginning of his judgment, emphasised that, although in the other proceedings the claimants had sought to charge Dun with fraud, this charge had been negatived. As a consequence the claimants had failed in their demand to recover either compound interest or simple interest at a " penal " rate. The LORD PRESIDENT proceeds, at p. 32 :

> Plainly, therefore, the court regarded the 3½ per cent. as interest in the proper sense of that word and not as liquidated damages for breach of trust.

The LORD PRESIDENT then cited the definition of " interest " in BELL'S DICTIONARY, the second part of which definition is :

> Otherwise stated, it is just recompense to the creditor for being deprived of the use of his money . . .

and went on to observe that the 3½ per cent. interest must be taken as having been awarded for the purpose of giving just recompense to the trust, the rate fixed being presumably that which the principal money would have earned had it been in the trustees' possession and properly invested by them.

In *Sweet's* case (17), the decision was that interest ordered to be paid in respect of a successful claim by a widow for her *jus relictae* was liable to tax ; and it was pointed out by LORD MACKENZIE, at p. 644, that the interest on the *jus relictae* :

. . . is not of the nature of damages, for the element of wrongful withholding is absent.

It is, as I understand it, largely on the observations of the judges in the two Scottish cases of *Schulze* (16) and *Sweet* (17), together with the observations of WRIGHT, J., in the English case (presently mentioned) of *The National Bank of Wales* (19) that is founded the proposition that, *prima facie* at any rate, interest awarded on a money claim under the 1934 Act is only what has been called "interest proper" and as such liable to income tax where the element of wrongful withholding is absent; or conversely that, where such an element of wrongdoing is present, then *prima facie* the interest awarded is in reality not interest but damages. As I have already indicated, I find considerable difficulty in appreciating this proposition or in giving to it a precise significance. In some sense there must always be an element of wrongful withholding by a defendant who is ordered to pay over a sum of money. Otherwise, presumably, the claim against him would be dismissed. I can also understand that, if a man is charged with fraud or with other acts giving rise to a claim in damages, an award may be made against him which, though calculated in terms of or by reference to interest, is in truth an award of damages for fraud or breach of contract; and in such a case a court may find as a fact and having regard to all the circumstances of the case (including the terms of any statute under the powers of which the award is made) that the sum awarded, however it is described, is not "interest of money" so as to be chargeable with income tax. I cannot, however, speaking for myself, follow how the presence of an element of wrongdoing in the sense of opprobrious conduct, whether or not forming or capable of forming the basis of any claim sounding in damages, can of itself be the determining factor, though it may well be a consideration relevant to the exercise by a judge of a discretion vested in him. To take an example, suppose that a defendant against whom action had been brought for payment of a debt had succeeded in postponing the evil day by persisting in unsubstantial interlocutory applications or other delaying tactics. The judge at the trial might well express his strong disapproval of the defendant's conduct in the action and found upon such conduct the exercise of his discretion to award "interest" under the 1934 Act. Would it be said that there had in the case supposed been an element of wrongdoing on the defendant's part and that the sum awarded was therefore not taxable?

Nor is the matter advanced merely by stating that in any particular case the interest awarded is "in the nature of or by way of damages"; for, as already shown, that is true of every case where interest is not part of the debt, and the statement may amount to no more than a definition. Thus I observe that in *Schulze's* case (16) the LORD PRESIDENT, after stating that the 3½ per cent. interest awarded was interest proper and not liquidated damages, proceeds immediately afterwards, at p. 33, to describe the interest as "compensation" to the trust, which appears to me the same thing as saying that the interest, though having the quality of interest, was nevertheless awarded by way of damages.

I refer hereafter to the *National Bank of Wales* case (19). As regards the two Scottish cases of *Schulze* (16) and *Sweet* (17), there is nothing, in my judgment, in the decisions themselves or in the language of the Scottish judges which binds or persuades me to accept the proposition that liability to tax depends on the absence of an element of wrongful withholding, whether or not such wrongful conduct could form the basis of an action for damages at law.

This conclusion is, in my view, supported by the language of the judgments of the Court of Appeal in the *Barnato* case (18), particularly the judgment of LORD WRIGHT, M.R. So far as concerns the question actually decided in the case, I do not think the matter is carried further than it was carried by the earlier cases. The facts are extremely complex. It is sufficient for me to state that Capt. Barnato had brought proceedings against two persons, claiming that they were accountable to him for very large sums, both as trustees and as partners in a business. Upon the matter coming on for trial, a consent order was made, which opens with the recital that the plaintiff and defendants by their counsel admitted a number of propositions, including the proposition that the defendants were chargeable with compound interest at the rate and from the date specified on all sums found due to the plaintiff, who accepted such compound interest in lieu of his share of profits of the business. The order then directed the taking of various accounts, and the question at issue between Capt. Barnato and the Crown was whether the sum found due in respect of the item of compound interest was or was not taxable.

As I follow the facts, the item of interest was, for tax purposes, on all fours with a claim for interest under a contract. Alternatively, the interest was something which the plaintiff elected to take in substitution for a share of profits which would, beyond question, have been taxable. Certainly the interest did not arise out of or form part of an award of damages. Strictly, therefore, the conduct of the defendants and the degree of their wrongdoing was irrelevant; but, in the course of his judgment, LORD WRIGHT, M.R., said this, at p. 1195, after referring to the *Schulze* case (16):

> . . . it was owing, not to any fraud, as the case has proceeded, on the part of the defendants, but owing to their negligent and improper accounting [that Capt. Barnato] was deprived of that money for all that time, and he was entitled, according to the ordinary law, either to the profits or to interest and I see no reason at all why the appropriate sums payable under the admissions embodied in the consent order of ROMER, J., should not be treated as interest here in the ordinary sense.

I take that passage as supporting the view that the presence of a degree of wrongdoing—negligence and improper accounting—cannot of itself convert the quality of interest into something else, namely, damages for that wrongdoing.

I cite also and adopt the language of SLESSER, L.J., who states the effect of the two Scottish cases, *Schulze* (16) and *Sweet* (17), as follows, at p. 1203:

> Where, on the consideration of the realities of the case, it emerges that the money is paid as interest and is not paid merely as a means of measuring damages, there it can properly be said that it satisfies the requirement of case III (1) that the tax shall extend to any interest of money.

Neither the *Schulze* case (16) nor the *Sweet* case (17) was in any way concerned with the Civil Procedure Act, 1833, s. 28.

I have left till last on this part of the case the *National Bank of Wales* case (19), though it is the earliest in point of time. In that case WRIGHT, J., had found a director of the bank guilty of a misfeasance, holding, further, that his conduct amounted to fraud. WRIGHT, J., says, at p. 645:

> The result is that . . . the respondent must be held liable to repay . . . £37,000 in all, besides interest, as in cases of fraud, at 5 per cent. from the dates when the dividends were paid, which I suppose will make the total sum about £50,000.

After this judgment had been delivered, the respondent director raised by his counsel the question whether, as regards the amount of interest, he was entitled or bound to deduct income tax. There was some argument (the Crown not being a party or otherwise represented in the action) at the end of which WRIGHT, J., said, at p. 650:

> I do not see my way to allowing Mr. Cory to deduct the amount of income tax from the penal interest of 5 per cent.. It is not a question of contract. . . . The matter must be regarded for this purpose as if the respondent had fraudulently given away £37,000 of the capital of the company. I ordered him . . . to repay that sum and I make an order the effect of which is to find that the company has, by its capital being withheld all these years, suffered damages equal to 5 per cent. per annum. If the company has suffered those damages I can see no reason why it should not get the whole of the damages back . . . It is called "interest," but it is really damages . . .

If the decision of WRIGHT, J., means this and no more than this, that in his view the bank had been damaged by the fraudulent acts of Mr. Cory and that part of the damages awarded was to be calculated by reference to interest at a certain rate from certain dates, then the decision may be said to be in accord with the other authorities; and this view appears to be supported by the passage I have quoted, at p. 645, where the judge refers to what he supposes will be "the total sum of about £50,000." Furthermore, the emphasis on the penal nature of the interest may import the idea of punishing the respondent rather than that of compensating the company. But it seems open to doubt whether either of these lines of reasoning is consistent with the later language of WRIGHT, J., where he bases himself on the view that the company should be compensated for the loss it suffered (that is, the interest it was prevented from earning) by reason of the sum of £37,000 of capital having been withheld from it. In *Kay's* case (14), LAWRENCE, L.J., cited the *National Bank of Wales* case (19) with approval, but only as authority for the proposition that the mere fact of part of the compensation awarded being called interest does not make it taxable if in truth it is not interest but damages. In the *Barnato* case (18), the decision is discussed at length by LORD WRIGHT, M.R., who stated that he desired to express no concluded opinion whether it was rightly decided or not. In so far, however, as the decision cannot be justified on the special facts of the case and seeks to lay down a general proposition that interest awarded as proper compensation to the injured party for the detention of his money against a delinquent guilty of fraud or other wrongdoing is for that reason or on those facts alone not taxable, it would, in my judgment, have been inconsistent with the reasoning of LORD WRIGHT, M.R., in *Barnato's* case (18), and would have been disapproved by him ; and with all respect to the judge in the *National Bank of Wales* case (19) I am not prepared to follow it.

The result, therefore, of all the tax cases is, in my judgment, that there is no rule or principle referable to the circumstance that interest awarded under the 1934 Act is by way of compensation to the injured party or to the circumstance that the other party has been guilty of fraud or other wrongdoing which compels me to hold that the interest awarded is not in reality interest or otherwise qualifies the right of the court to construe the language of the 1934 Act, s. 3, according to its ordinary and proper meaning.

There remains what counsel for the defendant has called his subsidiary point, namely, that, since the "interest" here awarded had no existence until the award and did not, therefore, possess the quality of recurrence or liability to recur, it could not satisfy the terms of the Income Tax Act, Sched. D, para. 1. Counsel for the defendant relies for this proposition upon the *dictum* of LORD MAUGHAM in *Moss' Empires, Ltd.* v. *Inland Revenue Comrs.* (20), at p. 795. On the facts of the present case, as explained at the beginning of this judgment, I am not concerned with the special effect, if any, of the word "yearly" which occurs before "interest of money" in rule 19 but not in rule 21 of the All Schedules Rules. The point taken by counsel for the defendant is, however, independent of the word "yearly." The answer to the point is, in my judgment, this. Assuming that LORD MAUGHAM intended to define interest of money by reference to an essential characteristic, then an award of interest under the 1934 Act at some specified rate and in respect of some specified period must be taken to bring into existence the same quality of recurrence or liability to recur as if interest had in fact been accruing throughout the whole of the specified period at the specified rate. The contrary conclusion would necessarily mean that no interest awarded under the 1934 Act could satisfy the terms of the Income Tax Act, Sched. D, para. 1—in other words, that the legislature, in using the word "interest" in the 1934 Act, meant and intended something essentially different from "interest" as used in the Income Tax Act. I cannot accept such a result. I should add that, in my judgment, the phrase "there shall be included in the sum for which judgment is given" in the 1934 Act, s. 3, cannot have the effect of so merging the subject matter of the award under the section with the debt that the former loses its individuality and quality. The point was not pressed, and I need not, therefore, enlarge upon it.

My conclusion, therefore, is that the words of the 1934 Act, s. 3, ought to be construed according to their plain and ordinary significance, and that an award of "interest" on a debt under the section is no less interest properly so-called and "interest of money" within the terms of the Income Tax Act, because it is awarded as compensation to the injured party and may, therefore, be described and justified as being interest "by way of or in the nature of damages."

In my judgment, the meaning of the section, if judged according to the ordinary usages of language and freed from the embarrassment of the arguments of which I have attempted to dispose, is reasonably plain. It speaks of "interest upon . . . the debt." I have referred to the title of the Act. I add that, if the defendant's argument is correct, the strange result must follow that in the body of the first subsection and in its first two provisos the word "interest," in spite of the absence of any context to justify such a view, must be taken to be used in varying senses.

In any case I hold that (if it is permissible to travel outside the wording of the section) there is nothing in the facts of the present case which compels me, notwithstanding the terms of the section, to the conclusion that the sum awarded was damages by way of interest instead of interest by way of damages. The fact of Ridsdel's fraud may, no doubt, have determined the exercise of the discretion of Oliver, J. It was a discretion—exercised because of the fraud—to award "interest," not an adjudication on a claim of damages for fraud. There was no such claim in the action.

At the beginning of this judgment, I observed that the present was a case arising on a money claim, and I have confined myself, so far as I have been able, to the general problem as it affects interest awarded in respect of claims of this class. It will have been noted that in the 1833 Act awards of interest in respect of damages as distinct from awards of interest on debts form the subject matter of sect. 29, the language of which differs in material respects from the language of sect. 28. The difference in language between "damages in the nature of interest" in sect. 29 and "interest upon debts" in sect. 28 may well have indicated an intentional distinction of substance; and in the case, for example, of a claim for damages for fraud or negligence it is plainly easier to conceive of an award calculated in terms of interest being in reality an integral part of a single award of damages as such. (See, for example, per Lord Johnston in *Schulze* v. *Bensted (Surveyor of Taxes)* (16), at p. 34). Moreover, in a claim for damages of this character the conception of loss through the withholding by the delinquent of the claimant's money is very frequently absent.

However that may be, the compendious form of the 1934 Act, s. 3, omits, and I must assume deliberately omits, any distinction between the two classes of case. Lord Johnston's point may, therefore, be no longer open or valid. The terms of the present section may preclude, in the case of an award of interest upon damages, a conclusion based on the particular facts of the case. Upon that I express no view. As I have said, I am satisfied that no such problem arises in the present action.

Declaration accordingly. Defendant to pay plaintiff's costs of the action.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *Last, Riches & Co.* (for the defendant); *Treasury Solicitor* (for the Crown).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

H.M. ATTORNEY-GENERAL (AT THE RELATION OF THE ROYAL COLLEGE OF ORGANISTS) v. THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF ST. PETER AND ST. WILFRID AT RIPON.

[Chancery Division (Uthwatt, J.), **March 21, 1945.**]

Ecclesiastical Law—Jurisdiction of High Court—Divine service—Ripon Cathedral—Dispute regarding provision in cathedral statute for "full choral service"—Obligation to hold services part of ecclesiastical law alone—Disobedience to statute punishable only in ecclesiastical court—Refusal of High Court to make declaration regarding construction of statute—Cathedrals Measure, 1931 (*No.* 7), *ss.* 2 (1), 6 (v), 8, 10 (1), (2) (xv), (xvi).

The constitution and statutes for the government of Ripon Cathedral were contained in a Scheme prepared and confirmed under the Cathedrals Measure, 1931, and having the effect of an Act of Parliament. Subject to the provisions of the statutes, the dean was responsible for the cathedral services. Stat. XIII, cl. 2 (1) provided that there should be "full choral service every Sunday morning and evening throughout the year." The bishop was the visitor of the cathedral and by cl. 5 (3) of Stat. I, he was empowered, in certain circumstances, to determine conclusively the construction of the statutes. An action was brought by the Attorney-General at the relation of the Royal College of Organists complaining that the canticles were sung to chants and not to settings and that this was a breach of the provision in Stat. XIII, cl. 2 (1) which required full choral services. The plaintiff claimed a declaration as to the true construction of the clause in the statute. It was contended that, in an action by the Attorney-General, the court, if satisfied that his contentions were correct, was bound to make the declaration which was claimed. On behalf of the defendants it was contended that (i) the plaintiff's construction of the clause in question was not correct and (ii) the court had no jurisdiction to deal with the matter :

Held : (i) the clause in question formed part of the ecclesiastical law and the power to enforce obedience or punish disobedience belonged exclusively to the ecclesiastical courts. The obligation to hold services as prescribed by the Prayer Book was part of the ecclesiastical law alone ; the provision in Stat. XIII, cl. 2 (1), which repeated the obligation but required services on Sundays to be full choral services, was not intended to make any part of the obligation enforceable as part of the general law.

(ii) the discretion as to making a declaration rested with the court even in actions by the Attorney-General.

A.-G. v. *Birmingham, Tame and Rea District Drainage Board* (14) *and A.-G.* v. *Westminster City Council* (15) *considered*).

(iii) assuming that the High Court had jurisdiction to make a declaration as to the construction of the clause in the statute, it had a judicial discretion as to the exercise of its jurisdiction and this was not a case in which such jurisdiction ought to be exercised ; in the circumstances, the court refused to construe the statute.

[**EDITORIAL NOTE.** The distinction between ecclesiastical law and the general law is primarily a matter of jurisdiction. The court holds here that as the obligation to hold the services as prescribed by the Prayer Book is part of the ecclesiastical law alone, the construction of cathedral statutes made under a Measure and relating to the choral form of such services is a matter for the ecclesiastical courts. The court does not come to any conclusion as to whether the temporal court has also jurisdiction, but assuming that it has, decides that this is not a proper case for its exercise. The claim for an injunction was abandoned, but Uthwatt, J., indicates his opinion that a mandatory injunction would not be granted in relation to the holding of cathedral services, since it is not the practice to grant an order for the execution of a series of operations (*Kennard* v. *Cory Bros. & Co.* [1922] 2 Ch. 1 ; 28 Digest 400, *283*). The claim then stands as an action for a declaration as to the construction of the statute, and this the court refuses to make, although the action is by the Attorney-General, because on a consideration of all the circumstances and the terms of the statutes, it is peculiarly a matter for the ecclesiastical authorities.

As to the Law of the Church, see HALSBURY, Hailsham Edn., Vol. 11, pp. 425-428, paras. 723-726 ; and for Cases, see DIGEST, Vol. 19, pp. 224, 225, Nos. 12-19.

As to Declaratory Judgments, see HALSBURY, Hailsham Edn., Vol. 19, pp. 215, 216, para. 512 ; and for Cases, see DIGEST, Vol. 30, pp. 145-149, Nos. 209-231.]

Cases referred to :

*(1) *Caudrey's Case* (1591), 5 Co. Rep. 1a ; 19 Digest 224, *12* ; *sub nom. Cawdry* v. *Atton*, Poph. 59.

(2) *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424 ; 19 Digest 224, *16* ; 50 L.J.Q.B. 611 ; 44 L.T. 479 ; *affg., S.C. sub nom. Martin* v. *Mackonochie* (1879), 4 Q.B.D. 697.

(3) *Representative Body of the Church in Wales* v. *Tithe Redemption Commission, Plymouth Estates, Ltd.* v. *Tithe Redemption Commission*, [1944] A.C. 228 ; [1944] 1 All E.R. 710 ; 113 L.J.Ch. 181 ; 171 L.T. 70.

(4) *Gould* v. *Gapper* (1804), 5 East, 345 ; 19 Digest 321, *1219* ; 1 Smith, K.B. 528.

(5) *R.* v. *Millis* (1844), 10 Cl. & Fin. 534 ; 19 Digest 225, *20* ; 1 L.T.O.S. 502.

(6) *Gore-Booth* v. *Manchester* (*Bp.*), [1920] 2 K.B. 412 ; 19 Digest 315, *1147* ; 89 L.J.K.B. 1123 ; 123 L.T. 301 ; *on appeal*, 89 L.J.K.B. 1128.

(7) *Exeter* (*Bp.*) v. *Marshall* (1868), L.R. 3 H.L. 17 ; 19 Digest 228, *41* ; 37 L.J.C.P. 331 ; 18 L.T. 376 ; *affg. S.C. sub nom. Marshall* v. *Exeter* (*Bp.*) (1862), 13 C.B.N.S. 820.

(8) *Veley* v. *Burder* (1841), 12 Ad. & El. 265 ; 19 Digest 303, *1016* ; Arn. & H. 194 ; 10 L.J.Ex. 532 ; *affg. S.C. sub nom. Burder* v. *Veley* (1840), 12 Ad. & El. 233 ; *previous proceedings, sub nom. Veley & Joslin* v. *Burder* (1837), 1 Curt. 372.

(9) *R.* v. *Canterbury* (*Archbp.*) (1856), 6 E. & B. 546 ; 19 Digest 340, *1520* ; 25 L.J.Q.B. 346 ; 27 L.T.O.S. 153.

(10) *Re Londonderry Cathedral Church Pews* (1863), 8 L.T. 861.

(11) *Barraclough* v. *Brown*, [1897] A.C. 615 ; 30 Digest 148, *222* ; 66 L.J.Q.B. 672 ; 76 L.T. 797.

*(12) *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, [1898] 2 Ch. 331 ; 30 Digest 148, *223* ; 67 L.J.Ch. 603 ; 78 L.T. 673.

(13) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516 ; 30 Digest 152, *251* ; 69 L.J.Ch. 299 ; 82 L.T. 662.

*(14) *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board*, [1912] A.C. 788 ; 16 Digest 483, *3652* ; 82 L.J.Ch. 45 ; 107 L.T. 353 ; *varying*, [1910] 1 Ch. 48.

*(15) *A.-G.* v. *Westminster City Council*, [1924] 2 Ch. 416; Digest Supp.; 93 L.J.Ch. 573; 131 L.T. 802; *affg.* [1924] 1 Ch. 437.

ACTION claiming (i) a declaration that upon the true construction of the statutes of Ripon Cathedral the dean and chapter are under a duty to maintain and hold full choral services in the cathedral every Sunday morning and evening throughout the year: (ii) a declaration that the words "full choral service" bear a particular meaning; and (iii) a mandatory injunction directing the defendants to maintain and hold on every Sunday full choral services in the sense sought to be ascribed to that phrase. The meaning which the court was asked by the plaintiff to put upon the phrase "full choral service" varied during the hearing. By the statement of claim the meaning propounded was:

> . . . services at which are sung full musical renderings according to the tradition established in cathedrals of two of the canticles appointed by the Book of Common Prayer and an anthem.

In course of the hearing the suggestion that an anthem was necessary was dropped and the claim was made that Mattins and Evensong were not full choral services unless the canticles were sung to settings and not chanted. In the course of time that supposed construction disappeared and the claim ultimately assumed this form:

> (ii) that, for the purposes of the first declaration the service of morning prayer is not a full choral service unless the *Te Deum* or *Benedicite* is sung to a setting and not to a chant or chants and the service of evening prayer is not a full choral service unless the *Magnificat* and the *Nunc Dimittis* (or the authorised alternatives therefor) are sung to settings and not to chants.

The facts and the relevant clauses of the statutes are set out in the judgment.

J. Neville Gray, K.C., and *A. T. Macmillan* for the plaintiff.

G. O. Slade, K.C., and *B. S. Tatham* for the defendants.

UTHWATT, J.: The plaintiff rests his case upon a particular provision contained in the Scheme relating to Ripon Cathedral made under the Cathedral Measures, 1931, and 1934, which prescribes that there shall be full choral services every Sunday morning and evening throughout the year. The substance of his complaint is that the canticles are sung to chants and not to settings and that this is forbidden by the provision when properly construed. The defendants do not accept the plaintiff's construction of the provision and questioned the jurisdiction of the court to deal with the matter. The question of jurisdiction must first be decided. I approach it from a different standpoint from that taken in argument. I am at liberty to do so, for it is *pars judicis* to raise and take into account any question of jurisdiction.

By the Cathedrals Measure, 1931 (which was amended in immaterial respects by the Cathedrals (Amendment) Measure, 1934) there was set up a body of commissioners whose principal function (under sect. 2 (1)) was:

> . . . to provide by means of schemes under this Measure for (i) the establishment of constitutions and the making of statutes for . . . cathedral churches . . .

The commissioners were required by sect. 9, to prepare schemes concerning the relation of bishops to their cathedral churches; these schemes should:

> . . . (i) provide that the bishop . . . shall be the visitor [of the cathedral church belonging to his diocese] (ii) define the powers and duties of the bishop as visitor.

By sect. 10 (1) schemes were to be prepared containing such further statutes for cathedral churches and such other provisions as were required to enable the Measure to be carried into effect. Sect. 10 (2) set out in detail the subject matter to be included in schemes framed under this section. All the 16 matters referred to in this subsection relate in substance to matters of internal administration of the cathedral and its affairs, unless one excepts paras. (xv) and (xvi) which provide that the schemes shall:

> (xv) contain suitable directions in respect of the cathedral music and the education of the choristers, and as to the duties of the organist; (xvi) contain such further and other directions as shall be proper so as to enable this Measure so far as it affects such cathedral church to be fully carried into effect.

By sect. 8 no scheme was to be approved by the commissioners without the consent of the consenting body (as defined in sect. 3 of the Measure—generally the dean and chapter) and the bishop of the diocese. Sect. 6 (v) provided that when a scheme had been duly confirmed:

> . . . such scheme shall be effectual in law as if contained in this Measure.

The result of this section is that a scheme duly confirmed has the force and effect of an Act of Parliament.

Many schemes were prepared and confirmed under this Measure. Included in them is a scheme relating to the Cathedral Church of Ripon. The Ripon Scheme, as scheduled to the Order in Council confirming it, is described by the cathedral commissioners as being :

> . . . the constitution and statutes we propose for the government of the Cathedral Church of St. Peter and St. Wilfrid at Ripon.

The constitution is first set out. I need only refer to two provisions. By sect. 1 (2) it is provided that, subject to the statutes of the cathedral, the dean and chapter shall possess all rights, powers and privileges theretofore enjoyed by them and be subject to all laws and customs by which the dean and chapter had theretofore been governed and regulated. Sect. 2 provides as follows :

> The bishop is the visitor of the cathedral and shall have power to do all such things as belong as of right to the office of visitor.

Then follow the statutes, the first of which deals with the position of the bishop. By Stat. I, cl. 5 (1), it is provided that the bishop may at any time upon giving due notice hold a visitation at his own volition and shall hold a visitation when desired to do so by the dean or any two canons. By cl. 5 (2) at a visitation all ministers and officers and servants employed in the service of the cathedral are to appear before the bishop and answer any inquiries relating to the cathedral which he may make and may prefer complaints for his consideration. When the bishop has delivered such admonition as he may deem expedient all but the chapter are to withdraw and the visitation is to go forward. Cl. 5 (3) provides :

> In the event of any dispute arising as to the interpretation of the constitution or the statutes the visitor, at the request of the dean or any two canons, shall, after consultation with the chancellor of the diocese, give his decision in writing, which decision shall be final : Provided that, if any doubt or dispute arises regarding the extent of the authority of the bishop as visitor, the doubt or dispute shall be referred to the Archbishop of York, whose decision shall be final.

The other statutes provide for a variety of matters and I need only refer specifically to some of them. Stat. III provides that all powers and duties in matters relating to the cathedral except those otherwise assigned by the statutes are, subject to the constitution and statutes, to be exercised by the chapter and that the chapter, subject as aforesaid, shall maintain and regulate the service. At the regular meetings of the chapter the dean is to lay before the chapter such business as may be expedient to be transacted relating, *inter alia*, to the "services of the cathedral." The cathedral services (Stat. IX, cl. 4) are to be the special care of the precentor, and parochial services (Stat. IX, cl. 5), and the cure of souls in the parish are to be the special care of a minor canon. (The parish of Ripon is attached to the cathedral.) Stat. X deals with the organist and choirmaster, and Stat. XI with the lay clerks and choristers. Stat. XIII is headed "Of the Services." Cll. 1 and 2 runs as follows :

> 1. Subject to the provisions of the statutes, the regulation and direction of all services (including parochial services) held in the cathedral and the control of such persons as officiate thereat, shall rest solely with the dean or in his absence with the canon in residence. 2. (1) There shall be full choral service every Sunday morning and evening throughout the year with a sermon at each service. On Christmas Day, on Good Friday and on Ascension Day there shall be such services and sermons as the chapter, subject to the statutes, from time to time appoints. (2) Subject to such exceptions as the chapter may from time to time deem necessary, there shall be choral Mattins and Evensong daily throughout the year [with certain exceptions].

Stat. XIII, cl. 3 makes some further provisions as to services. It requires that sermons shall be preached on four days of Holy Week and that on those days and on Fridays in Lent and Advent the preacher is to be chosen in a specified way. No person not a clerk in Holy Orders of the Church of England, or of some Church in connection therewith, is to be invited to preach in the cathedral except with the consent of the dean and chapter.

Those are the provisions of the statutes. They provide a constitution for the cathedral church ; they define the powers and duties of the bishop and of the dean and chapter and the manner in which the dean and chapter are to conduct their internal affairs. They contemplate cathedral services and parochial services. Particular provision is made as to the nature of the services. There is no doubt that the Scheme has the effect of an Act of Parliament. The Scheme is part of the law of England, and is part of the ecclesiastical law in the wide sense in regard that it relates to a matter concerning the Church of England. But it is in my view necessary to determine whether the provisions which it is sought to construe, and compliance with which the court was asked by the writ to enforce by mandatory order, are part of the ecclesiastical law in the sense of law administered by ecclesiastical courts and persons and not by the temporal courts. A conclusion upon that matter is necessary in considering the jurisdiction of the court to entertain the proceedings and the propriety of exercising that jurisdiction.

It is beyond dispute that there is a body of law which is administered and enforced by ecclesiastical courts alone. COKE draws the distinction in *Caudrey's* case (1), where he says (at ff. 8b, 9a) :

> And as in temporal causes, the King, by the mouth of the Judges in his courts of Justice doth judge and determine the same by the temporal laws of England ; so in causes ecclesiastical and spiritual, as namely, blasphemy, apostasy from Christianity, heresies, schisms, ordering admissions, institutions of clerks, celebration of divine service, rights of matrimony, divorces . . . (the conusance whereof belongs not to the common laws of England), the same are to be determined and decided by ecclesiastical judges, according to the King's ecclesiastical laws of this realm . . .

Many of the topics included in COKE's list have passed out of the jurisdiction of the ecclesiastical courts to the jurisdiction of the temporal courts, but much still remains to the ecclesiastical courts. Included in the matters which so remain is the celebration of divine service. This distinct meaning of ecclesiastical law—law enforced by ecclesiastical courts—(I propose hereafter to call that law " ecclesiastical law " and to refer to all law other than ecclesiastical law as " the general law ") has been in terms recognised by the legislature. The Welsh Church Act, 1914, s. 3 (1), provides :

> As from the date of disestablishment ecclesiastical courts and persons . . . shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law.

The Irish Church Act, 1869, s. 21, was to the same effect. Apart from statutory provision, the propriety of drawing a distinction in the law of this country as a whole by reference to the jurisdiction of the ecclesiastical courts and the jurisdiction of the temporal courts has the support of LORD BLACKBURN in *Mackonochie* v. *Lord Penzance* (2), and of VISCOUNT SIMON, L.C., in *Representative Body of the Church in Wales* v. *Tithe Redemption Commissioners* (3), at p. 240 ([1944] 1 All E.R., at p. 713). Ecclesiastical law is part of the law of the land : (see *Mackonochie* v. *Lord Penzance* (2), at p. 446). The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. Where a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly ; and where a matter depending on ecclesiastical law finds a place in a case properly before the temporal courts those courts, similarly, will ascertain for themselves ecclesiastical law and apply it as part of the law they administer. Each court ascertains the law by reason and argument—not by evidence : (see *Gould* v. *Gapper* (4), *R.* v. *Millis* (5), and *Gore-Booth* v. *Bishop of Manchester* (6)). The unity and coherence of the law is not affected by the division of jurisdiction as to its enforcement.

The distinction between ecclesiastical law and the general law is not merely a matter of jurisdiction. It has its practical consequences. The sanctions —and sanctions are all important in law—are different. For an offence the temporal courts punish by fine, imprisonment and other pains and penalties. In a civil cause damages may be awarded and injunctions (in some cases mandatory injunctions), disobedience to which is a contempt of court, may be granted. The remedies provided by ecclesiastical law are different. The ecclesiastical courts have no power to give damages or grant injunctions or, subject to certain minor exceptions, inflict any of the punishments open to the temporal courts. The remedies open to it are monition, suspension *ab ingressu ecclesiae*, penance and excommunication, and against clerks in Holy Orders further remedies such as suspension from office or benefice, deprivation of benefice, inhibition from exercising the cure of souls, deposition or degradation.

There is, of course, a body of law concerning the Church of England which does not form part of ecclesiastical law in the sense in which I have defined it. For instance, the rights of property to an advowson and the obligation of parishioners to repair a church (other than the chancel) were, and in the former case continue to be, enforced in the temporal courts : (see *per* BLACKBURN, J., in *Bishop of Exeter* v. *Marshall* (7), at p. 32, and *per* TINDAL, C.J., in *Veley* v. *Burder* (8), at p. 301). Subject matter is no certain test of ecclesiastical law. Lastly the temporal courts have a certain jurisdiction in relation to the ecclesiastical courts and, arising out of that jurisdiction, some concern with matters which come before those courts. If an ecclesiastical court decline to exercise jurisdiction vested in it, the temporal court may by *mandamus* compel the ecclesiastical court to take the case into consideration : (see *R.* v. *Archbishop of Canterbury* (9)). If the ecclesiastical court exceeds its jurisdiction or powers by trying or deciding a matter not within its jurisdiction, the temporal court may by prohibition restrain the ecclesiastical court. It would also appear that a writ of prohibition may issue where the ecclesiastical court misconstrue an Act of Parliament; though the extent of this jurisdiction may be open to discussion : (see *Mackonochie* v. *Lord Penzance* (2), at p. 445, and PHILLIMORE'S ECCLESIASTICAL LAW, 2nd Edn., Vol. 2, p. 1116). The line of demarcation between what is properly only a matter for appeal to a higher ecclesiastical court and matter for prohibition by a temporal court is difficult to draw, but the temporal courts are not courts of appeal from the ecclesiastical courts. Within their jurisdiction the temporal courts are supreme and that supremacy is marked by the fact that a temporal court is not, on a matter of ecclesiastical law, bound by the decision of the highest ecclesiastical courts : (see *Mackonochie* v. *Lord Penzance* (2), at pp. 431, 447, 460).

That is a general picture of the relation between the ecclesiastical law and the general law. The distinction between the ecclesiastical law and the general law is a marked distinction that has obtained throughout the ages. The whole matter is the subject of a learned article by DENNING, J., in the LAW QUARTERLY REVIEW, Vol. 60, p. 235—an article which no one who addresses himself to the topic can afford to neglect and from which I have drawn much instruction.

The National Assembly of the Church of England may legislate in regard to any matter concerning the Church of England. Their Measures, like Acts of Parliament, may form part of the ecclesiastical law or the general law. In other words jurisdiction in respect of the ascertainment of the meaning of a Measure and the enforcement of the Measure may be conferred by the National Assembly on the temporal courts or the ecclesiastical courts or it may be on both sets of courts, or, as is provided by the Benefices (Ecclesiastical Duties) Measure, 1926, on a new court freshly set up. The question to whom the jurisdiction is given in respect of any Measure or any provision in a Measure can, in the absence of any express enactment, be determined only by a consideration of the subject to which the Measure is addressed, viewed in connection with the existing jurisdiction on the same topic or on connected or related topics.

I turn now to consider the question whether the clause under consideration forms part of the ecclesiastical law. There is no express provision and I have stated the test which in that event is applicable. To my mind it forms part of the ecclesiastical law. The Prayer Book sets forth the Order for Morning Prayer and Evening Prayer daily throughout the year. The rubric provides that as part of the morning service there shall be said or sung in English the hymn called *Te Deum Laudamus* daily throughout the year or the canticle *Benedicite*. Directions are given as to the use of the *Benedictus* or its alternative, the *Jubilate*, in the morning service and as to the canticles in the evening service. It cannot be doubted that the obligation to hold the services as prescribed by the Prayer Book and to include all the canticles in the services is part of the ecclesiastical law, and the ecclesiastical law alone. Even the pains and penalties prescribed by the Act of Uniformity disappeared in 1840. The provisions in Stat. XIII, cl. 2, relating to services repeat the obligation to hold services throughout the year (subject to an immaterial exception) but require that the services on Sundays shall be " full choral " services. It surely could not have been intended that the obligation to hold the services therefore enforceable only as part of the ecclesiastical law should become enforceable as part of the general law, or that, while the obligation to hold the services remained part of the ecclesiastical law, the musical form of part of that service should be enforceable as part of the general law. The subject matter to which the clause is addressed precludes any such inference, and a comparison of the remedies available for breach of the provision if it be part of the ecclesiastical law with those available if it be part of the general law leads one to the same conclusion. Full effect is given to every part of the Measure if the clause to be construed is treated as part of the ecclesiastical law for which proceedings may be taken in an ecclesiastical court in respect of any breach. I do not doubt that a dean and chapter could be sued in its corporate capacity in an ecclesiastical court: (compare the *Londonderry Cathedral* case (10)). Moreover, no possible doubt could exist as to the amenability to suit of the officiating minister. Further, the bishop has jurisdiction to visit. He can and should take into account the law as he finds it. If circumstances so demand, he may admonish or make orders, and disobedience to the orders of the visitor will, I apprehend, be the ecclesiastical offence of disobedience to the lawful orders of the ordinary. In my opinion, the power to enforce obedience or to punish disobedience to the provisions in question belongs exclusively to an ecclesiastical court.

The question then arises whether this court has any jurisdiction to entertain these proceedings at all. There is much to be said for the view that in light of the history of the law, of the source from which the Measure and Scheme came, and the particular subject matter under consideration, the jurisdiction of the High Court is impliedly excluded for all purposes saving, of course, the jurisdiction over the ecclesiastical courts by *mandamus* and prohibition. If that be so, this action is not maintainable at all: (see *Barraclough* v. *Brown* (11)). The point is open to doubt and I have not come to any certain conclusion upon it. But I have come to the conclusion that, assuming there is jurisdiction in the High Court, this is not a case in which the jurisdiction ought to be exercised, and I propose to deal with this case on those lines.

On the assumption that jurisdiction exists, I am of the opinion that the Attorney-General has a *locus standi* justifying his position as plaintiff. The case in this regard does not differ in principle from an action by the Attorney-General based on the provisions of a statute for breach of which the only remedy expressly given consists of penalties recoverable in a court of summary jurisdiction. Next, the action must I think be treated as an action brought for a declaration upon a point of construction only. It is against the practice of the court, as I understand it, to grant a mandatory order for the performance of a continuous series of operations, and the holding and conduct of services in a cathedral are a singularly inapt subject for such an order. The plaintiff at the trial indeed abandoned the claim for the injunction, but that abandonment was not an abandonment of anything to which on any view of the case the plaintiff was entitled. The inclusion of an unsustainable claim for an injunction cannot I think alter the nature of the action. Regard must be paid to the reality of the case.

The question posed, therefore, is whether the jurisdiction to make a declaration as to the construction of the provision ought to be exercised in a case where any substantive relief based upon the meaning attached to the provision construed must be sought in another jurisdiction. There is no doubt that the court has a judicial discretion in the matter of exercising the jurisdiction, and equally there is no doubt that it ought only to be exercised with care. Stirling, J., in *Grand Junction Waterworks Co.* v. *Hampton U.D.C.* (12), at pp. 345, 346, stated the rule to be that:

> . . . when the court is simply asked to make a declaration of right, without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances.

The matter there in issue was the construction of a section of an Act of Parliament. That statement was approved by Romer, J., in *A.-G.* v. *Merthyr Tydfil* (13), at pp. 524, 525. In the Court of Appeal Lindley, M.R. (at p. 550), did not question the accuracy of the statement but thought it inapplicable to the case in hand, for there was, as he pointed out, no adequate remedy obtainable elsewhere.

I do not understand the plaintiff to dispute this general proposition. The argument, as I understood it, was that in an action by the Attorney-General brought to obtain a declaration as to the construction of an enactment and an injunction to secure its observance, the court, if satisfied that the contentions on the merits put forward by the Attorney-General were correct, was bound to make a declaration or grant an injunction: or, put in another way, that the court's usual discretion as to the grant of these remedies found no place in an action by the Attorney-General. In my opinion this argument is not well founded. The point has been specifically considered by the Court of Appeal and, to a limited extent, by the House of Lords in *A.-G.* v. *Birmingham, Tame* A *and Rea District Drainage Board* (14), and by Tomlin, J., and the Court of Appeal in *A.-G.* v. *Westminster City Council* (15). In both cases the question under debate was whether an injunction should be granted. In the first case Kekewich, J., had stated that the Attorney-General, coming to complain that a public body was committing an offence against a statute, was entitled as a matter of right to the only relief which the court could grant, namely, an injunction in one form or another. On appeal Cozens-Hardy, M.R. (at p. B 53), refused to accept the proposition and said it was not the law. Fletcher Moulton, L.J., did not deal with the point. Farwell, L.J., was of the same opinion as Cozens-Hardy, M.R., and summarised his conclusion by saying:

> It is for the Attorney-General to determine whether he should commence litigation, but it is for the court to determine what the result of that litigation shall be.

On the appeal to the House of Lords, Lord Robson alone referred to the point C (at p. 812). He dealt with the question from one limited aspect and not from the broad point of principle and his observations do not carry the matter very far.

In *A.-G.* v. *Westminster City Council* (15) it would appear that the defendants did not raise any objection to the propriety of making a declaration, but did object to the granting of any injunction. It does not appear from the reports that the proceedings in the Court of Appeal in *A.-G.* v. *Birmingham, Tame and Rea District Board* (14) were cited either to Tomlin, J., or the Court of Appeal, D and the judgments given suggest to my mind that those proceedings were not in fact cited. Tomlin, J., accepted the view that the granting of an injunction was a matter of discretion and gave his reasons for exercising his discretion in that case, observing (at p. 454), that it was not for the court to investigate whether an illegal act was for the public benefit. In the Court of Appeal, Pollock, M.R., made some observations on which the plaintiff relied, but E those observations when read in light of the contention with which he had to deal—that the breach of law was not contrary to the public interest and that no injury to the public generally was shown—do not really assist the plaintiff in his contention here, though the language used is somewhat general. Warrington, L.J., treated the granting of an injunction as a matter of discretion. Sargant, L.J., dealt with the matter shortly but pointedly by saying, at p. 425:

> Of course the discretion as to the relief to be granted, whether by injunction or F otherwise, still rests with the court . . .

The statement of Sargant, L.J., covers a declaration as well as an injunction: and, in my view, for the purpose in hand, *i.e.*, the existence of a discretion in the court, no distinction can be drawn between those remedies, though it may well be that there are circumstances which may warrant the making of a declaration, but which do not warrant the granting of an injunction. G

I turn now to consider what are the circumstances, and what special circumstances can be found which show the propriety of exercising the jurisdiction. Many things to which the lay mind might attach importance are irrelevant. It is irrelevant that the relators are not and cannot be members of the Church of England. It is irrelevant that the relators are probably more concerned with the dignity and consequence of cathedral services in general—a matter with which the court in this case is not concerned—than with the form of the H services in Ripon Cathedral. It is irrelevant that Ripon Cathedral serves the purpose of a parish church and that the parochial church council as a whole and the church meeting, with one dissentient, approve the present form of services, and that there is no evidence of public injury; for the law is to be obeyed whatever be the wishes of those affected by it and it is not for the court to dispense with its observance. It is, I think, irrelevant that the action is an action by the Attorney-General. I draw no distinction between proceedings by the Attorney-General *ex officio* and proceedings by him at the instance of a relator—for the Attorney-General, as I have held, is not a privileged suitor. It is irrelevant that the question raised affected only Ripon Cathedral and not cathedrals generally, but I may observe that a tedious search through the statutes of all the cathedrals and collegiate churches made under the Cathedral Measures, 1931 and 1934—a search which I undertook for the purpose of informing my mind upon the merits—has not resulted in my finding in any other of the cathedral statutes the phrase " full choral service," or, except in two cases, A the phrase " choral service," and in one of these cases one finds the lamentable addition to the obligation to hold choral services the words " so far as funds admit." And lastly, with considerable regret, I regard it as irrelevant that the substantive point at issue is one upon which I have not found any particular difficulty in making up my mind.

Are there any special circumstances pointing to the desirability of the intervention of the court ? I can find none. All the circumstances point the other B way. Proceedings can be taken in an ecclesiastical court. That jurisdiction has not been invoked. The bishop has his powers as visitor. He has not been appealed to as visitor. The statute contemplates that, in certain circumstances, the bishop may conclusively determine the construction of the statutes and, if there be disagreement between members of the chapter, his power under the statutes comes into play. The dean and chapter, it was stated in court, were C prepared to obey the law whatever it might be. The law can be ascertained in an ecclesiastical court. The dean and chapter, in obedience, it may be, to the Aristotelian precept not to seek in anything a greater certainty than its nature admits (a precept which is as good law as it is good sense) have not put forward any substantive case as to the meaning of the clause. They have contented themselves with denying the accuracy of the plaintiff's construction and with placing fairly before the court the evidence which might help the court in arriving D at a conclusion on construction. They do not ask me to construe the provision.

In these circumstances I think it would be merely officious for this court to construe the statute. I decline to exercise the jurisdiction I have assumed to exist and I do not propose to embarrass the parties by expressing gratuitously my apprehension of its meaning.

There is only one other matter to which I need refer. It was not contended by the defendants that the provision in question was merely a matter of internal E regulation of the cathedral so that only the bishop, the dean and chapter and the members of the chapter were in law concerned with its observance or non-observance, and that the Scheme was part of the law only in this sense. While reflecting upon the case it occurred to me that this point might require consideration. But a conclusion upon it could not I think have been reached except after taking into account the position in law of the former statutes which were repealed by the present statutes. History must have its say. But F upon that all I can glean is that the diocese of Ripon was set up pursuant to a scheme under the Ecclesiastical Commissioners Act, 1836, that the scheme under which the former statutes were made had effect as if enacted by that Act (sect. 14), and that the dean and chapter with the sanction of the bishop could alter the statutes. In the circumstances I have neglected this possible aspect of the case, and that, of course, is not a matter of which the plaintiff G can complain.

In those circumstances the action is dismissed with costs.

Action dismissed with costs.

Solicitors : *Lee, Bolton & Lee* (for the plaintiff) ; *Crossman, Block & Co.*, agents for *Hutchinson & Buchanan*, Ripon (for the defendants).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

BIRD *v.* BRITISH CELANESE LIMITED.

[Court of Appeal (Scott, Lawrence and Morton, L.JJ.), **February 22, 23, March 8, 1945.**]

Master and servant—Wages—Scheduled undertaking—Wilful misconduct of workman by disobedience of order—Suspension from work for two days without pay—Accepted general practice of suspension known to workman—Whether non-payment of wages in the nature of a fine or a deduction from wages—Truck Act, 1831 (*c.* 37), *s.* 25—*Truck Act*, 1896 (*c.* 44), *ss.* 1, 2, 3—*Defence* (*General*) *Regulations*, 1939, *reg.* 58a—*Essential Work* (*General Provisions*) (*No.* 2) *Order*, 1942 (*S.R. & O.*, 1942, *No.* 1594), *art.* 4.

The respondent was employed as a spinner by the appellants. The contract of employment, terminable on either side by one day's notice, was oral, but it included the acceptance of various internal rules for work and behaviour, some of which were posted up as printed rules, whilst others were practices in the works regularly enforced or followed. One of these practices, known to the respondent, was that the appellants could temporarily suspend a workman from his employment, with a proportionate deduction from the week's wages, for breaches of the factory rules, such as wilful misconduct, breach of duty, or disobedience to an order. It was the duty of the respondent to take his share of cleaning the fixed parts of a machine at which he and some other employees worked. On Jan. 3 and 4, 1944, the respondent refused to do such cleaning, and he was, therefore, "suspended" for the two days. Subsequently he agreed to comply with the order and was reinstated. In these circumstances the respondent brought an action in respect of two days for £2 10*s.* 0*d.* as damages, or, alternatively, as wages. The county court judge found that the parties had contracted upon the terms that the contract might be suspended if the respondent was guilty of serious misconduct and the respondent had been so guilty; but he gave judgment for the respondent on the footing that the Truck Act having made the suspension clause illegal, the appellants had repudiated the contract, entitling the respondent to recover damages, the amount of which was measured by the two days' wages thereby lost. On appeal, the question for the determination of the court was whether the sanction of non-payment of the respondent's daily wage for the two days in question, consequent on the "suspension" was, in the circumstances of the case, made illegal by the Truck Act, 1896, s. 1:—

Held: the suspension having been in accordance with the terms of the contract of employment, the mutual obligations of the parties ceased for the two days of the suspension. Therefore, non-payment of two days' wages was neither in the nature of a fine, nor a deduction from the sum contracted to be paid by the appellants, and, in these circumstances, the Truck Act, 1896, s. 1, did not apply.

[**EDITORIAL NOTE.** It is here held that an agreement between employer and workman for suspension for misconduct is not within the prohibition of the Truck Act, 1896, s. 1. That section prohibits payments in respect of fines, whether in the form of deductions from wages, or of payments by the workman, unless certain conditions of notice, etc., are complied with. But on suspension the mutual obligations to work and to pay wages cease; as no wages are payable, and there cannot be a deduction from nothing, the Truck Act does not apply.

As to Deductions from Wages, see HALSBURY, Hailsham Edn., Vol. 14, pp. 654-658, paras. 1237-1241; and for Cases, see DIGEST, Vol. 24, pp. 938-941, Nos. 263-275.]

Cases referred to:

(1) *Gedge* v. *Royal Exchange Assurance Corpn.*, [1900] 2 Q.B. 214; 12 Digest 303, *2495*; 69 L.J.Q.B. 506; 82 L.T. 463.

(2) *Wallwork* v. *Fielding*, [1922] 2 K.B. 66; 42 Digest 765, *1923*; 91 L.J.K.B. 568; 127 L.T. 131.

(3) *Hanley* v. *Pease & Partners, Ltd.*, [1915] 1 K.B. 698; 34 Digest 111, *830*; 84 L.J.K.B. 532; 112 L.T. 823.

Appeal by the defendant company from a decision of His Honour Judge Willes, made at the Long Eaton County Court, and dated Nov. 16, 1944. The facts and arguments are fully set out in the judgment of Scott, L.J.

Richard O'Sullivan, K.C., *Claude G. Bonard* and *J. L. Gamgee* for the appellants (defendants below).

R. T. Paget and *R. Boswell* for the respondent (plaintiff below).

SCOTT, L.J.: The appellant company (defendants below) carried on a very large undertaking where over 10,000 men were employed. It was scheduled pursuant to the Essential Work (General Provisions) (No. 2) Order of 1942, made by the Minister of Labour and National Service under the powers of Defence Regulation 58A, and, therefore, having statutory force. The respondent was a workman in the appellants' employ. He claimed £2 10*s.* 0*d.* as damages, or, alternatively, as wages, in respect of two days, Jan. 3 and 4, 1944. On each of those days he had been suspended from employment by the appellants, pursuant to a term of his contract with them, on the ground that at the beginning of the shift on each day he had refused to obey an order given him by a superior servant of the company. This suspension the company was entitled to impose under a term of the contract of employment, if the enforcement of the term was not prohibited by statute. On the facts as found by the judge I think the only question of law for us to decide is whether the sanction of non-payment of his daily wage for those two days, consequent on the "suspension," was, in the circumstances of the case, made illegal by the Truck Act, 1896, s. 1. The judge held that it was; that the right of suspension without wages was for that reason inoperative; and that consequently the company had itself broken its contract of employment and was liable in damages. He held that the right to wages did not remain effective, and, therefore, gave judgment, not for £2 10*s.* 0*d.* for the two days' wages, but for a like sum as damages. The point of law under the Truck Act was not raised in the pleadings; but if, on the facts before him, the enforcement of the term of the contract was forbidden by statute, it was his duty to take the point: *Gedge* v. *Royal Exchange Assurance Corpn.* (1).

The following facts were found by the judge. The respondent was a spinner. He had entered the appellants' employ in 1929, left it in 1931, but returned in 1935, and thereafter remained in their employ as a spinner. The contract of employment was oral, originally and throughout his years of service, although it included the acceptance of various internal rules for work and behaviour, some of which were posted up as printed rules, whilst others were practices in the works regularly enforced or followed. It was common ground below that the contract was at all times terminable on either side by one day's notice (not two days, as by an error the judge says in his judgment.) The material term on which the present dispute turns was that, for various transgressions, including refusal to obey an order, the employer was entitled "temporarily to suspend the workman from his employment"; the wording of the recognised practice being, "if he was guilty of misconduct or breach of duty or breach of an order." That term was held by the judge to have been well known to the respondent as a practice of the works, and he held it to be a term of his contract of employment. On the evidence he could not have held otherwise. He also held that the appellant company had always applied that right reasonably. The very nature of the right shows that its object is, on the one hand, to enforce discipline by a reasonable exercise of pressure, and, on the other, to relieve both employer and workman of the burden of actual dismissal, by the agreed substitution of a milder sanction.

In the present case the respondent's duty was to take his share of cleaning the fixed part of the machine, to which he and others of the gang were attached, before leaving at the end of the shift; the factory being worked on a three-shift system, continuously through the 24 hours of each day, and the whole gang on the shift taking their allotted share, in turns presumably, in that part which fell to be done in that shift of the day's cleaning. The cleaning was necessary because, without it, the machine tended to "fur up," and, if it did so, there was danger of its catching fire. On the morning of Jan. 3, 1944, the respondent informed the chargehand or foreman that he refused to do the cleaning which was incumbent on him before the end of the shift; and he was therefore "suspended" for a day. The same thing happened the next day. On Jan. 5th, however, he had thought better of it, and said he would obey the order, and was, therefore, in accordance with the rule, allowed to resume his place in the shift. It is for those two days of suspension that the action was brought. We were informed that both sides in the rayon industry—employers and trades unions—regarded the case as of great importance, and the judge gave a considered judgment of comparable length in favour of the workman because of his interpretation of the Truck Act.

An issue was half-raised at the trial, though not mentioned in the respondent's amended claim, as to whether the cleaning which was ordered was contrary to the Factory Act, 1937, and regulations thereunder, so as to make the order to clean illegal; but that suggestion was dropped and we were informed that, as a consequence, the appellants abstained from calling the factory inspector whom they had brought to court to give evidence. A similar suggestion was also made in regard to the company's exhibited placard of rules, which contains a prohibition of cleaning machines in motion in terms equivalent to those of the Factory Act prohibition. That suggestion, too, was dropped, and the judge gave judgment on the footing that there was nothing illegal or improper from either point of view in the order to clean.

There was discussion both below and before us upon the operation and construction of the Essential Work Order. So far as the present case is concerned, I do not think it alters the legal position which would obtain without it. It leaves the terms and conditions of employment unaffected in most respects, but grafts upon the contract of employment certain additions and modifications. For instance, by art. 4, (1) the employer is prohibited from dismissing his workman (except for serious misconduct) (sub-para. (*a*)); nor can a workman leave without permission in writing from a "national service officer" (sub-para. (*b*)): the employer is required (sub-para. (*d*)) to pay not less than the "normal wage" (as defined) for each "prescribed period" (defined to be a week) but subject to the condition of the workman being "capable and available for work." Para. (3) is the nearest to being relevant in the present case: it provides that:

> . . . if [the workman] is in accordance with the conditions of his service suspended without pay from his work for a period not exceeding three consecutive days for reasons of a disciplinary character, then if . . . he is paid on a time rate basis [the] provisions [of sub-para. (*d*)] shall apply as though the prescribed period . . . were reduced by the days [of suspension] . . .

But subject to the proviso of a right of appeal by the workman to a local appeal board. Para. 8 provides for the contractual provisions for notice to terminate the contract continuing, but imposes a minimum length of notice of one week.

The suspensions in the present case, each for one day, were not directly questioned by any authorised proceedings under the Order of 1942; but the matter found its way before a local appeal board, and that board held that in disobeying the order to clean the machine the workman had been guilty of serious misconduct. The judge, independently of that decision, also held that the refusal to obey the order amounted to serious misconduct; but he gave judgment for the workman on the footing that the Truck Act having made the suspension clause illegal, the employer had repudiated his contract, entitling the workman to recover damages, the amount of which was measured by the two days' wages thereby lost. He did not deal with the question whether the workman ever elected to treat such repudiation as a final breach, so as to entitle him so to rescind. In my view the workman never so elected. The judge said in his judgment that there was no claim for wages before him; but he was in error in so thinking, for the last paragraph of the amended particulars of claim put forward that claim as an alternative. The judge's view apparently was that if the workman's claim had been for wages, it would necessarily have failed on the ground that the workman would have been unable to show that during the two days he was "capable of and available for work."

This question is, however, in my opinion academic. The one question in the appeal is the true meaning of the Truck Act; and that depends solely on the proper interpretation of the 1896 Act, s. 1. For this purpose I assume, with the judge, that the order was a proper order; and that the right to suspend for a refusal to obey it was a term of the contract of employment. The consequences of the suspension, namely, the agreed absence of any right to receive, or duty to pay, wages during the suspension, does not, in my opinion, come within the ambit of sect. 1, which reads as follows:

> An employer shall not make any contract with any workman for any deduction

> from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman, for or in respect of any fine, unless [certain conditions are fulfilled].

Of these one at least—an exhibited notice or signed contract containing the suspense clause—was not fulfilled; therefore, if the judge's interpretation were right, his result of illegality would follow; for the "suspension" term was clearly, as the judge said, a "contract" within the definition in the Truck Act, 1831, s. 25, with which the 1896 Act is to be read as one: but I think that he misconstrued the enacting words at the commencement of the section. There are only two types of contractual stipulation within the provisional prohibition—(i) deductions from wages; and (ii) payments made by the workman unconnected with his wages. Both are, I think, qualified by the last seven words "for or in respect of a fine." Those words are an essential limitation on both prohibitions, because without that limitation all deductions from wages, and also all payments by the workman out of his own pocket would be brought within the ban—for example, subscription to a pension or welfare or sports fund. It is quite clear that the "suspense" clause in the particular contract of employment before the court is not within the second category of prohibited stipulations; no payment by the workman was called for by it. Is it within the first? Clearly not, because you cannot deduct something from nothing. The suspense clause may act in two ways. It may be a merciful substitute for the procedure of dismissal, and a possible re-engagement. Under the suspense clause the right to wages ceases and the wages are not earned; no deduction can be made from wages which are not payable. In the present case, as the workman was adjudged guilty of serious misconduct, the operation of the clause was merely merciful; it enabled the workman, when the suspension ended, to claim as of right to continue in his old job. The clause operates in accordance with its terms; the whole contract is suspended, in the sense that the operation of the mutual obligations of both parties is suspended; the workman ceases to be under any present duty to work, and the employer ceases to be under any consequential duty to pay. That is the natural meaning of the word "suspend" when applied to a contract of employment, and I think it is also its legal meaning. If so, this suspense clause is not obnoxious to the veto of sect. 1 of the Act. It was suggested in argument that the words "for or in respect of a fine" should be read as applying only to the second limb of the prohibition, and not to deductions from wages. I do not think that is the right construction; it applies to both limbs. My interpretation is strongly supported by a comparison of sects. 2 and 3 with their parallel provisions and language. Those two sections forbid two specific types of deduction from wages; they would both have been superfluous if sect. 1 had contained a general prohibition of all types of deductions from wages. Under all three sections the deduction is from wages which have been earned under the contract and for which the employer is under a present duty to make payment. In this sense the deductions from wages under sect. 1 are generically similar to those under sect. 2 and 3; for in all three cases the deductions are from wages earned and payable in accordance with the terms of the contract: on the other hand, where there is a suspension in accordance with the terms of the contract, there are no wages so to become payable.

For these reasons I think the Truck Act veto is inapplicable; and the appeal must be allowed with costs here and below.

LAWRENCE, L.J. [read by MORTON, L.J.]: The county court judge has found in this case that the appellant, an employer, and the respondent, a workman, contracted upon the terms that their contract might be suspended if the workman was guilty of misconduct and that the workman had been so guilty, but held that such a contract infringed the Truck Act, 1896, s. 1. The question is, therefore, whether such a contract is a contract for any deduction from the sum contracted to be paid for, or in respect of a fine within the meaning of the Truck Act, s. 1. In my opinion, it is not. Apart from the Truck Act, there is nothing in law or in fact which prevents two contracting parties contracting on the terms that either during holidays or illness, or any other period, the obligations of the contract shall be suspended. By the terms of such a contract the contracting party, if he be an employer, never contracts to pay wages during the period referred to, any more than the other party, if he be a workman, contracts to work during that period. That is the meaning of suspension (see per Lord Sterndale, M.R., and Warrington, L.J., in *Wallwork* v. *Fielding* (2)), and there can be no doubt such a result can be achieved by agreement. It follows, in my opinion, that such a contract is not a contract for any deduction from the sum contracted to be paid since no sum was ever contracted to be paid during a period of suspension. Counsel for the respondent attempted to argue that the respondent had been given orders which conflicted with the employer's rules, which formed part of his contract, but such an argument was, in my view, not open to him on this appeal, not having been raised in the pleadings, being inconsistent with the judge's findings of fact, and evidence on such an issue having been excluded by the judge.

Morton, L.J.: As I read the judgment of the county court judge in this case, he declined to consider the question whether the order, which the respondent workman refused to obey, infringed the provisions of the Factory Acts; and he also declined to consider the question whether that order infringed the rules laid down by the appellant employers for the safety of their workers. In my view, the judge was right in so declining. These questions could only have been relevant if the issue of misconduct or no misconduct by the workman had been before the judge, and the workman's solicitor, at the outset of the hearing in the county court, stated that the issue of the workman's misconduct was "not now down for consideration" and later admitted, in effect, that the workman was guilty of misconduct. Further, it is not disputed before this court that the contract between the workman and the employers contained a term enabling the employers to suspend the workman from his employment if he was guilty of misconduct.

It follows, in my view, that the only question with which this court is concerned is whether this term of the contract does or does not infringe the provisions of the Truck Act, 1896, s. 1. In my view it does not, and I do not desire to add anything to the reasons already given by my brethren. The observations of Atkin, J., in *Hanley* v. *Pease & Partners, Ltd.* (3) were relied on by counsel for the workman, but these observations contain no expression of any opinion. I agree that the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *B. P. Webster*, agent for *Flint, Bishop & Barnett*, Derby (for the appellants, defendants in the court below); *Gibson & Weldon*, agents for *C. Leslie Hale & Mander*, Burton-on-Trent (for the respondent, plaintiff in the court below).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

F.P.H. FINANCE TRUST, LTD. (*in Liquidation*) *v.* INLAND REVENUE COMMISSIONERS.

[House of Lords (Lord Russell of Killowen, Lord Porter, Lord Simonds). **February 7, 8, 12, 13, 14, 15, 19, March 22, 1945.**]

Income Tax—Sur-tax—Preference shareholders entitled to surplus assets on winding up—Direction and apportionment by Commissioners—Basis of apportionment—Interests of the members—Interest in capital assets—Limitation of time for direction—Finance Act, 1922 (*c.* 17), *s.* 21, *Sched. I, paras.* 4, 8, 9—*Finance Act,* 1927 (*c.* 10), *ss.* 31 (3), 32—*Finance Act,* 1928 (*c.* 17), *s.* 18—*Finance Act,* 1937 (*c.* 54), *ss.* 14 (3), 31 (4).

At the material time the appellant company had a paid-up capital of £11,000, divided into 1,000 £1 ordinary shares and 10,000 £1 preference shares; every share carrying the right to one vote. The preference shareholders were entitled to a fixed preference dividend of 5 per cent., and the ordinary shareholders to such dividend as the company in general meeting might resolve. On a winding-up the ordinary shareholders were entitled to be repaid the amount paid up in respect of their shares, *i.e.*, £1,000 and the preference shareholders were entitled to the surplus assets. The ordinary shares were held by the National Mining Corpn., Ltd., of which H. G. Latilla was in effective control. The preference shares were held in equal parts by the wife and two daughters of H.G. Latilla. On Oct. 12, 1937, the appellant company adopted the accounts for the period Apr. 1, 1935, to Dec. 31, 1936, which showed a profit of £645,192 11*s.* 6*d.*, and authorised the payment of a 5 per cent. dividend to the preference shareholders for the period from Nov. 27, 1936, to Dec. 31, 1936, amounting to £46 11*s.* 6*d.*, and a 10 per cent. dividend to the ordinary shareholders for the year amounting to £100. On Feb. 8, 1938, the company's accountants, in reply to a request from the Special Commissioners, under the Finance Act, 1922, Sched. I, para. 4, gave the above facts but stated that the accounts, though settled by the directors, had not yet been approved in general meeting. On Apr. 1, 1938, the company went into voluntary liquidation. Subsequently, the Special Commissioners issued a direction to the company under the Finance Act, 1922, s. 21, that for the purposes of assessment to surtax the income of the company for the period from Apr. 1, 1935 to Dec. 31, 1936, should be deemed to be the income of the members, and, having computed the undistributed income at £858,817, they apportioned on May 16, 1941, the liability of the members as being : National Mining Corpn., Ltd., £100, the wife and two daughters of H. G. Latilla £286,296 5*s.*, £286,210 7*s.* 6*d.*, and £286,210 7*s.* 6*d.*, respectively. The company appealed against both direction and apportionment. The company's principal contentions were (i) that the commissioners in apportioning the amount of the income in question among the members "in accordance with the respective interest of the members" were bound to apportion it among those members who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by the company by way of dividend in accordance with the rights of the members as defined in the memorandum and articles of association of the company ; (ii) that the direction made by the commissioners was invalid by reason of their failure to make the direction within the time limited by the Finance Act, 1928, s. 18 :—

HELD : (i) on the true construction of the Finance Act, 1922, s. 21, the commissioners must, for the purpose of apportionment, determine the persons who, according to their interests in the company, owned the real and paramount beneficial interest in the fund in question. Since under the constitution of the appellant company the preference shareholders were entitled on a winding up to share the capital and undistributed dividends, and were in a position, until liquidation, to prevent any but a nominal distribution of profits by way of dividend, the commissioners made a correct apportionment of the company's income among its members for the purposes of sur-tax.

(ii) in order to claim the protection of the Finance Act, 1928, s. 18, the company must forward to the commissioners the accounts of the company for the period, which had been adopted by the company in general meeting. Since the company did not comply with that specified condition, they did not secure the benefit of the three months' limitation period.

Decision of the Court of Appeal ([1944] 1 All E.R. 194) *affirmed.*

[**EDITORIAL NOTE.** The House of Lords here, upholding the Court of Appeal, decides in favour of a broad construction of the phrase "the interests of the members" in the Finance Act, 1922, s. 21. The contention of the taxpayer that the commissioners are bound to apportion undistributed income among those members who would have received it and in the proportions in which they would have received it if the whole had been distributed as dividend is rejected and it is said that the commissioners should ask themselves the questions (*a*) upon whom did it depend whether or not the income should be withheld from distribution, and (*b*) who would avoid payment of sur-tax by the withholding. The answers to these questions should indicate who owns the real beneficial interest in the undistributed fund. On a preliminary objection based upon the limitation period given to companies by the Finance Act, 1928, s. 18, it is held that this does not apply unless the commissioners have received the accounts of the company, not as settled by the directors, but as adopted by the company in general meeting. No notional declaration of dividend is envisaged by the section.

AS TO UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289, 290, paras. 574, 575, p. 297, para. 590 ; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674g-674s.]

Cases referred to :

*(1) *Drew (Alexander) and Sons, Ltd.* v. *Inland Revenue Comrs.* (1932), 17 Tax Cas. 140 ; Digest Supp.

(2) *Re Drew (Alexander) & Sons, Ltd.*, [1935] Ch. 93; Digest Supp.; 104 L.J.Ch. 78; 152 L.T. 281.

Appeal by the company from a decision of the Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.), dated Dec. 14, 1943, reported (1944] 1 All E.R. 194, confirming a decision of Wrottesley, J., dated Oct. 26, 1942. The facts and arguments are fully set out in the opinion of Lord Russell of Killowen.

J. Millard Tucker, K.C., H. Wynn-Parry, K.C., Terence Donovan and *F. Heyworth Talbot* for the appellant company.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

Lord Russell of Killowen: My Lords, this appeal is concerned with the provisions of the Finance Act, 1922, s. 21, as amended by subsequent legislation, dealing with the imposition of sur-tax upon the income of certain companies which fail to distribute reasonable dividends. The facts of the case which are relevant to the determination of the legal questions involved in the appeal must first be stated.

The appellant company (which I will refer to simply as the company) was incorporated on Sept. 13, 1912, under the name Rhoex Development Co., Ltd., with a nominal capital of £100 divided into 100 shares of £1 each. Although its objects as stated in its memorandum of association cover innumerable fields of activity, the company for many years seems to have lived quietly with its modest capital apparently doing nothing in particular. In the year 1927, however, it developed considerable activity. Its capital was increased to £10,000 divided into 10,000 shares of £1 each; it adopted new articles of association; it changed its name to F.P.H. Finance Trust, Ltd.; and it became a trading company the business of which consisted mainly in financing and dealing in the shares of gold mining and mining development companies. The whole of its capital was issued, and belonged beneficially to Mrs. Latilla, the wife of one H. G. Latilla. In 1934 Mrs. Latilla sold her shares to Marlands Trust, Ltd. (a company incorporated in Southern Rhodesia) in exchange for debentures in the purchasing company, the shares in which were held by Mrs. Latilla and her two daughters, Mrs. Mayo and Mrs. Campbell. The 10,000 shares in the company were transferred to the Rhodesian company and its nominees. No dividends were paid on the shares so transferred, but a very large income was accumulated by the company for the benefit of the Rhodesian company, which was not assessable to sur-tax. The individuals, however, who owned the shares in the Rhodesian company, became apprehensive in the year 1936, that, as a result of recent financial legislation, the income of the company might be regarded as income of the shareholders of the Rhodesian company and thus become assessable to sur-tax. With a view to avoiding the possibility of their thus being called upon to bear a share of the country's taxation, they decided to act.

In pursuance of this decision the capital structure of the company was altered and made to represent a state of affairs in which it would seem that the only persons who were beneficially interested in the profits earned by the company gave up that interest (except to the extent of 5 per cent. upon a capital of £10,000) to newcomers who were prepared to invest in the company the modest sum of £1,000. Accordingly on Nov. 27, 1936, special resolutions of the appellant company were passed by which (i) its capital was increased to £11,000 by the creation of 1,000 shares of £1 each; (ii) the existing 10,000 shares became preference shares, the new shares being ordinary shares; (iii) the preference shares became entitled to a fixed cumulative dividend of 5 per cent. and, in a winding up, to the whole of the surplus assets after payment to the ordinary shareholders of the amounts paid up on their shares and (iv) the ordinary shares became entitled as regards profits (subject to the rights of the holders of the preference shares) to have distributed among the holders "the whole of any sums declared for distribution as dividends out of the profits of the company," and (as regards assets) the right in a winding up to a priority repayment of £1,000, but with no further or other participation in the assets of the company. It is, however, to be noted that the voting power was unaltered. It remained as provided in the articles adopted in 1927, *viz.*, a vote for every share, a provision which left complete control of the company in the hands of the preference shareholders. These, at this stage, were the Rhodesian company and its nominees, they in their turn being under the complete control of Mrs. Latilla and her daughters.

Attention may, I think, properly be called to the unusual type of ordinary share thus created, a share with no interest in surplus assets on a winding up beyond the repayment of the capital paid up on it, and with no interest in the profits beyond such a dividend as might be allowed to be declared in its favour by those who by their votes control the company. It is not, therefore, surprising to find that no offer of these unattractive shares was made to the public. They were, by arrangement, taken up and paid for by the National Mining Corpn., Ltd., a public company with the said H. G. Latilla on its board, one term of the arrangement being that the company would offer the corporation 25 per cent. of any underwriting business which it undertook thereafter. The Special Commissioners say, in the case stated, that it is clear that the ordinary shares were offered to the corporation with conditions attached ; they further state that it is clear that the corporation did not seek the investment, but was sought out by the company, and they add a passage in the following terms :

> The scheme by which the capital structure of the appellant company was reorganised within a month of the end of the accounting period under review, was admittedly designed to continue for Mrs. Latilla and her daughters the immunity from liability to sur-tax which they had succeeded in securing under the original evasive design. In our view it is inconceivable that such immunity was to be bought at the price of handing over to the National Mining Corporation, Ltd., any substantial part of the profits the conservation of which was of the very essence of the scheme, and we have come to the conclusion, after considering such evidence as we had before us to a contrary effect, that there was an understanding that any dividend declared on the ordinary shares should be so limited as to be ludicrously incommensurate with the amount of the income available for distribution.

On Dec. 15, 1936, the Rhodesian company went into liquidation, and in the same month its 10,000 preference shares in the company were distributed among Mrs. Latilla (3,334 shares) and Mrs. Mayo and Mrs. Campbell (3,333 shares each). The ladies were entered in the company's share register as the respective holders of those shares on Feb. 2, 1937.

On Oct. 12, 1937, the company adopted the accounts for the period of 21 months from Apr. 1, 1935, to Dec. 31, 1936, which showed a profit for the period of £645,192, and authorised the distribution of a sum of £146 11*s.* 6*d.* by way of dividends, *viz.*, £46 11*s.* 6*d.* in payment of a dividend on the preference shares at the rate of 5 per cent. per annum from Nov. 27, 1936, to Dec. 31, 1936, and £100 in payment of a dividend of 10 per cent. on the ordinary shares for the period to Dec. 31, 1936. On Apr. 1, 1938, the company went into liquidation. In the winding up the corporation received payment of the £1,000 paid up on the ordinary shares, and the balance of the assets was distributed among Mrs. Latilla and her daughters.

On Sept. 2, 1940, the commissioners issued a direction under the Finance Act, 1922, s. 21, that for the purposes of assessment to sur-tax the income of the company for the period from Apr. 1, 1935, to Dec. 31, 1936, should be deemed to be the income of the members ; and on May 16, 1941, they apportioned the actual income (computed at £858,817) as follows : the corporation, £100, Mrs. Latilla, £286,296 5*s.* 0*d.*, Mrs. Mayo and Mrs. Campbell £286,210 7*s.* 6*d.* each. An earlier apportionment, which apportioned practically the whole income to the said H.G. Latilla was not relied on and may be ignored.

On an appeal by the company against this direction and apportionment, the Special Commissioners discharged the apportionment, but dismissed the appeal against the direction. At the request of the respondents in your Lordships' House, the Special Commissioners stated a case for the opinion of the High Court. The case was heard by WROTTESLEY, J., who allowed the appeal, reversed the decision of the Special Commissioners, dismissed a cross-appeal by the company, and ordered the case to be remitted to the commissioners for their further consideration and also to make the proper apportionments. An appeal to the Court of Appeal by the company was dismissed.

These being the relevant facts I now proceed to consider the provisions of the Finance Acts which are applicable to the case, and the contentions of the parties. The Finance Act, 1922, s. 21, as originally enacted, only applied to companies which answered the description contained in subsect. (6), one ingredient of which was registration since Apr. 5, 1914. It had no application to the company until a later date. The section starts with a preamble which states the object of the legislation in the following terms :

> With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows :

Subsect. (1) then states the event upon the happening of which the powers conferred by the subsection come into operation. The event is thus described :

> Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period . . . [The subsection then confers powers upon the commissioners in the following terms] . . . The commissioners may by notice in writing to the company direct that for purposes of assessment to super-tax the said income of the company shall, for the year or other period specified in the notice be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.

Subsects. (2) to (6) contain provisions relating to the recovery of the super-tax in question and to other matters irrelevant to the questions involved in this appeal. Subsect. (7) defines the expression " member " by enacting that it :

> . . . shall include any person having a share or interest in the capital or profits or income of a company . . .

Subsect. (8) enacts that :

> . . . the provisions contained in the First Schedule to this Act shall have effect as to the computation of the actual income from all sources of the company, the apportionment thereof amongst members of the company and otherwise for the purpose of carrying into effect, and in connection with, this section.

The provisions of the First Schedule which relate to apportionment of the said income among members of the company are contained in paras. 8 and 9 thereof which run thus :

> 8. The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members, and the income as apportioned to each member shall, for the purposes of super-tax, be deemed to represent [his] income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require and shall be deemed to be the highest part of that income.
>
> 9. The income apportioned to a member of a company . . . under sect. 21 of this Act shall, for the purposes of [super-tax] be deemed to have been received by him on the date to which the accounts of the company for the year or period were made up . . .

By the Finance Act, 1927 (s. 31 (3)), an amendment was made in subsect. (6) of sect. 21 of the 1922 Act, the effect of which was to bring the company under, and make it subject to, the provisions of that section. By the same Act (sect. 32) provision was made for the case where a member of a company which was subjected to the operation of the 1922 Act, s. 21, was itself a company. In such a case it was provided that the excess (as therein described) of the amount apportioned to the last-mentioned company should for the purposes of the said section be deemed to be income of members of that company "and shall be apportioned among them in accordance with their respective interests in that company."

The main point at issue between the parties can now be stated. The company contends that the commissioners in apportioning the amount of the income in question among the members " in accordance with the respective interests of the members " are bound to apportion it among those members who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by the company by way of dividend in accordance with the rights of the members as defined in the memorandum and articles of association of the company. The result in the present case of an apportionment on those lines would be that a very small part of the fund would be apportioned in substantially equal shares among Mrs. Latilla and her daughters, and that the balance (being substantially the whole of the £858,817) would be apportioned to the corporation.

On the other hand, the respondents attribute a wider meaning to the words "the interests of the members." They contend that the commissioners must take into consideration all the different interests of the members, including voting power and all shares or interests in the capital or profits or income of the company as a going concern or in winding up, for the purpose of ascertaining who are the persons who in fact are beneficially interested in the income in question, and in what proportions. In short that the commissioners should consider the whole position of members under the company's constitution, including their rights to undistributed profits and otherwise in a winding up.

My Lords, in my opinion the contention of the company places far too narrow a construction upon the wide and comprehensive words which the legislature has used, and I can find no language in sect. 21 to justify such a construction, but much to justify a broader interpretation. The foundation of the power given by the section to the commissioners is the fact that the company, for an unreasonable time after the end of the period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the commissioners may take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the section ? I can find none. I can conceive many cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases. Obviously everyone who falls within the extended definition of member is not necessarily to be included in the apportionment. In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (i) that they fall within the definition, and (ii) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions. Further, I think that in considering these interests and apportioning the income among members the commissioners may properly be guided by the preamble to sect. 21, and endeavour to make an apportionment appropriate to their interests to those members for whose benefit in relation to the avoidance of payment of super-tax (now sur-tax) the distribution of income has obviously been withheld. They may well ask themselves the questions (i) upon whom did it depend whether or not the income should be withheld from distribution, and (ii) for whose benefit was the distribution withheld or (in other words) who would avoid payment of sur-tax by the withholding ? If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question. Other members may also have an interest therein, but to a smaller extent.

Applying this view to the facts of the present case, there should be no doubt about the broad result. Both questions admit of one answer only—*viz.*, Mrs. Latilla and her daughters, whose voting power enabled them (i) to prevent (before liquidation) any distribution to the ordinary shares beyond a nominal percentage, and thus to enforce the "understanding" referred to in the case stated, (ii) to wind up the company at any moment and (subject to the payment of £1,000 to the corporation) get all the surplus assets (including the fund in question) for themselves, or (iii) if ever they wanted the income paid to them as such, to alter the articles of association by special resolution and (notwithstanding art. 47) thereby increase the dividends payable on the preference shares to any desired amount.

It was contended that the decision in *I.R.C.* v. *Drew* (1) was inconsistent with the contention of the respondents ; but I am unable to agree. In that case the company concerned was a normal trading company which had issued preference and ordinary shares, the interest which each class had in the profits of the company being reflected in the interest which each class possessed in the surplus assets in the event of a winding up (see the judgment of EVE, J., in *Re Drew* (2)). There was no such topsy-turvey structure as existed here. The case was concerned only with the apportionment in relation to blocks of both preference and ordinary shares which had been settled upon tenants for life and remaindermen by two settlements. The shares were registered in the names of the trustees of each settlement, but the apportionments had been made to the tenants for life. The company had gone into liquidation. FINLAY, J., affirmed the apportionment, and I think rightly on the facts of that case. It was a difficult position. On the one hand, the tenants for life would normally only be entitled to receive the income produced by the share in the surplus assets in the winding up attributable to the settled shares ; on the other hand, the remaindermen were only entitled to an interest which might only become an interest in possession at some future unpredictable date. The judge solved the problem in the light of the Finance Act, 1937, s. 31 (4), which provided that the income which was in question in the particular case should for the purposes of the 1922 Act, s. 21, be deemed to be income available for distribution to the members of the company, and he confirmed the apportionment of the whole to the tenants for life, who were the only persons who could be described as beneficially " interested " in any income of the company available for distribution to its members. I am unable to take the view that the decision is inconsistent with the contentions of the respondents in the present case, or that the judge was concerned with the questions which, upon the facts of the present case, arise now for your Lordships' consideration.

An apportionment which would result in attributing to Mrs. Latilla and her daughters a minute portion of the fund in question and the balance to the corporation would be a travesty of the truth ; it would be an apportionment in the inverse ratio to the actual beneficial interest in the fund in question. It would involve the commissioners closing their eyes to the obvious fact that the persons who owned or controlled all but a nominal interest in the assets and profits of the appellant company were the Latilla ladies ; and it would treat as the person overwhelmingly interested in the company's actual income from all sources for the period in question the corporation, whose only interest in fact therein was what the Latilla ladies allowed it to have, an amount which, according to an understanding for which the Latilla ladies had stipulated and which they had the power to enforce, was to be " ludicrously incommensurate with the income available for distribution." It would be acting upon the ridiculous footing that these ladies, in order to enjoy their income free of surtax, had made a present of it to the corporation.

Two further arguments on behalf of the company must be mentioned. Reliance was placed upon the provisions contained in the Finance Act, 1937, s. 14 (3), which runs thus :

> (3) Where a direction is given under subsect. (1) of sect. 21 of the Finance Act, 1922, with respect to an investment company, the Special Commissioners in determining the respective interests of the members for the purpose of apportioning income in accordance therewith under paragraph 8 of the First Schedule to that Act, may, if it seems proper to them so to do, attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

The company is not an investment company ; but it was said (i) that if the wider construction of the words " in accordance with the respective interests of the members " was the right one, this enactment was unnecessary, and (ii) that the restriction of the power to the case of investment companies carried with it an inference that the commissioners had no such power in the case of other companies. At first sight this would appear to be a formidable argument. But if, as I think it is, the wider construction is the proper one, the subsection, on closer consideration, would seem not to be inconsistent with that construction. What the section does is merely to enable the commissioners, in the case of investment companies, to disregard all other interests, and look only to interests in the assets on a winding up. An investment company was a very popular ingredient in tax-evasion schemes, and the structure of investment companies fulfilling that role was very frequently of a most complicated nature, and the income interests of members were elusive and peculiar. In my opinion all that the 1937 Act, s. 14 (3), does is to enable the commissioners to omit all consideration of the state of affairs existing while the company is a going concern, and to apply only the acid test of the interests in surplus assets on a winding up, which would include all interests in undistributed income. There is nothing in the enactment inconsistent with the contention of the respondents.

A The other argument was in the nature of a preliminary objection. It was that, in the circumstances of this particular case, the power of the commissioners to give any direction or make any apportionment in regard to the company's income for the period from Apr. 1, 1935, to Dec. 31, 1936, had absolutely ceased and determined by reason of the provisions contained in the Finance Act, 1928, s. 18. The relevant provisions of that section run thus:

> (1) Any company to which section twenty-one of the Finance Act, 1922, applies, may B at any time after the general meeting at which the accounts of the company made up for any year or other period are adopted, forward to the Special Commissioners for their consideration a copy of the said accounts, together with a copy of the report, if any, of the directors for that year or period, and such further information, if any, as it may think fit, and the Special Commissioners shall, subject to the provisions of this section, on receiving the said accounts and other documents, if any, proceed to consider the position of the company in relation to the said section twenty-one.
>
> C (2) The Special Commissioners may as soon as reasonably may be, but not later than twenty-eight days after the receipt of the said accounts and other documents, if any, call upon the company to furnish to them within twenty-eight days, or such extended period as they may subsequently allow, such further particulars as they may reasonably require:
>
> Provided that if the particulars so required are not furnished to the commissioners within the period or extended period allowed for the purpose they may proceed under this section upon the information before them.
>
> D (3) Where a company has under subsect. (1) of this section forwarded to the Special Commissioners the accounts of the company for any year or other period, whether with or without any other documents, the following provisions shall have effect:
>
> (*a*) unless within three months after the receipt of the said accounts and other documents, or, if further particulars have been required as aforesaid, within three months after the receipt of those particulars, or the expiration of the period within which those particulars are to be furnished, as the case may be, the Special Commis- E sioners intimate to the company their intention to take further action in the case of the company under the said section twenty-one in respect of that year or other period, the power of the commissioners to take any such further action in respect of that year or other period shall absolutely cease and determine . . .

A few additional facts require to be stated in this connection. The company did not in fact ever forward to the commissioners a copy of the accounts for the relevant period, adopted at the general meeting, which was held on Oct. 12, F 1937. It is true that in a letter of Oct. 5, 1937, the company's accountant sent to the commissioners a copy of the balance sheet of the company at Dec. 31, 1936, and a copy of the profit and loss account for the period ending on that date, but stated that the accounts, though settled by the directors, had not yet been approved in general meeting. Later, in answer to a letter from the commissioners, the accountants (by letter dated Feb. 8, 1938) informed them that the general meeting had been held on Oct. 12, 1937, and that the dividends, G already referred to by me, had then been declared. On Sept. 19, 1939, the commissioners wrote a letter to the accountants in which they stated that they did not propose to take any further action under the 1922 Act, s. 21, in respect of the income of the company for the period ending Dec. 31, 1936. Subsequently, however, they changed their minds, and gave the direction and made the apportionment of which the company now complains. It is not suggested, on this part of the case, that the commissioners could not alter their intention H if their powers under sect. 21 were still available to them. The point urged is, that as regards the period in question, the powers had ceased because the commissioners had in fact received the accounts for the period in question and had not within three months intimated their intention to take further action. My Lords, in my opinion there is nothing in this point. The provisions of the 1928 Act, s. 18, confer upon companies a means by which, if they comply with the conditions specified, they can secure for themselves the benefit of a short limitation period, upon the expiration of which they will, as regards an accounting period, be freed from the powers conferred on the commissioners by the 1922

Act, s. 21. But the provision under which alone this freedom is obtainable (*viz.*, subsect. (3)) operates only where a company has under the first subsection forwarded to the commissioners the accounts of the company for the period, not the accounts as settled by the directors, but the accounts which have been adopted by the company in general meeting. The specified conditions not having been complied with by the company, the period of three months never began to run. For the reasons which I have indicated I would dismiss this appeal with costs.

Lord Macmillan : My Lords, I am so entirely in agreement with the reasons for the dismissal of this appeal which Lord Russell of Killowen has expounded that I need do no more than express my concurrence.

Lord Porter : My Lords, I also agree with the opinions expressed by Lord Russell of Killowen, and concur in the result.

Lord Simonds : My Lords, I also concur.

Appeal dismissed with costs.

Solicitors : *Birkbeck, Julius, Edwards & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

H. R. HOOD-BARRS *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Wrottesley, J.), **March 2, 1945.**]

Income Tax—Sur-tax—Transfer of shares to daughters as an absolute gift—Dividends declared after transfer—Whether dividends settlor's income for taxation purposes—" Transfer of assets "—" Settlement "—" Disposition "—Settled Land Act, 1882 (*c.* 38), *s.* 2—*Finance Act,* 1894 (*c.* 30), *s.* 22 (1)—*Income Tax Act,* 1918 (*c.* 40), *s.* 27—*Finance Act,* 1922 (*c.* 17), *s.* 20—*Finance Act,* 1936 (*c.* 34), *s.* 21—*Finance Act,* 1938 (*c.* 46), *ss.* 38, 41 (4), (6).

On July 25, 1938, the appellant transferred certain shares to the value of £45,000 to his two infant daughters in equal moieties. The appellant provided the consideration out of his own resources. The transfer to the daughters was absolute, the appellant not retaining any rights or claims in respect of the shares. After the transfer had been effected, dividends were declared upon those shares amounting to £4,200 for the year ending Apr. 3, 1939. It was contended for the respondents that the transfer of the shares constituted a settlement within the meaning of the Finance Act, 1936, s. 21 (9) (*b*), which, by its definition of " settlement," included a " transfer of assets " ; therefore, the dividends, paid income-tax free, should be treated as the appellant's income for the year in question. It was contended for the appellant that, in order to fall even within the expanded definition contained in subsect. (9) (*b*), the transaction must still partake of the nature of a settlement in its generally accepted meaning and that there must be a condition or limitation whereby capital and income had different interests. The transfer of the shares being a gift out and out, the transaction did not fall within the ambit of sect. 21. In support of this contention, the appellant relied on the Finance Act, 1922, s. 20 (1) (*c*) which provided, *inter alia*, that income payable to a child for a " period less than the life of a child " was to be deemed to be the income of the settlor only so long as the child was an infant and unmarried ; and, under the second proviso to that section, the mere fact that the income ceased to be payable in certain events, did not render the disposition one " for some period less than the life of a child." It followed, therefore, that income which the settlor had handed over absolutely was not to be treated as the settlor's income. The appellant contended further that the latter section was to be read in conjunction with the 1936 Act, s. 21, and that the dispositions of the 1922 Act included transactions which were, and some which were not, settlements in the strict sense. Since by the 1936 Act, s. 21 (11), the provisions of the 1922 Act, s. 20 (1) (*c*) were not to apply to settlements to which the 1936 Act, s. 21, applied, it followed that the settlements dealt with by the latter section were only settlements in the strict sense :—

HELD: the Finance Act, 1922, s. 20 (1) (*c*) applied only to income, which, before Apr. 22, 1936, was irrevocably handed over to the child, for the whole of the child's life, or for the whole of the settlor's life. After that date, by the provisions of the 1936 Act, s. 21, any income paid to a child under any disposition, trust, covenant, agreement or by transfer of assets, was to be treated, for the purposes of taxation, as the income of the settlor, and not of the beneficiary. That being the object of the provisions of sect. 21, there was no reason for deliberately cutting down the plain meaning of the words of the section, and the dividends paid on the shares were to be considered as the appellant's income.

Chamberlain v. *Inland Revenue Comrs.* (2) *distinguished.*

[**EDITORIAL NOTE.** This case considers the meaning to be given to " settlement " in the Finance Act, 1936, s. 21, and holds that the term is not limited to settlements strictly so-called whereby property stands limited to persons by way of succession, but includes also an out-and-out gift. The expression in the definition section " transfer of assets " is a broad one, and the court rejects arguments drawn from a consideration of other taxing statutes, which would narrow the meaning of the plain words of the statute.

FOR THE FINANCE ACT, 1936, s. 21, see HALSBURY'S STATUTES, Vol. 29, pp. 236-239.

AS TO DISPOSITIONS IN FAVOUR OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 267-270, paras. 537, 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575*a*-575*e*.]

Cases referred to:

*(1) *A.-G.* v. *Owen, A.-G.* v. *Coulson*, [1899] 2 Q.B. 253; 21 Digest 45, *290*; 68 L.J.Q.B. 779; 81 L.T. 121.

*(2) *Chamberlain* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 200.

(3) *Inland Revenue Comrs.* v. *Morton*, [1941] S.C. 467.

*(4) *Copeman* v. *Coleman*, [1939] 2 K.B. 484; [1939] 3 All E.R. 224; Digest Supp.; 108 L.J.K.B. 813; 22 Tax Cas. 594.

*(5) *Fitzwilliam* (*Earl*) *Collieries Co.* v. *Phillips*, [1943] A.C. 570; [1943] 2 All E.R. 346; 169 L.T. 242.

CASE STATED under the Finance Act, 1927, s. 42 (7) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by H. R. Hood-Barrs (the appellant) against an additional assessment to sur-tax in the sum of £4,200 made upon him for the year ended Apr. 5, 1939, the question at issue was whether certain dividends amounting to £4,200 arising from 120,000 ordinary shares of 5*s.* each in Steel Barrel Scammels & Associated Engineers, Ltd., should be included in computing the appellant's total income for sur-tax purposes. The following facts were found by the Commissioners:

The . . . 120,000 shares were transferred on July 25, 1938, by the appellant (who was managing director of the company and held 318,850 shares prior to the transfer) in equal moieties to his two infant and unmarried daughters, Christine . . . born July 22, 1920, and Heather, born Sept. 10, 1924.

. . . The appellant was represented by counsel who opened the appeal by submitting on the facts that the shares in question were purchased out of moneys provided as a gift to the children by an aunt (Mrs. Rutland, the appellant's sister) and were an investment of the gifts, and that the transactions were not colourable or a cloak for a gift of the shares by the appellant himself to the children. Counsel also indicated that he would . . . contend that a gift of shares by the appellant himself would not constitute a settlement within the Finance Act, 1936, s. 21, so as to render the dividends the income of the appellant under the section. The explanation of the transfer of the shares to the two children, as being a gift by their aunt, had previously been given by the appellant through his accountants in correspondence with the inspector of taxes in support of a repayment claim for one of the children . . . In support of the submission on the facts, evidence was given on oath to the following effect by the appellant and his wife:

The money, amounting in all to £45,000 to purchase the said shares from the appellant was to be provided by the appellant's sister . . . from her own resources for her nieces. Some £25,000 of this sum had been received by the appellant in this country from Mrs. R., and the balance was to follow shortly. Mrs. R. was the wife of F. J. Rutland, a British subject, and at all material times they resided in Los Angeles, Cal. Mrs. R. was a wealthy woman and was possessed in her own right of means amply sufficient to make the gift . . .

As a result of the cross-examination of the appellant it was established that F. J.

Rutland, in making returns of total income of himself and his wife for the purpose of claiming certain allowances, had at all material times returned his wife's income as nil, and neither the appellant nor his wife were able to give a satisfactory account of the resources of Mrs. R. which enabled her to make such large gifts to her nieces.

In the above circumstances . . . the commissioners were not satisfied that, on the evidence as a whole, the appellant had proved that Mrs. R. was possessed of sufficient means to provide the sum of £45,000 as a gift out of her own resources to her nieces . . .

[At the adjourned meeting] . . . no further evidence was called on behalf of the appellant, and counsel for the appellant stated that he would leave the appellants' case where it stood . . .

The Solicitor-General who appeared for the respondents at the resumed hearing . . . stated with regard to the facts alleged that, as a result of further investigations, it had been discovered that there had been a deliberate attempt at the previous hearing to mislead the tribunal; that in addition to the sworn evidence then given, the appellant had, in previous negotiations with the Revenue authorities, repeatedly represented that the shares in question were a gift to the children by their aunt but that he himself had provided money, which by previous arrangement with Mrs. R. he had caused to be sent out to her to the United States and caused to be remitted by her to England, to give the appearance of a gift to the children by their aunt; that the sworn evidence given by the appellant at the previous hearing was false . . . Counsel on behalf of the appellant then stated to the commissioner that the facts as alleged for the respondents were not disputed.

It was thus admitted on behalf of the appellant that the evidence given at the previous hearing as to the sum of £45,000 provided, or to be provided, out of Mrs. R's own resources as a gift to her nieces was entirely untrue. It was further so admitted that the sum in question had been provided by the appellant, in this country, through the medium of various companies, that it had been remitted on his behalf to Mrs. R. in America and immediately remitted by her to the appellant; that in effect the appellant took the money out of one pocket and replaced the same amount into another . . . The said shares were transferred by the appellant without consideration or restriction . . .

The following decision was given by the commissioners on the contention of the appellant that the transfers of shares without consideration or restriction to the appellant's infant daughters did not constitute a settlement within the meaning of the Finance Act, 1936, s. 21:

We find that the transfers were absolute. The . . . question depends upon the construction of sect. 21, and in particular of subsect. (9) (*b*). In our opinion this subsection defines and extends the meaning of the word settlement in the section. We hold that the two transfers were transfers of assets within the meaning of the subsection and are to be included in the expression settlement. In view of the actual terms of the subsection and in particular of the words "or transfer of assets" we do not consider that the conclusion we have arrived at conflicts with . . . *Chamberlain* v. *Inland Revenue Comrs.* (2). In that case settlements within the generally accepted meaning of the term were in existence and the question turned upon "income arising under the settlement" and "property comprised in the settlement" under the provisions of the Finance Act, 1938, s. 38 and the definition of settlement in sect. 41 (4) (*b*) of that Act. In this definition the words "or transfer of assets" do not occur. We are of opinion that this is of importance in view of LORD MACMILLAN's statement [in *Chamberlain* v. *Inland Revenue Comrs.* (2), at p. 204] "that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others." In our view LORD MACMILLAN was considering whether the various transactions constituted an arrangement and a settlement within the meaning of the Finance Act, 1938, ss. 38, 41 (4) (*b*), having regard to the particular terms of the latter and the facts of the case. The inclusion of the words "or transfer of assets" in the Finance Act, 1936, s. 21 (9) (*b*), in our view, puts an entirely different complexion on the matter.

Having regard to the contention [of the appellant] that settlement in sect. 21 must be given its generally accepted meaning, and there must be a condition or limitation whereby capital and income have different interests, we consider that guidance may be derived, in construing sect. 21 and in particular subsect. (9) (*b*), from *Fitzwilliam (Earl) Collieries Co.* v. *Phillips* (5). This case involved the construction of the Finance Act, 1934, s. 21, which deals with an entirely different subject matter. We consider, however, that the Finance Act, 1934, s. 21 (4) (*b*) in form coincides with the Finance Act, 1936, s. 21 (9) (*b*) and also with the Finance Act, 1938, s. 41 (4) (*b*) . . . [In the latter case] LORD WRIGHT [says, at p. 580, ([1943] 2 All E.R., at p. 349)]: "[The Finance Act, 1934, s. 21] is clearly of an amending or remedial character. It is essential to approach the construction of such an enactment without undue bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effort. At the same time its effect must be ascertained by considering the words actually used, interpreted in a fair and reasonable way in the light of the whole tenor of the section read as forming part of the Income Tax legislation. The actual words of subsect. (4) (*b*) are not words of art or such as a conveyancer would use. They are popular in character . . ."

In our opinion these words of LORD WRIGHT, *mutatis mutandis*, are also applicable in approaching the construction of the Finance Act, 1936, s. 21, including subsect. (9) (*b*). If the term settlement is to be restricted to the generally understood meaning thereof we have considerable difficulty in finding any reason for the inclusion of the definition contained in subsect. (9) (*b*).

The commissioners held, therefore, that the appeal failed and they confirmed the additional assessments.

Serjeant Sullivan, K.C., and *T. J. Sophian* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

WROTTESLEY, J.: On July 25, 1938, the appellant transferred to his two infant daughters 120,000 ordinary shares in the Steel Barrel Scammells and Associated Engineers, Ltd., for the sum of £45,000—one half to each daughter. The appellant pretended at the time, in order to avoid any claim for sur-tax on the income to be derived from those shares, that his sister had paid for these shares out of her own resources and presented them to the daughters. In truth and in fact the appellant found the money, and caused it to be remitted to his sister in California, and she merely paid to him, as the price of those shares, money with which he had already provided her. In the result, therefore, it is the appellant who gave these shares to his two infant daughters, but it is common ground that the transfers were absolute, that is to say, they were out and out to the young ladies, and the appellant had no right or claim to get the shares back. Upon these shares a dividend or dividends has been declared amounting to £4,200 for the year ending Apr. 5, 1939: that is to say, after the shares had been transferred to these young women, who were at the time infants and unmarried.

On the above facts the Crown claims that these dividends, paid income-tax free, are income which is to be treated for all the purposes of the Income Tax Acts as the income of the appellant for the year above named, and not as the income of the young women. The Crown bases this claim upon the Finance Act, 1936, s. 21 (1), which is as follows:

> (1) Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person.

It is said that the transfer of these shares by the appellant to his daughters on July 25, 1938, was a settlement within that subsection. The expression "settlement" is dealt with in subsect. (9) (*b*), which is as follows:

> (*b*) the expression "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets.

Subsect. (9) (*c*) may also be looked at, and is as follows:

> (*c*) the expression "settlor," in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement.

The commissioners decided that the transfer thus made by the appellant to his daughters for no consideration is a transfer of assets, and is, therefore, a transaction which is, by the express words of the section, included in, and covered by, the word "settlement," and, if they are right in this, they have come to a right conclusion upon the only point which was argued before me. Counsel for the appellant submitted that in order to fall, even within the expanded definition contained in subsect. (9) (*b*), the transaction must partake of the nature of a settlement, as that phrase was used, for instance, in the Finance Act, 1894, s. 22 (1), where it is defined as meaning any instrument, whether relating to real or personal property which is a settlement within the meaning of the

Settled Land Act, 1882, s. 2, or, if it related to real property, would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust. The Settled Land Act, 1882, s. 2 (1), provides that :

> Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

The test, apparently, there, is whether, by virtue of it, any land, or an estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession. It is, I think, quite clear that the transaction in this case could not be said to comply with such a test ; the gift was a gift out and out. No question arose of succession or of any limited estates or interests. *A.-G.* v. *Owen, A.-G.* v. *Coulson* (1), illustrates the point. There it was held that a testatrix who, by her will, set aside a portion of her estate to provide for an annuity, but subject thereto bequeathed that portion to another person, had created a settlement of the property so set apart. The portion so set aside was, therefore, held to attract settlement duty under the Finance Act, 1894, s. 5 (1).

The argument for the appellant next refers to the Finance Act, 1922, s. 20, which was an original, or, at any rate an early endeavour by the legislature to prevent evasion of taxes, by treating income under revocable and certain other dispositions as income of the disponor. That, indeed, is the effect of the marginal note to that section. One of the kinds of income dealt with by that section in subsect. (1), para. (*c*) was income payable to . . . a child for some "period less than the life of a child," but in that case the income was to be deemed to be the income of the settlor only for so long as the child was an infant and unmarried. Moreover, under the second proviso to that section, the mere fact that the income ceased to be payable, in the event of the child being made bankrupt, or assigning or charging the income, did not render such a disposition one "for some period less than the life of the child." And it was argued that the general effect of this part of the section in the light of this proviso was not to treat as the income of the settlor that which he had handed over wholly, whether the capital or the income from it. Then came the section under discussion, namely, the Finance Act, 1936, s. 21, by subsect. (11) of which the last-mentioned provisions of the 1922 Act were to cease to have effect as respects any settlement to which sect. 21 applied. The appellant says that the Finance Act, 1922, s. 20, and the Finance Act, 1936, s. 21, are to be read together, as I understand the argument, and that the dispositions dealt with under the 1922 Act included transactions which were, and also some which were not, settlements, in what I may call the strict sense of that word. So far I agree with the argument. For "disposition" is defined in subsect. (5) to include "any trust, covenant, agreement or arrangement." And a covenant on the part of a parent to pay a yearly sum to his child was one of the commonest transactions, aimed at by that section. The next stage in the argument is that, since the provisions of sect. 20 (1) (*c*) are not to apply to settlements to which s. 21 of the 1936 Act applies, it follows that the settlements with which sect. 21 deal are only settlements in the strict sense.

I find myself unable to accede to this argument. I think the true view of these somewhat complicated sections is as follows. Broadly speaking, by the 1922 Act certain classes of income were directed to be treated as the income of the person who settled, or agreed or arranged to pay that income to other persons, in certain circumstances : for instance, if the giver retained for self or spouse a power of revocation, or, in the case of a child, for a period less than the child's life. On the other hand, the income given away absolutely to a child in the manner dealt with in the provisos, or for the whole of the life of the giver, was not to be affected. But it then appeared that a disposition for the life of a child with powers of revocation to be exercised with the consent of named persons, who might be persons nominated by the settlor, had the effect of defeating the obvious intention of the legislature in the 1922 Act, s. 20 (1). Accordingly, there comes into existence sect. 21, constructed on much broader lines, and aimed at the payment of income to a child under any disposition, trust, covenant, agreement or transfer of assets, and which caused this income to be reckoned as the income of the parent who made the disposition, created the trust, entered into the covenant or agreement, or transferred the assets, or provided directly or indirectly the funds. Whether or not this was the reason why the provisions of the 1936 Act, s. 21, were enacted, I cannot see any sufficient reason for deliberately cutting down the plain meaning of these words. The argument for the appellant would, it is agreed, apply equally to a covenant or agreement to pay income. Moreover, under any rule of construction, I am bound to give effect to the change in language from "disposition," which is the word used in 1922, to the word "settlement" used in 1936, and to the specific addition in 1936 of the words "transfer of assets."

But then it is necessary, the appellant says, to consider the meaning and effect of the 1936 Act, s. 21 (10), (11). They are as follows:

> (10) This section applies to every settlement, wheresoever it was made or entered into, and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before the twenty-second day of April, nineteen hundred and thirty-six, which immediately before that date was irrevocable. (11) Paragraph (*c*) of subsection (1) of section twenty of the Finance Act, 1922, and any other provisions of that subsection relating to that paragraph, shall cease to have effect as respects any settlement to which this section applies.

A settlement on a child of the settlor made, therefore, before Apr. 22, 1936, (the date when I suppose the budget was introduced in 1936) was not touched by the 1936 Act, s. 21, provided it was immediately before that date irrevocable. Such a settlement would, therefore, only fall to be tested by the provisions of the 1922 Act, s. 20, and would, therefore, if a mere transfer of assets, escape altogether. If, on the other hand, it were only for a part of the child's life, and did not, for instance, include a provision for the capital to be handed over to the child in due course, it would, though *pro tanto* irrevocable, be caught. But such a settlement made before that date which was revocable, even if it were a mere transfer of assets, and all such settlements made after that date, whether revocable or not, pass under the harrow of the new s. 21. And to all these latter settlements the provisions of the 1922 Act, s. 20 (1) (*c*) cease to apply, so long as they fall within the general words of the new section; that is to say, are cases where income is paid to a child of the settlor during the settlor's life. Nothing in these subsections really supports the appellant's contention as to the meaning of the word "settlement."

Nor does anything in subsects. (2) and (3) of sect. 21 seem to lead to any different conclusion. Subsect. (2) deals (*a*) with accumulations of income, that is, income which is accumulated for a number of years, and then made payable to the child in a lump sum, and (*b*) where the accumulations are not allocated between the children of the settlor; and directs that, nevertheless, they shall be reckoned as being paid to the child or children, and in equal shares where there is more than one child. In either case, these payments are caught up by subsect. (1) of the section, and are treated as income of the settlor. The case under discussion, however, does not present any of these features.

Subsect. (3) also deals with accumulations of income under irrevocable settlements, and confines the operation of the section to the extent that the sums paid to the child are in fact income, that is to say, paid out of annual payments directly or indirectly, and then only to the extent that they are income and not capital. The phrase "sums paid by the settlor" which are allowable as "deductions in computing his total income" is said by the Solicitor-General to be another way of stating annual payments within the Income Tax Act, 1918, s. 27, and so made by the parent. It will thus be seen that the 1922 Act, s. 20 (1) (*c*), will still have a field of operation, namely, on irrevocable settlements, such as trusts, covenants, agreements or arrangements to make payments to a child for a period less than the life of the child, provided they were made before Apr. 22, 1936. There is nothing in subsect. (4), nor in subsects. (5) to (7) upon which any argument can be based for the appellant. Subsect. (8) explains the meaning of the term "irrevocable," by giving instances of what is and what is not to be regarded as irrevocable and revocable. It carries in provisions corresponding to proviso (ii) to para. (*c*) of sect. 20 of the 1922 Act. I have dealt in detail with these provisions in deference to the careful argument of counsel for the appellant. But they do not seem to me to throw any real light on the matter under discussion. Similarly, I do not think that a discussion of the Finance Act, 1938, s. 38, can throw any light on the proper meaning of the word "settlement" in the 1936 Act. For the purposes of that section, the expression "settlement" was once more defined to include any disposition, trust, covenant, agreement or arrangement. Transfer of assets was, therefore, designedly omitted.

However, the court was much pressed with a decision on that section, or rather, by a passage in the speech of Lord Macmillan in *Chamberlain* v. *Inland Revenue Comrs.* (2), at p. 204:

> I accept the view that the statutory expansion of the term "settlement," which includes an "arrangement," justifies and, indeed, requires a broad application of s. 38 of the 1938 Act, but a settlement or arrangement to come within the statute must still be of the type which the language of the section contemplates. I agree with Lord Moncrieff that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others. (*Comrs. of Inland Revenue* v. *Morton* (3), at p. 480). It must comprise certain property which is the subject of the settlement; it must confer the income of the comprised property on others for it is the income so given to others that is to be treated as, nevertheless, the income of the settlor. There can be no question that the deeds of Mar. 10, 1936, and Dec. 7, 1936, were settlements. Each of them settled a sum of money provided by the settlor and provided for the application of the income for the benefit of third parties, although the four settlements of Dec. 7, 1936, because of their irrevocability, do not fall within sect. 38. But none of these settlements comprised any property of the Staffa Investment Co. The trust funds were invested in shares of that company, which is quite a different matter. In point of fact, the whole assets of the company have never been settled at all, so as to dedicate the whole of its income to any trust purposes.

Here, it is said, is authority for saying that by parity of reasoning the statutory expansion of the term "settlement" which includes a "transfer of assets" justifies and requires a broad application of sect. 21, but a transfer of assets to come within the statute must still be of the type which the section contemplates. There is no doubt of the soundness of this proposition; but it still leaves me to ascertain what is the type of settlement contemplated by this statute. It clearly includes a covenant; for it is, I should have thought, too late to argue that a covenant by a parent to make income payments to a child is not within, firstly, the 1922 Act, s. 20, and, secondly, the 1936 Act, s. 21. But if that is right, where are the *indicia* of a settlement in its strict sense to be found in such a covenant? The answer is that they are not there at all, any more than they are in an agreement. Does it then make any difference that the beneficiary is an infant, of whose rights the courts have always been particularly sensitive? It was not argued that it did, and I do not think that it can make any difference. At any rate, in that case there were settlements in the strict sense of the word, five of them. And what was decided in that case was that the property comprised in the settlements were not the whole of the assets of the company, whose income the Crown claimed to treat as the appellant's income; and that, therefore, the formation of that company could not be said to be an arrangement within the 1938 Act, s. 41 (4), (6). It is the decision in that case that binds me, provided it is relevant. And if only because of the difference in the definition section, it is not, I think, relevant.

The only other authority which bears even remotely on this question is *Copeman* (*Inspector of Taxes*) v. *Coleman* (4). The transaction there was the allocation of shares in a company, formed by the father to take over his business, to his infant children. There was, therefore, nothing in the shape of a settlement in the strict sense, yet Lawrence, J., applied the 1936 Act, s. 21 (1), holding that the transaction fell within the definition in subsect. (9). In addition, were it necessary, I could avail myself of what was said by Lord Wright, in *Earl Fitzwilliam Collieries Co.* v. *Phillips* (5), at p. 580, ([1943] 2 All E.R., at p. 349). That was the case of an expanded definition of the word "easement":

> It is essential to approach the construction of such an enactment without due bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effect. At the same time its effect must be ascertained by considering the words actually used, interpreted in a fair and reasonable way in the light of the whole tenor of the section read as forming part of the income tax legislation. The actual

words of subsect. (4) (*b*) are not words of art or such as a conveyancer would use. They are popular in character.

It is not necessary here to resort to the principle there laid down. The plain words are enough.

Mention was made by the Solicitor-General of decisions of the courts as to what was or was not held to be a transfer of property for the purposes of the Bankruptcy Acts. To some extent such problems are analogous. But it is wiser, I think, not to rely on them.

In order to see what is the object aimed at, or the mischief to be cured by the Finance Act, 1936, s. 21, it is, I suppose, permissible—even in the case of a taxing statute—to go thus far: To say that the two sections (accepting the appellant's contention that they are to be read together, and deal with the same subject matter) take as their target (*inter alia*) income payable *not* to the person sought to be charged with tax, but to some other person—in particular to the children of the persons sought to be taxed: Next, to say that they aim only at income which those children enjoy through some step taken by the parent or settlor, such as the case where the settlor provides the funds from which the income arises. Down to Apr. 22, 1936, such income was not caught if irrevocably handed over to the child, for the whole of the child's life, or the whole of the settlor's life. But thereafter neither of these qualifications makes any difference: and if the income were paid to the child in consequence of something done, such as a transfer of assets by the parent to the child, then for taxation purposes it was to be treated as the income of the settlor, and not of the beneficiary. By this means, one result in particular would flow. Instead of this amount of income being taxed for sur-tax in the hands of, and so at the scale appropriate to, the beneficiary, it would be taxed in the hands of, and so at the higher scale appropriate to, the settlor, being aggregated with the income which he retained. I cannot see any other object to be attained by these complicated provisions. And if the plain language of the statute leads to this result, I must give effect to it. The commissioners, therefore, came to a right conclusion, and the appeal is dismissed.

Appeal dismissed with costs.

Solicitors: *J. de Meza & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

In the Matter of WARDEN & HOTCHKISS, LTD., *and in the Matter of* THE COMPANIES ACT, 1929.

[COURT OF APPEAL (Scott, Morton, L.JJ., and Cohen, J.), **March 5, 1945.**]

Companies—Confirmation of special resolution to alter objects of company—Notice of meetings—Articles requiring service of notice on all members—Failure to serve notice on members resident abroad—Interpretation of articles providing for service of notice of meetings based on decision of long standing—Validity of special resolution—Companies Act, 1929 (c. 23), *ss.* 5, 115, 117.

The appellant company sought the confirmation of the court to an alteration of the company's memorandum of association with respect to its objects. The company which was limited by shares and had been incorporated under the Companies Acts, purported to effect the alteration by passing a special resolution at a meeting of which due notice, as provided under the company's articles of association, was sent to all the members of the company except five who had registered addresses in South Africa. The question for the determination of the court was whether the omission of the giving of notice to those members stultified the special resolution:—

HELD: the special resolution was validly passed in view of the decision of *Re Union Hill Silver Co., Ltd.* (1), which must have been acted upon in many cases, that the service of notice of meetings on shareholders resident outside the United Kingdom was not necessary.

Re Union Hill Silver Co., Ltd. (1), *Re Newcastle United Football Co., Ltd.* (2) *and the principles laid down by* LORD BUCKMASTER *in Bourne* v. *Keen* (4) *applied.*

Decision of UTHWATT, J. ([1945] 1 All E.R. 268), *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal here reverse the decision of the court below and hold that the special resolution in question was validly passed. The point at issue was first decided by Malins, V.-C., in 1870, and his decision was followed by Maugham, J., in 1932. As title to property is involved, within the meaning of the principles set out by Lord Buckmaster in *Bourne* v. *Keen* (4), it is held to be wrong to upset the interpretation of such articles accepted over a long period. All the members of the court indicate, however, that were the matter *res integra* they would favour the view taken by Uthwatt, J., in the court below.

As to Necessity of Serving Notice of Meetings to Members Resident Abroad, see HALSBURY, Hailsham Edn., Vol. 5, pp. 431, 432, para. 710; and for Cases, see DIGEST, Vol. 9, pp. 564, 565, Nos. 3746-3749.]

Cases referred to:

*(1) *Re Union Hill Silver Co., Ltd.*, (1870) 22 L.T. 400; 9 Digest 564, *3746*.

*(2) *Re Newcastle United Football Co., Ltd.*, [1932] W.N. 109; Digest Supp.; 173 L.T.Jo. 344.

*(3) *London Founders Assocn.* v. *Clarke* (1888), 20 Q.B.D. 576; 9 Digest 353, *2232*; 57 L.J.Q.B. 291; 59 L.T. 93.

*(4) *Bourne* v. *Keane*, [1919] A.C. 815; 30 Digest 185, *527*; 89 L.J.Ch. 17; 121 L.T. 426.

*(5) *Re Anglo-International Bank, Ltd.*, [1943] Ch. 233; [1943] 2 All E.R. 88; 112 L.J.Ch. 305; 169 L.T. 82.

Appeal by a limited company incorporated under the Companies Acts, 1862-1893, from a decision of Uthwatt, J., dated Dec. 21, 1944, and reported in [1945] 1 All E.R. 268, dismissing the petition of the company for confirmation by the court, under the Companies Act, 1929, s. 5, of the validity of a special resolution passed at the company's meeting of which notice had not been duly served on all the members. The facts are fully set out in the judgment of Scott, L.J.

Gordon Brown for the appellant company.

Scott, L.J.: In this case the appellant company appeals from the decision of Uthwatt, J., to which there was no opposing party in the court below, and there is no opposing party here.

It is an application by the company, in effect, for the validation of a special resolution passed by the company to alter its memorandum of association. Uthwatt, J., expressed complete sympathy with the essence of the application, feeling that the alteration of the memorandum was entirely reasonable in the circumstances before him, but he held, in a considered judgment, that the special resolution necessary to enable the court to give it effect by approving it had been invalidly passed. Due notice, as provided under the company's articles, was sent to all the members of the company except five who were in South Africa; and the question for determination is whether the omission of the giving of notice to those members stultifies the special resolution.

The relevant articles in the company's articles of association are in exactly the same terms as the three articles of Table A of the Companies Act, 1862. Art. 42 of the company's articles is the same as art. 35 of Table A of the Act of 1862 and provides:

> Seven days' notice at least, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned . . .

Art. 109 is identical with art. 95 of Table A of the 1862 Act, and provides:

> A notice may be served by the company upon any member, either personally, or by sending it through the post in a prepaid letter, addressed to such member at his registered place of abode.

Art. 111, which is equivalent to art. 97 of Table A of the 1862 Act, states:

> Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

In 1870, in *Re Union Hill Silver Co., Ltd.* (1), a case arose under the Act of 1862. Notice in that case was issued to the shareholders of the company of a general meeting for the purpose of passing a resolution to wind up voluntarily. The resolution was passed, and confirmed at a subsequent general meeting. The headnote, at p. 400, proceeds:

Some of the shareholders were resident in America, and consequently could not, in the ordinary course of the post, have received seven days' notice of either of the meetings as required by sect. 52 of the Companies Act, 1862. *Held*, that this section only applies to shareholders within the jurisdiction, and that, therefore, the proceedings were valid.

MALINS, V.-C., in the course of his judgment, dealing with this particular issue, said this, at p. 402 :

> A The petitioner was well aware that the general feeling of the shareholders was in favour of a voluntary winding-up, but, notwithstanding this, he presents a petition for a compulsory winding-up which can be of no benefit to any of the parties concerned ; and he contends that the resolutions for the voluntary winding-up were invalid because some of the shareholders, who were in America, did not receive due notice of the meetings at which those resolutions were passed. This objection is founded on the 52nd section of the Companies Act, 1862, which provides that seven days' notice of any general meeting must be served upon every shareholder in the manner specified in Table A of B the first schedule to the Act. Now, if the petitioner's construction of this section is right, namely, that every shareholder must have notice of a general meeting, no matter in what part of the world he may happen to be, it is a most inconvenient construction ; because a company cannot, without serious injury to itself, delay the transaction of important business until every shareholder in every part of the world has had notice of the meeting at which the business is to be discussed. I think that such a construction would be entirely opposed to the spirit and intention of the Act. It seems to me that the Act has reference only to shareholders who can be reached by the ordinary C English post, and that, in fact, it was not necessary to serve these absent shareholders. I am therefore of opinion that this objection to winding-up the company voluntarily is unfounded.

That decision of the Vice-Chancellor remained unqualified in the courts for a very long time.

In 1898 the company in this case was registered with articles in precisely the form which had been dealt with in the decision in *Re Union Hill Silver* D *Co., Ltd.* (1). In the Companies Act, 1906, an alteration was made in Table A to the Act, which was repeated in the Companies Act, 1908. The law to-day as regards the articles is broadly similar to what it was in 1908. UTHWATT, J., has come to the conclusion in this case that the interpretation of the articles put upon them by the Vice-Chancellor in *Re Union Hill Silver Co., Ltd.* (1) is not justified, that the articles cannot have the meaning which he assigned to them, E and that, therefore, he must definitely refuse to follow it. LORD MAUGHAM as MAUGHAM, J., in *Re Newcastle United Football Co., Ltd.* (2), in which *Re Union Hill Silver Co., Ltd.* (1) was cited to him, followed the Vice-Chancellor's decision. There has been no case definitely rejecting the decision, and, in my view, the decision is one which raises a question of general importance, namely, whether, where an interpretation is doubtful, but upon one interpretation a document or instrument or set of rules has passed into common acceptance F on the basis of its having a certain meaning, it is desirable to upset the original interpretation because to do so will disturb titles and upset business transactions to a great degree.

In the course of the argument by counsel this morning, I referred to that principle as applied to commercial documents, and it was to the case of *London Founders Association, Ltd., and Palmer* v. *Clarke* (3), that I was referring. LORD Esher, M.R., said, at p. 581 :

> G Taking the decision of the Queen's Bench alone, I do not think that, even if we did not agree with the reasons they gave, we could nearly forty years afterwards overrule a decision as to the construction of a contract in daily mercantile use, which must be taken to have been the basis upon which all subsequent contracts of the same description were made.

That is a strict statement of the general position bearing upon the old maxim of *communis error facit jus*, which has been the Latin tag upon which that rule H of interpretation has been framed ; and there have been several decisions in the House of Lords in which that principle of not disturbing a settled interpretation of documents in common use has been referred to.

I am indebted to COHEN, J., for one reference, which is a recent decision, the case of *Bourne* v. *Keane* (4), in which, at p. 874, LORD BUCKMASTER said this :

> From these authorities I collect the following principles as applicable to such a question.
>
> Firstly, the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless your Lordships could say

positively that it was wrong and productive of inconvenience;

Secondly, that decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection;

Thirdly, decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue.

I think those authorities state an accepted principle of judicial interpretation of documents which is applicable in the present case, although the interpretation adopted by UTHWATT, J., if the matter had been *res integra* would have been one that might well have been adopted at the outset, though I express no opinion upon that. I think that it would be contrary to principle to upset what must have been the accepted interpretation of these three articles over a long period of time. When the company framed its articles in 1898, it must be taken to have framed them on the basis of that accepted view; and, having adopted its articles, and there having been no definite decision that that interpretation was wrong, I think at this late stage it would be wrong to upset it.

I leave to my brethren, who are more familiar with the details of company drafting than I, consideration of the additional point that the modern form of these articles is somewhat different because it makes posting equivalent to service.

For these reasons, I think that the appeal ought to be allowed.

MORTON, L.J.: If this matter had been wholly free from authority, it may well be that I might have agreed with the judgment of UTHWATT, J. I entirely appreciate the force of the reasons as to the true construction of the articles in question which are put forward by the judge; and, for my part, I cannot draw any inference one way or the other from the fact that the articles in question, which were incorporated in Table A annexed to the Act of 1862, were altered in the year 1906.

But the matter is by no means free from previous authority. As my Lord has pointed out, the point was decided by MALINS, V.-C., in 1870, and the decision of MALINS, V.-C., was followed by MAUGHAM, J., as he then was, in 1932. Further, I think there can be no reasonable doubt that the construction which the Vice-Chancellor put upon the articles in question must have been followed in a very large number of instances.

As one illustration of that I would refer to PALMER'S COMPANY PRECEDENTS, 15th Edn., Pt. I, at p. 733, where the learned authors say this:

> It was long since held by MALINS, V.-C., in *Re Union Hill Silver Co., Ltd.* (1), that it is not necessary to serve notice on shareholders who have chosen to reside outside the United Kingdom. And this rule, being entirely consistent with common sense and common convenience, has been acted on ever since.

I think there can be no doubt that if we were now to say that the decision of MALINS, V.-C., was wrong, we should be upsetting the title to property in a large number of cases. It must be borne in mind that only a very small minority of the cases in which special resolutions are passed by the company come before the court for decision; many special resolutions are passed affecting the title to property which require no confirmation by the court; and, for my part, I cannot doubt that, relying upon the articles in question which are part of Table A of the 1862 Act, and relying upon the view expressed by MALINS, V.-C., many companies must have acted upon the view that it was not necessary to send notices to shareholders resident abroad.

It seems to me, therefore, that the conditions laid down by LORD BUCKMASTER in the case of *Bourne* v. *Keane* (4) are directly applicable to this case. It appears to me quite impossible to say of the decision of MALINS, V.-C., both that it was wrong and that it was productive of inconvenience. On the contrary, it seems to me that the decision (whatever view one might take of it if the matter were to come before the court for the first time to-day) was one which was productive of convenience.

Reference was made by UTHWATT, J., in his judgment, to the practice of the registrar to the court in company matters, and the judge says, at p. 271 ([1945] 1 All E.R. 268):

> So far as reported authority goes, the matter rests there [that is to say, so far as reported authority goes, the matter rests upon the decision of MALINS, V.-C., as followed

by MAUGHAM, J., as he then was]. But that authority has not been accepted in practice. The registrar [Mr. Wilson] to the court in company matters, whose experience on questions arising in checking the evidence as to the due passing of special resolutions extends over thirty years, informs me that both before and after the decision in the *Newcastle* case (2) [that is the case before MAUGHAM, J.] the practice in Chambers of the companies court has been to refuse to certify that the special resolution has been duly passed in cases such as the present. The cases which the registrar can recall fell generally into two classes (i) cases where the articles were in much the same form as the present and service on the shareholders with a registered address abroad was defective in point of time or entirely absent; and (ii) cases where the articles authorised service on such shareholders by posting up a notice in the registered office, and there had been no such posting up. In most of these cases the companies on being told of the difficulty accepted the position and started afresh. As regards such of these cases as were brought into court, the registrar is unable to recall any occasion, other than the *Newcastle* case (2), where the court accepted the resolution as duly passed. According to his recollection authorities were not cited in the majority of cases, but in some cases authority was cited. I may add that to fortify himself in dealing with the companies the registrar to the court kept a collection of his notes of the cases where questions of service came before the court. Unfortunately, as a result of enemy action, that collection has been destroyed. Specific instances cannot be referred to.

Now I entirely accept that the registrar is a most experienced official, and I do not for a moment doubt that what he has reported to the judge, and what is reproduced in the judge's judgment, is correct; but I think there are certain observations which fall to be made upon the passage in the judgment which I have just quoted. In the first place, the registrar refers to cases in which the articles "were in much the same form as the present." Unfortunately, owing to the destruction of the records in question, one cannot be sure whether the articles were so nearly in the same form as the present that any reference to them is of assistance. It may be that the difference in wording had something to do with the result. In the second place, the cases in which the articles authorised service on shareholders by posting up a notice, and there had been no such posting up, are not relevant for the present purpose. In the third place, although apparently there were a number of cases in which "the companies, on being told of the difficulty, accepted the position and started afresh," that, of course, carries the matter no further. Fourthly, as regards cases which were brought into court. I quite accept that the registrar is unable to recall any occasion (other than the *Newcastle* case (2)) where the court accepted the resolution as duly passed where notice had not been served on shareholders resident abroad. But it seems to me extremely likely that in any case in which objection was raised by the court on that ground, the company thought it wise to take an adjournment and to rectify what might have been an omission by serving the shareholders abroad. It appears to me very unlikely that if in any case a judge took a view directly contrary to that of MALINS, V.-C., in the case of *Re Union Hill Silver Co., Ltd.* (1), and to the decision of MAUGHAM, J., in *Re Newcastle United Football Co., Ltd.* (2), there would not have been some report of that decision.

However that may be, it remains undoubtedly the fact that a large majority of the special resolutions which companies pass do not come before the court at all; and the recollection of the registrar, undoubtedly valuable as it is, does not affect this point that there must, I think, have been many cases, in which the title to property depended upon the valid passing of a resolution, where the resolution never came before the court at all. In all the circumstances of this case, whatever view we might have taken as to the true construction of these articles if the matter had come before this court for the first time, I agree that it would not be right to treat as incorrect the decision of MALINS, V.-C., which has stood unchallenged for so many years, and has been followed, feeling, as I do, that it was a convenient decision which must have been acted upon over and over again.

For these reasons, I agree that the appeal should be allowed.

COHEN, J.: I agree; and, if I may, would add a few words as we are differing from the judge in the court below.

The question before the court turns, in the main, on the construction of art. 42 of the company's articles of association which provides:

> Seven days' notice at least, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the

members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting.

In commenting on that article, UTHWATT, J., says, at p. 270 ([1945] 1 All E.R. 268), that he cannot see any ambiguity or vagueness of expression which enables him :

> . . . to read into arts. 42 or 109 or 111 any exception excluding from members to whom notice is to be given members with foreign registered addresses ; throughout all the other articles, I may add, the expression " members " obviously includes all members.

In this article, I do not think it can include all members, because if the company in exercise of the power to create preference shares which is contained in art. 33 of the company's articles of association, had created preference shares (as they would have been entitled to) without any right of voting, it might well be that there would be a class of members who would not be entitled to notice. But I think the true view is that it must mean, to all the members who are entitled, on a true construction of the articles, to receive notice.

Be that as it may, I might have come to the same conclusion as UTHWATT, J., had the matter been free from authority ; but, as my brethren have pointed out, the matter is not free from authority. On the contrary, there is, in *Re Union Hill Silver Co., Ltd.* (1), a definite decision contrary to the view which has been expressed by UTHWATT, J., and it is impossible for this court to ignore that decision. Indeed, as MORTON, L.J., has said, it is a highly convenient decision. I share his view that it has certainly formed the basis of the practice in a number of special resolutions which have been passed since 1870, and that, if we were to hold that that case was wrongly decided, we might be casting doubt on a number of titles to property, and as to the validity of a number of issues of preference shares. I do not propose to go into detail as to the possibility ; it is enough to refer to the Companies Act, 1929, s. 234, which only reproduces the Companies Act, 1908, s. 192. That is the section which enables a liquidator, with the sanction of a special resolution, to accept shares as consideration for the sale of property of the company. It might well be that a resolution which has been passed under that section would be invalid if *Re Union Hill Silver Co., Ltd.* (1) were wrongly decided. I agree entirely with what both my brethren have said that that decision is essentially one which, in accordance with the principles laid down by LORD BUCKMASTER in *Bourne* v. *Keane* (4) ought to be upheld, whatever our views may be as to the original correctness of the decision.

I would add only one other observation. UTHWATT, J., in his judgment, at p. 271, called attention to the case of *Anglo-International Bank, Ltd.* (5), and said that the articles of association in that case were in substantially the same form as the articles in the present case, adding that :

> . . . it would have been unnecessary either for BENNETT, J., or the Court of Appeal to consider the question whether the right of shareholders in enemy-occupied countries to receive notice of meetings was suspended by reason of their enemy status if residence abroad was of itself a sufficient reason for not sending them notice.

That comment would have considerable force if in fact the articles had been in substantially the same form as those in the present case ; but the point was never raised in that case, and when one looks at the report, I think, one sees that it was for a perfectly good reason ; the salient feature in that case was that there was no reference to the " ordinary course of post." The corresponding article in that case, as appears from the report at p. 234, was this :

> Any notice or other document, if served by post, shall be deemed to have been served at the time when the letter containing the same is put into the post office.

So that no possible difficulty could have arisen if one assumes that all members were entitled to receive notice, because foreign shareholders, although in fact they would never have received notice, would be deemed to have received it on the date on which the letter addressed to them was put into the post. I do not think, therefore, that any assistance can really be derived for the view contrary to that which this court is taking from the decision in that case.

For these reasons, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors : *Burton, Yeates & Hart*, agents for *Johnson & Co.*, Birmingham (for the appellant company).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Applied. EVERITT *v.* EVERITT.
[1949] 1 All E.R 908.

Distinguished. ALLEN *v.* ALLEN.
[1951] 1 All E.R. 724.

GLENISTER *v.* GLENISTER.

AND ADMIRALTY DIVISION (Lord Merriman, P., and

Applied. CHILTON *v.* CHILTON.
[1952] 1 All E.R. 1322.

uary 23, 1945.]

risdiction—Summons for maintenance on ground of desertion —Defence of adultery—Conduct of wife—Effect on deserting spouse's mind—Reasonable and honest belief of adultery exonerating husband.

Evidence—Admissibility—Evidence of non-access admitted on issue of condonation —Evidence so admitted not available for proof of adultery—Rule in Russell v. Russell—Gonorrhea—Characteristics of disease—Judicial notice.

A finding of desertion had been made by the magistrate against the appellant husband. In July, 1943, the appellant had withdrawn from cohabitation, and in Jan., 1944, he finally left the respondent on discovering that she was pregnant. On July 30, 1944, the respondent gave birth to a child. The appellant asserted that he had reasonable grounds for leaving the respondent, one of his contentions being that she had committed adultery. The respondent, while admitting that no intercourse had taken place since July, 1943, denied that she had committed adultery. The magistrate accepted the evidence of the respondent and found that she had not committed adultery and that, therefore, the appellant had no excuse for leaving her. On appeal, it was contended for the appellant (i) that the evidence of the spouses, that there had been no sexual intercourse since July, 1943, which was admissible on the issue of condonation, could, once it was so admitted, also be used to prove that the respondent must have committed adultery; (ii) that, short of proving adultery, the appellant had, nevertheless, shown and ought to be held to have shown that he had reasonable cause for withdrawing from cohabitation in the sense that he was not a deserter :—

HELD : (i) the true issue being whether the appellant had or had not a *bona fide* belief that his wife had committed adultery, the evidence by the appellant that there was no cohabitation between him and his wife since July, 1943, coupled with the fact that a child had been born in July, 1944, might not be inadmissible under the rule in *Russell* v. *Russell* (1), such evidence being directed only to his state of mind, and not to the issue whether adultery had, in fact, been committed.

Russell v. *Russell* (1) *and Ettenfield* v. *Ettenfield* (2) *followed.*

(ii) though no adultery was, in fact, committed, the respondent had so conducted herself as to give the appellant reasonable ground for supposing that she had committed adultery. In these circumstances the appellant ought not to be held to have left the respondent without reasonable cause.

Haswell v. *Haswell and Sanderson* (5) and *Ousey* v. *Ousey and Atkinson* (6) *applied.*

Per LORD MERRIMAN, P. : the court may take judicial notice of the fact that gonorrhea is a disease which may lie dormant for a long and indefinite period.

[**EDITORIAL NOTE.** Reasonable belief that a wife has committed a matrimonial offence is equally a defence whether a husband is resisting a decree for restitution or a charge of desertion. As DU PARCQ, L.J., says in *Williams* v. *Williams* ([1943] 2 All E.R. 746, at p. 752), " Conduct which falls short of adultery may excuse desertion and so in some circumstances may the honest though mistaken belief of one spouse that he or she has been wronged by the other." The court holds here that, on the facts, the wife had so conducted herself as to give the husband reasonable ground for supposing she had committed adultery, and PILCHER, J., points out that evidence of non-access may be admissible to establish the husband's state of mind, although it is otherwise inadmissible under the rule in *Russell* v. *Russell* (1).

AS TO DEFENCES TO CHARGE OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 835-838, para. 1338 ; and FOR CASES, see DIGEST, Vol. 27, pp. 322, 323, Nos. 3000-3012.]

Cases referred to :

*(1) *Russell* v. *Russell*, [1924] A.C. 687 ; 27 Digest 297, *2743* ; 93 L.J.P. 97 ; 131 L.T. 482.

*(2) *Ettenfield* v. *Ettenfield*, [1940] P. 96 ; [1940] 1 All E.R. 293 ; Digest Supp. ; 109 L.J.P. 41 ; 162 L.T. 172.

(3) *Russell* v. *Russell*, [1895] P. 315 ; 27 Digest 318, *2960* ; 64 L.J.P. 105 ; 73 L.T. 295 ; *on appeal*, [1897] A.C. 395.

(4) *Thomas* v. *Thomas*, [1924] P. 194; 27 Digest 315, *2925*; 93 L.J.P. 61; 130 L.T. 716.

*(5) *Haswell* v. *Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; 27 Digest 373, *3609*; Sea. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69.

*(6) *Ousey* v. *Ousey and Atkinson* (1874), L.R. 3 P. & D. 223; 27 Digest 322, *3004*; 43 L.J.P. & M. 35; 30 L.T. 911; *subsequent proceedings* (1875), 1 P.D. 56.

*(7) *Whittaker* v. *Whittaker*, [1939] 3 All E.R. 833; Digest Supp.

APPEAL by the husband from an order made by the metropolitan magistrate, sitting at the North London Police Court, on Dec. 7, 1944, adjudging him to have A
deserted his wife and ordering him to pay maintenance at the rate of £1 10*s*. 0*d*. per week in respect of his wife and 7*s*. 6*d*. per week in respect of each of the two children of the marriage. The facts and arguments are fully set out in the judgment of LORD MERRIMAN, P.

Elliot M. Gorst for the appellant husband.

Hugh Evans for the respondent wife. B

LORD MERRIMAN, P.: This is an appeal by a husband, against whom the magistrate has made a finding of desertion. The case was one in which, admittedly, the husband had withdrawn from cohabitation, and in which he was asserting that he had reasonable grounds for so doing. The question is whether it is possible or right for us to interfere with the final conclusion of the magistrate that the husband had not made out any reasonable cause for withdrawing from cohabitation, and, therefore, was a deserter. C

The case presented by the husband, in substance, was that his wife had committed adultery. He did not, as I see it, in so many words put forward the issue which, after very helpful argument on both sides, we have come to the conclusion is really the ultimate issue in this case, that whether the wife had committed adultery or not she had so conducted herself as to give him every ground for supposing that she was misconducting herself with men, and had, in D
fact, committed adultery, and that this, whether adultery was ultimately proved, or not, justified him in withdrawing from cohabitation.

As I read the very careful note of the evidence on the one side and on the other (and, let me add, the only two witnesses called were the two parties), the issue was presented by the husband and his advocate on the basis that the wife had been guilty of adultery. That issue was presented under three heads, I think it is only necessary to premise that the parties had been married about E
six years; there was, I think, one child of the marriage at that time (though one has been born since, to whom reference will necessarily have to be made); and the husband was serving in H.M. Forces. He was at all material times serving in England, and it is common ground that in July, 1943, between, I think, July 10, and 20, he had a normal period of leave, and lived with his wife, not only in the sense that they lived under the same roof, but had sexual intercourse with her. It was also proved, by documentary evidence, that on the very F
day after his return to his unit, he reported sick with gonorrhea. It is also common ground that he wrote, I think, both to the wife and to her parents (and the writing to the parents might in itself be thought to be some badge of innocence) letters in which he advised his wife to be examined. That in itself is a neutral feature, because he might, of course, be implying that he had infected her; but it is also common ground, as between the husband and the wife, G
whatever he had said in the letter to the parents, that he had made it clear to her that he was accusing her of having infected him. I will come back to that question later. According to the evidence, which was clearly admissible for certain purposes (it was admissible from the point of view, of course, of rebutting any question of condonation) the husband said that he had not had intercourse with his wife after that time until they parted. My authority for saying that the evidence must be admissible on the question of condonation is in H
the opinion of LORD DUNEDIN in *Russell* v. *Russell* (1), at pp. 728, 729. It is also common ground that on at least one occasion, which is variously stated to be in August or September (and it may be that there were two such visits), he did visit the matrimonial home, and I ought to say in that connection that though ambiguous phrases, such as "lived together" and "lived as man and wife," appear on the face of the note, the wife herself on at least one occasion stated categorically that there had been no sexual intercourse between them after July, 1943. It is clear, therefore, that, as it was admitted that the husband

had resided under the matrimonial roof after this episode in connection with the venereal disease, the question of condonation had to be cleared up by the court, even if it was not raised by the wife, and, as I say, I think it is indisputable that the evidence about the termination of sexual intercourse was admissible for that purpose, but not, as I shall show in a moment, for another purpose. That being so, there came a night in October when the husband came home in the small hours of the morning and found men in the house. He
A was not admitted; his wife shut him out; and the men bolted through a back door, or a window; but he contrived to get hold of one of them, at any rate, and to get some particulars from him; and he was able to say that they were all in civilian clothes. But the wife did not let him into the house. She herself supplies the rest of the evidence about what went on inside the house, but, so far as I know, did not communicate her explanation in any shape or form to her husband until she gave it in evidence at the police court. First of all she
B admitted that one of these men was in her bedroom and that two of them were waiting outside. It is impossible to conceive a state of things more likely to cause suspicion in the mind of a husband who arrives home at 1.30 in the morning. Her explanation was that one of these men had been importuning her to misconduct herself with him; she admits that she told him that she was living separate and apart from her husband; she told the magistrate that she had made it clear to the man she did not want him, and that these men had, so to speak,
C forced their way into the house and arrived breathless up the stairs because they were wanted by the police. In other words, they had come into the house as refugees from justice, and not for the purpose that the husband might reasonably suppose. The point on which I am laying stress is that, so far as I know and I hope I shall be corrected if I am wrong, that explanation in detail was never given to the husband until he heard it given in the witness-box.
D The result was this (and this is the desertion charge): the husband the next morning contrived to get admission at 8 o'clock, made it clear to his wife what he thought about it, and took the child away, after which, it is common ground, in no form at all could he be said to have resumed cohabitation. I ought to add, however, that in Jan., 1944, whether on the wife's information or not I do not know, he discovered that his wife was pregnant. I shall deal with that separately in one moment. On that discovery he appears actually to have
E turned her out of the house, and if he had not already deserted her (as he clearly had, unless he had some reasonable cause) thereby made it clear beyond a peradventure that he had broken up the matrimonial home, as it turned out, irrevocably.

On that part of the case, the magistrate, who saw these witnesses whom we have not seen, accepted the wife's story that she had not committed adultery, and, I presume, therefore, accepted her story that these men had only come in
F as refugees from the police, and were not there in the circumstances which the husband obviously suspected. It goes without saying that on the issue of adultery, these facts taken by themselves, could clearly afford sufficient proof, had the magistrate chosen to draw an inference hostile to the wife; but, speaking for myself, when the magistrate says that he accepted the wife's story that she had not committed adultery, and accepted her explanation of the
G presence of these men on that occasion, I do not feel, sitting here on appeal, with nothing but the written note to go on, that I am entitled to say that the magistrate ought necessarily to have drawn the inference that adultery was committed on that occasion, and so reverse his finding of fact. I feel bound to deal with this case on the assumption that the magistrate had material (the demeanour of the witnesses, for instance) from which he could take the more lenient view. I shall come back to that incident.

H Finally, it was proved at the first hearing, in July, 1944, that the wife was very shortly about to give birth to a child. The hearing was adjourned, and by the time of the resumed hearing the wife had given birth to the child (on July 30, I think). That fact was known to the magistrate, and it was known that the child had been born alive. As I have already said, evidence had been given and as I think, legitimately given for a certain purpose, by the husband, and, incidentally, confirmed by the wife in terms, that the last time the husband had sexual intercourse with her, having regard to this incident in connection with the venereal disease, was in the July before. It is true that that evidence, so far as I can see, was not given with reference to the birth of the child. At any rate, as I say, it was legitimate from the husband's point of view on the issue of condonation ; I am not sure that there was any issue on which the wife could legitimately give the evidence except as tending to confirm the husband's evidence that there had been no condonation ; and it is said, therefore, that because the evidence was given legitimately it can be used illegitimately, in other words that it can be used in defiance of the case of *Russell* v. *Russell* (1) to prove that a wife who gave birth to a child in July must have committed adultery because there was evidence given by the spouses, but only by the spouses, that there had been no sexual intercourse since the July preceding. I ought to say, however, that the wife, while saying in so many words that there had been no subsequent intercourse, also said that she had not committed adultery with anybody, and that her husband was the father of the child. She was evidently a very stupid witness. The magistrate says that she was very hard of hearing, that she spoke with an impediment, and that it was by no means certain that she really understood any question that was put to her. But apart from the law on the matter, with which I shall deal in a sentence or two, there is a very clear illustration of the danger attaching to evidence of this character, as is recognised by the highest tribunal, in the very fact that the wife gave this directly contradictory evidence on this highly controversial topic.

I can deal with this matter in a few sentences. I am not going to delve deeply into the report of *Russell* v. *Russell* (1) in the House of Lords. It is sufficient to look at the decision in *Ettenfield* v. *Ettenfield* (2), and to the judgment of the Court of Appeal, to show that that case, by which we are bound exactly covers this point, for it was with reference to the well-known practice before the decision in *Russell* v. *Russell* (1) that the Court of Appeal gave their judgment in these words : they say, at p. 103 ([1940] 1 All E.R., at p. 297) that the petitioner was formerly asked : " When did you last have intercourse with your wife ? " and then there was the proof of the birth outside the period of gestation. It is exactly this case, with this exception, and this exception only, that the evidence about the date when he last had connection with his wife was not necessarily adduced as a prelude to the production of the birth certificate ; it was, as I think, given with another object ; but however that may be, the position appears to me to be whether it was originally given with the one object or the other, or both, that as soon as it is attempted to connect that evidence with the sequel of the birth of a living child outside the period of gestation, for that purpose, at any rate, it is inadmissible and must be ignored altogether. It may be admissible for another purpose, but it is not admissible for that purpose. That seems to me to be the plain effect of the decision both in *Russell* v. *Russell* (1) and in *Ettenfield* v. *Ettenfield* (2), and so long as those decisions stand there can be no argument about the matter ; and I am not prepared to listen to an argument that because the evidence may have slipped out inadvertently, without reference to this question, but was given none the less, or because it was legitimate for some other purpose, therefore it may be taken out of its legitimate context and used in an illegitimate context contrary to the law as it stands. That being so, in my opinion, for all purposes connected with this case, including the question whether there was, apart from proof of adultery, reasonable ground for suspecting adultery, that particular element in the case must be rejected altogether, because in the last analysis it must depend (if the evidence is looked at at all for any purpose) upon the wrongful admission in relation to adultery of the evidence : " When did you last have intercourse with your wife ? " I propose, therefore, to deal with this case on the rest of the material, and to ignore that matter altogether and for all purposes.

Now I come back to the other two matters. I have already said that on the very doubtful question of the inference to be drawn from the incident of Oct. 17, I am not prepared to differ from the magistrate. That brings me back to the question of the venereal disease, which is a much more difficult matter, and I propose to read the magistrate's conclusion about this. I am omitting the earlier part of his reference to the venereal disease, but when he speaks of the written report which he had received, and which we have seen, he says :

> I saw a report on the wife stating that she had symptoms of gonorrhea in Aug., 1943, and that the disease was not of long standing. I also saw the defendant's military medical history sheet, from which it appeared that he had had illnesses, etc., before

July, 1943, but no V.D., and that, as he said, he suffered from gonorrhea in August, 1943. [The magistrate goes on :] on this evidence I held that it was impossible to decide which of the spouses had infected the other, and that, therefore, the husband had failed to prove his defence justifying his conduct, and must continue to support his wife and family.

Then he deals with the point with which I have just dealt, on *Russell* v. *Russell* (1). In so far as the husband was trying to drive home the charge of adultery A by this evidence of venereal disease, I am in complete agreement with the finding of the magistrate, that the husband had not proved thereby a charge of adultery. But it will be observed that the ground on which the magistrate expresses his doubt is, that it was impossible to decide (and I quite agree with him) which of the spouses had infected the other, and, of course, one could only convict the wife of adultery by reason of the fact that she was suffering from venereal disease if, on the one hand, it were proved that she had contracted B it at a time when she could not possibly have been infected by her husband or, on the other hand, the husband proved that he had not had connection with any other woman and had not suffered from venereal disease before the time at which he could have been infected by his wife.

I have mentioned those two things separately for this reason : the latter is a mere question of whether the evidence of the husband is believed, and I C think we must take it, having regard to the doubt expressed by the magistrate, that his doubt was not based upon any disbelief of the husband's evidence, but was a doubt as to whether, assuming the evidence to be true, it was possible to draw an inference hostile to the wife. I say that for this reason : the husband gave evidence that he had not had connection with any other woman, he gave evidence that he had had connection with his wife during that leave, which would have been a time within which he could have been infected, had she already been D infected when he came on leave. If the magistrate did not believe the husband at all, and thought he was not telling the truth, there would be no argument about it ; it would not be a question of doubt, and that would be the end of the matter.

The other alternative which I mentioned is more difficult, for a reason which itself introduces a complication, which, before the magistrate was entitled to convict the wife of adultery upon it, would have required very technical E evidence needing to be scrutinised very carefully. In a statement which counsel for the appellant has obtained from the hospital during the adjournment, and of which I think I am entitled to take judicial notice (because I have had the same thing in evidence on more than one occasion, and there has never really been any dispute about it) we have been reminded that this disease may lie dormant for a very long time, and the mere fact that the wife was only found F to be suffering from it ostensibly in August is not of itself conclusive that she had not been infected with it before the husband came home on leave in July, and infected by it at a time when she was not, in fact, having sexual intercourse with her husband ; but that would be a very difficult thing to prove, because it would involve defining the length of the dormancy, which, I imagine, would be almost impossible, except in certain extreme circumstances which cannot possibly arise in this case.

G The magistrate is justified up to the hilt in his statement that he really could not decide positively which of the two spouses had infected the other, and, therefore, it was quite plainly impossible upon that incident alone to convict the wife of adultery, and, in my opinion, from the point of view of a charge of adultery that incident must be considered by itself and cannot be mixed up with other things. Either the husband proved the requisite facts from which adultery could be inferred with reference to the venereal disease or he did not. That H being so, it is impossible for us to hold positively that the wife has committed adultery ; equally, I think that in so far as the magistrate was of that opinion, it would be idle, and, indeed, wrong, for us to send the case back to him or to anybody else for further consideration.

That brings me to the only remaining point, which is the real crux of this case : Whether, short of proving adultery against the wife, the husband has nevertheless shown and ought to be held to have shown that he had reasonable cause for withdrawing from cohabitation in the sense that he was not a deserter. I do not fail to observe that in his very careful judgment the magistrate does recognise that the issue is whether the husband has shown that he had reasonable cause for the admitted withdrawal and that it is for the husband to justify his conduct in withdrawing from cohabitation. Although the approach is perfectly correct in that sense, I am not sure that the magistrate has considered as a separate head of justification whether reasonable belief that his wife had been committing adultery (a belief induced by her own conduct) was of itself, though adultery was not found, sufficient to justify his withdrawal from cohabitation, so that he ought not to be held to be a deserter. That a wife's misconduct, short of proof of a matrimonial offence, can be a justification for withdrawal from cohabitation, has been recognised ever since the well-known decision in *Russell* v. *Russell* (3), and it is, I think, clear, both from that case and from *Thomas* v. *Thomas* (4), that conduct which, though not in itself a matrimonial offence, would afford an answer to a petition for restitution of conjugal rights, would itself be sufficient to absolve a husband from a charge of desertion. In other words, it is now recognised that the issue with regard to conduct of a wife short of a matrimonial offence is precisely the same whether the husband is resisting a decree for restitution of conjugal rights or is resisting a charge of desertion. There is absolutely no distinction between the two. That seems to me to be settled beyond any doubt. That being so, was the wife's conduct here (leaving aside altogether this question of the birth of the child) such as to justify the husband in withdrawing from cohabitation? Had she so conducted herself as reasonably to lead the husband to believe that she had committed adultery (though ultimately it was held that she had not) and, if so, is that sufficient to enable the husband to resist the charge of desertion? Before I cite the cases which I think assist on this point I would like to say that it seems to me that it would be most unreasonable if it were not so. Take a hypothetical case, in which, short of actual and direct proof of adultery, the wife so conducts herself to the knowledge of the husband as to warrant the inference that adultery has been committed, though (I am supposing) that is ultimately held not to be the fact. The husband knows all the circumstances of the wife's conduct; if he continues to live with her, he is in danger of being held to have condoned, because he has taken her back with full knowledge of the circumstances from which adultery could be inferred. I do not say that is conclusive, because it might be said that he did not know quite enough; but there is quite plainly that risk, on the one hand, whereas, alternatively, if he withdraws from cohabitation on grounds that tend to a legitimate conviction of adultery reasonably held and honestly believed in, he is to be liable to be found a deserter. It seems to me to put the husband in an almost impossible position, if that is the law. But the question is whether it is the law. I do not think it is. If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause.

How does the matter stand in this case? In fact, though there was controversy about it, the husband had given evidence that some years before, the wife had given him grave cause of anxiety with another man, and that he had forgiven her. He then had this incident in connection with the venereal disease, in which I am assuming that the magistrate has found, at least, that he is telling the truth in saying that he himself had not contracted it adulterously elsewhere; the husband, with that background, comes home at 1.30 in the morning, and is refused admission to the house in the circumstances which I have described, and of which, until months afterwards, he receives no sort of explanation. I certainly think that that combination of circumstances (and, of course, I am referring in particular to her conduct on the night of Oct. 17) was sufficient to give any man reasonable cause to suppose that she was committing adultery, and I am prepared to assume in the husband's favour that he held that belief not merely reasonably but honestly.

I must say in passing that I was in some doubt whether we ought not to refer the matter back to the magistrate for him to come to a conclusion, either on his recollection of the witnesses or on a further hearing, but we have been expressly invited by counsel for the wife to deal with this matter ourselves, if we came to the conclusion that there was evidence of reasonable cause short of proof of adultery. That the husband held that belief, and held it reasonably, I am prepared to hold in his favour. There remains the sole question whether that is enough. My own impression is that there is authority on the question of reasonable belief of adultery, but I cannot put my hand on it, and counsel have not been able to refer us to it, but the principle, I think, is really settled by two cases. There is, first of all, *Haswell* v. *Haswell and Sanderson* (5), to which I need not refer in detail, where the husband caught the wife, not, indeed, A in adultery, but allowing a man to indulge in improper overtures to her, and it was held (and the case has been followed recently) that that was sufficient to afford reasonable cause. The issue actually arose on the question of the exercise of discretion on the ground of desertion, and, therefore, is very much in point, but I need not elaborate that. There is no doubt about that decision. But it might be said: "Yes, but there he saw the very thing happen which was itself held to be reasonable cause; it is not a case of drawing an inference or B of a belief"; and it is there that, in my opinion, *Ousey* v. *Ousey and Atkinson* (6) upon which, also, so far as I know, no doubt has ever been cast, is of considerable importance. This was a case in which the husband had proved adultery against the wife, and the question was whether he should be refused relief on the ground that he had been guilty of desertion, in other words whether there was a discretionary bar, so that it raises, as nearly as may be, precisely the same issue. C The husband had withdrawn from cohabitation, that is to say he had withdrawn from a marriage which had never been consummated, and, as SIR JAMES HANNEN, J., complained with justice, the issue about the non-consummation of the marriage came before him for the first time on an issue of dissolution, and not on a charge of impotence or anything of that sort in connection with nullity, and the matter was left completely in doubt. I need not analyse the evidence, but SIR JAMES HANNEN, J., said he must take it that the question of whose fault it was that the D marriage was not consummated was one on which he was not able to arrive at any definite conclusion. He says further, at p. 225:

> I think I am justified on the evidence before me in saying that it may well have been a matter of doubt between these two persons on which side the fault or physical defect lay. In such a state of things, I think that a husband taking the view that the fault was not with himself but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to E happiness, because the wife was either unable or resolutely unwilling to consummate, and, therefore, leaving her, cannot be said to have been guilty of such desertion as is contemplated by the statute. His proceeding, if a mistaken one, would, I think, under such circumstances, be excusable, and the court would not be bound by reason of it to visit on him the penalty of depriving him of the relief to which he would otherwise be entitled in the event of the wife not remaining constant to him.

And then, after calling attention to the fact that the husband did not behave F very generously, and had not even supported his wife during his withdrawal from cohabitation until he was compelled to do so, SIR JAMES HANNEN, J., adds, at p. 225:

> . . . yet assuming, as I do, that he so acted in consequence of the unhappy state of things existing between them [and I emphasise these words] and in consequence of a *bona fide* belief on his part that she was wronging him, I think that cannot be pleaded as desertion . . .

G Refusal of conjugal rights on the part of a wife, if proved, is a ground for the husband withdrawing from cohabitation. It has been held over and over again that that is a reasonable excuse, if proved. Adultery, if proved is, of course, obviously a ground for withdrawing from cohabitation. But if refusal or failure to consummate a marriage on the part of a wife is not proved to be due to wilful refusal or to impotency, and the matter is left in doubt, and yet the husband, H while unable to prove the charge against her can escape the imputation of desertion on the ground that he reasonably believed that she was in fault, why does not exactly the same thing apply to circumstances provided by the wife herself which justify him in the belief that he has been wronged in respect of adultery? I cannot see any distinction between the two. It seems to me that if the one is a grave and weighty matter which justifies a husband in resisting a petition for restitution and entitles him to say that his conduct is not even a discretionary bar to divorce if he proves another matrimonial offence, it must equally be an answer to a substantive charge of desertion. For these reasons which, I regret to say, have gone to considerable length but the case is one which I regard as of very great importance, I think that we ought to differ from the magistrate, and to hold that though no adultery was, in fact, committed, the wife had so conducted herself as to give the husband reasonable ground for supposing that she had committed adultery, and so to absolve him from the charge of desertion.

Pilcher, J.: I agree, and unless we had differed from the conclusion at which the magistrate arrived, after a very careful trial, I should not have found it necessary to add anything to what my Lord has said.

The point really is a short one. It is clear that a husband, charged with desertion without cause, can set up to such a charge a defence that his wife has been guilty of a matrimonial offence. The point which arises for decision here is whether it is sufficient for the husband to say "although I am unable by admissible evidence to satisfy a tribunal that my wife has been guilty of the matrimonial offence of adultery, yet I have proved conduct on her part which justifies me in saying that I am entitled to leave her."

My Lord has referred to the case of *Haswell* v. *Haswell* (5), in which it is made clear that a husband is entitled to leave his wife on proof by him of something short of the matrimonial offence of adultery. In that case the husband found his wife submitting to improper familiarities, and left her, and he was held justified in doing so. Again, I do not wish to refer at length to the case of *Ousey* v. *Ousey* (6). My Lord has analysed that case, and I agree so entirely with what he has said that I find it quite unnecessary to add anything, except to observe that in the case of *Whittaker* v. *Whittaker* (7), my Lord, in delivering the judgment of the Divisional Court, says, at p. 838, after dealing with other points in the case:

> Suffice it to say that there is authority that a reasonable belief in the wife's adultery may afford a defence to a charge of wilful neglect.

With this statement I respectfully agree, and if such a reasonable belief by a husband affords a defence in proceedings based upon wilful neglect, it must also afford him a defence in proceedings based on desertion.

The point, therefore, is, had the husband on the facts of this case a reasonable belief that his wife had committed adultery either prior to July, 1943, or in Oct., 1943, when he caught the men in the house? So far as the point based on venereal disease is concerned, the matter seems to me to lie in this way: After hearing all the available evidence, the magistrate was unable to determine which spouse had infected the other or whether either spouse had infected the other. The matter was left completely in doubt, and the husband, therefore, is in my view entitled to say "I honestly believed that my wife had infected me. As some proof, at any rate, of the honesty of my belief, I point to the fact that even after a trial the tribunal was unable to say that it was not so." So much for the venereal disease.

So far as the incident of Oct., 1943, was concerned, when the husband found three men in the house, and one man apparently in his wife's room, where his wife was in bed, the magistrate, in dealing with the credibility of the husband and the wife, who were the only two witnesses called, accepted the wife's story of that incident. He does not say in terms that he accepted her evidence or rejected her husband's evidence on any other point. But so far as that incident is concerned, he accepted the wife's evidence that she had not committed adultery. Because the husband did not succeed in satisfying the magistrate that his wife was guilty of adultery, it does not mean that the husband had not, in fact, the gravest suspicions at that time that his wife had been committing adultery. It is to be observed, as my Lord has pointed out, that so far from offering any explanation, either in the middle of the night, when her husband turned up, or later in the morning, when he came to take the baby away, as to the presence of these men in the house, this wife actually barred the husband from the house between the hours of 1.30 a.m., and round about 8 a.m. That is one aspect of the case which no doubt was considered by the magistrate, but it is certainly a point which may well have struck the husband as being extremely suspicious. That is all I desire to say with regard to the October incident.

The only other matter is the birth of this second child on July 30, 1944. As my Lord has pointed out, evidence of non-access, which was given by both husband and wife, was only admissible on the issue, or possible issue, of condonation. I think that there is an aspect of this matter which ought, perhaps, to receive some consideration. Both husband and wife, on the issue of condonation, were in agreement that no sexual intercourse had taken place between them since July, 1943. In Oct., 1943, the husband turned his wife out, or, at any rate, she left for a period, but she seems to have returned, because he finally turned her out again in Jan., 1944. He says in his evidence that he did so because he discovered that she was then three months' pregnant. I do not gather that the magistrate has disbelieved that fact, although he may have rejected it, and held, properly, of course, that it was inadmissible for the reasons laid down in *Russell* v. *Russell* (1). When, however, the point under consideration is whether a husband has got reasonable ground for leaving his wife owing to her conduct, it seems to me that certain knowledge by a husband that he has not had sexual intercourse with his wife for six months, coupled with the knowledge that six months later she is in the early stages of pregnancy, must induce in him not only a *bona fide* belief but a certainty that his wife has committed adultery, and where all that is in issue is whether the husband had, or had not, a *bona fide* belief that his wife has committed adultery, evidence by the husband of knowledge of the matters, to which I have referred, may not be inadmissible under the rule in *Russell* v. *Russell* (1), such evidence being directed only to his state of mind and not to the issue of whether adultery has, in fact been committed.

Even if I am wrong on that, taken as a separate point, I am quite satisfied that this husband, having regard to the past history of his married life, to the occasions upon which it is apparent that he had had to speak to his wife, to the incident with regard to the venereal disease and the incident in October, was well justified in entertaining, and, I think, did entertain, a *bona fide* belief that his wife had committed adultery. That being so, on the authority of *Ousey* v. *Ousey and Atkinson* (6), in my view the husband was justified in leaving his wife in the way in which he did, whether this occurred in Oct., 1943, or in Jan., 1944, and I, therefore, agree with my Lord that this appeal must be allowed.

Appeal allowed.

Solicitors: *J. C. Clifford Watts* (for the appellant husband); *C. V. Young & Cowper* (for the respondent wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

NOTE.

Re E. K. COLE, LIMITED.

[CHANCERY DIVISION (Vaisey, J.), **March 19, 1945.**]

At an extraordinary general meeting of the petitioning company a special resolution was passed that the provisions of the memorandum of association should be altered with respect to the objects of the company. The memorandum of association contained, at the end, the following clause, concerning the construction of all the clauses specifying the objects for which the company was established:

> It is hereby expressly declared that each sub-clause of this clause shall be construed independently of the other sub-clauses hereof and that none of the objects mentioned in any sub-clause shall be deemed to be merely subsidiary to the objects mentioned in any other sub-clause.

On the petition by the company to the court to confirm the alteration of the memorandum of association with respects to its objects, VAISEY, J., referred to the provision at the end of the company's objects clause as a provision which was severely criticised by the House of Lords in *Cotman* v. *Brougham* (1) and one which, since it had the effect of making each addition to the objects clause a separate and distinct business, was contrary to *Re Spiers & Pond, Ltd.* (2), *Re Brown (J.) & Co., Ltd.* (3), and *Re Parent Tyre Co.* (4). The judge stated that as the proposed new businesses were closely allied to the company's principal business he would, in this case, sanction the proposed alteration without putting the petitioning company on terms; but, where a memorandum contained a provision whereby each clause of the objects was to be construed independently of the others, he might, on some future occasion, refuse to confirm the alteration unless the company by its resolution either deleted the provision or gave power to the court to limit its application.

[**EDITORIAL NOTE.** In *Cotman* v. *Brougham* (1) the House of Lords expressed strong disapproval of the inclusion of a clause in the form herein discussed, in a memorandum of association. It has continued in use as a matter of common form, but it is clear that in future regard must be paid to the attitude of the court towards this clause, when drafting alterations to a memorandum.

As to Objects of Company, see HALSBURY, Hailsham Edn., Vol. 5, pp. 402-407, paras. 666-671; and for Cases, see DIGEST, Vol. 9, pp. 83, 84, Nos. 322-334, and pp. 649-656, Nos. 4293-4361.

As to Interpretation of Objects Clause, see also ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, Vol. 4, p. 162.]

Cases referred to:

*(1) *Cotman* v. *Brougham*, [1918] A.C. 514; 9 Digest 78, *286*; 87 L.J.Ch. 379; 119 L.T. 162; *affg. S.C. sub nom., Re Anglo-Cuban Oil, Bitumen and Asphalt Co., Ltd.*, [1917] 1 Ch. 477.

(2) *Re Spiers & Pond, Ltd.* (1895), 40 Sol. Jo. 32; 9 Digest 655, *4358*; 2 Mans. 596; 13 R. 838.

(3) *Re Brown (J.) & Co., Ltd., Re Tredegar Iron & Coal Co., Ltd.*, (1914) 84 L.J.Ch. 245; 9 Digest 656, *4361*; 112 L.T. 232.

(4) *Re Parent Tyre Co.*, [1923] 2 Ch. 222; 9 Digest 651, *4309*; 92 L.J.Ch. 358; 129 L.T. 244.

Harold Christie, K.C., and *J. G. Strangman* for the petitioning company.
Solicitors: *Allen & Overy* (for the petitioning company).

ROBERT BATCHELLER & SONS, LIMITED. *v.* BATCHELLER.

[Chancery Division (Romer, J.)

Batcheller (Robert) & Sons, Ltd. *v.* Batcheller. ([1945] 1 All E.R. 522). *Disapproved.* Grundt *v.* Great Boulder Proprietary Gold Mines, Ltd. [1948] 1 All E.R. 2

Companies—Articles of association—directors eligible for re-appointme “deemed to have been re-elected ’ as consecutive items, re-appoint directors in their place—Proposed resolution for re-appointment lost on show of hands—Retiring directors demanding poll—Vacancies not filled—Adjournment of meeting for decision on both items—Letter reminding shareholders of date of adjourned meeting, referring to poll only—Chairman closing adjourned meeting after adverse poll—Remaining members electing new directors—No re-election of retiring directors—Purported appointment of new directors of no effect.

In 1933 the defendants became managing directors of the plaintiff company for a period of ten years. Accordingly, in 1943, their appointment was determined, the defendants becoming ordinary directors subject to retirement by rotation, and, in the same year, they did so retire. It was provided by art. 93 that “ . . . if at any meeting at which an election of directors ought to take place, the places of the retiring directors . . . are not filled up, the retiring directors . . . shall, if willing to act, be deemed to have been re-elected.” At the annual general meeting of the company, held on Aug. 25, 1943, the agenda included as item 3 the re-election of the defendants; item 4 provided for the election of two new directors in their place. Item 3 was proposed by the chairman, and, on a show of hands, the proposition was lost. One of the defendants thereupon demanded in writing a poll on their re-election to the board of directors. Item 4 was then adjourned till the date of the taking of such poll which was fixed for Oct. 28, 1943, and the remaining business on the agenda was proceeded with. It was provided by art. 62 that “ whenever a meeting is adjourned . . . notice of the adjourned meeting shall be given in the same manner as in the case of an original meeting.” On Sept. 23, 1943, a letter, signed by the secretary of the company, was sent to the shareholders reminding them of the date and place of the poll without, however, referring to item 4. At the adjourned meeting held on Oct. 28, 1943, the votes cast were 10,860 for and 10,979 against the re-election of the defendants, whereupon the chairman declared the defendants were re-elected directors under art. 93 and declared the meeting closed. The members present declined to accept this statement and proceeded with the election of two new directors under item 4 of the agenda, whereupon the defendants left the meeting. The meeting then purported to elect A. and D. in place of the defendants. In these circumstances the company claimed declarations that neither of the defendants was a director of the company and each ceased to be a director on Oct. 28, 1943, and that A. and D. were duly elected and became directors on that date. The defendants counterclaimed that they now are, and at all material times since Oct. 28, 1943, have been, directors of the company and that neither A. nor D. were, or had at any time since that date been, directors of the company :—

HELD : (i) the letter of Sept. 23, 1943, was not a sufficient notice of an adjourned meeting within the meaning of art. 62, which was mandatory in nature and must be strictly complied with ; the meeting of the shareholders on Oct. 28, 1943, could, therefore, deal with the poll only, and, consequently, the purported appointment of the new directors was of no effect.

(ii) since it was positively known that the majority of the shareholders had refused to re-elect the retiring directors, art. 93 did not apply, and, in these circumstances, the retiring directors could not be deemed to have been re-elected to the board although their places had not been filled up.

[**EDITORIAL NOTE.** The principal point here is the question of the sufficiency of the notice of the adjourned meeting. The relevant document takes the form of a letter of reminder of the poll only and this is held insufficient to give the adjourned meeting jurisdiction to deal with other matters not dealt with at the original meeting and not referred to either directly or by implication in the letter. On the question of what the reader may be presumed to imply from such a notice the case may be usefully compared with *Choppington Collieries, Ltd.* v. *Johnson* ([1944] 1 All E.R. 762.) As to the article under which directors were to be deemed to be re-elected, its inapplicability is expressed by ROMER, J., in the following terms, "To deem that a thing happened, when not only is it known that it did not happen but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to a subject-matter such as that of art. 93, amounts to a complete absurdity."

AS TO RETIREMENT OF DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 340-343, paras. 560-563 ; and FOR CASES, see DIGEST, Vol. 9, pp. 524, 525, Nos. 3448-3455.]

Cases referred to :

(1) *Re Great Northern Salt and Chemical Works, Ex p. Kennedy* (1890), 44 Ch.D. 472 ; 9 Digest 245, *1539* ; 59 L.J.Ch. 288 ; 62 L.T. 231.

*(2) *Spencer* v. *Kennedy*, [1926] Ch.D. 125 ; Digest Supp. ; 95 L.J.Ch. 240 ; 134 L.T. 591.

*(3) *Holt* v. *Catterall* (1931), 47 T.L.R. 332 ; Digest Supp.

ACTION by Robert Batcheller & Sons, Ltd., a company incorporated on Oct. 31, 1918, and certain of its shareholders claiming declarations that neither of the defendants is a director of the company and that each of the defendants ceased to be such director on Oct. 28, 1943 (or, alternatively, some other date) and that the plaintiffs, Winifred Whiterose Andrews and Percy Edward Dormer, were duly elected to be and became directors of the company on Oct. 28, 1943 (or, alternatively, some other date) ; and the plaintiffs claiming ancillary relief. The defendants, by counterclaim, claimed declarations that they and each of them now are, and have at all material times since Oct. 28, 1943, been directors of the company, and that neither of the plaintiffs Andrews or Dormer is, or has at any time since Oct. 28, 1943, been, a director of the company ; the defendants also claiming consequential relief. The relevant articles of association provided :

55. Seven days' notice at the least, specifying the place, the day and the hour of meeting, and in the case of special business the general nature of such business, shall be given in manner hereinafter mentioned to such members as are under the provisions of these articles entitled to receive notices from the company. Provided that the accidental omission to give such notice to, or the non-receipt of such notice by, any such member shall not invalidate any resolution passed or proceeding had at any such meeting, and, with the consent of all the members for the time being entitled to receive notices of meetings, a meeting may be convened upon a shorter notice and in such manner as such members may approve. Proper minutes shall be kept of all general meetings of the company.

56. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting shall also be deemed special, with the exception of sanctioning a dividend, the consideration of the accounts and balance sheets and the ordinary reports of the directors and auditors, and the fixing of the remuneration of the auditors.

61. The chairman (if any) of the board of directors shall preside at every general meeting, but if there be no such chairman, or if at any meeting he shall not be present within fifteen minutes after the time appointed for holding the same, or shall be unwilling to act as chairman, the members present shall choose some director, or if no director be present, or if all the directors present decline to take the chair, they shall choose some member present to be chairman of the meeting.

62. The chairman may, with the consent of any meeting at which a quorum is present, and shall, if so directed by the meeting, adjourn any meeting from time to time and from place to place as the meeting shall determine. Whenever a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given in the same manner as in the case of an original meeting. Save as aforesaid, no member shall be entitled to any notice of an adjournment, or of the business to be transacted at an adjourned meeting. Except as provided by the statutes in the case of the statutory meeting, no business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.

63. At all general meetings a resolution put to the vote of the meeting shall be decided on a show of hands, unless before or upon the declaration of the result of the show of hands a poll be demanded in writing by the chairman (being a person entitled to vote) or by at least two members, or by the holder or holders in person or by proxy of at least one-twentieth part of the issued ordinary share capital of the company, and unless a poll be so demanded a declaration by the chairman of the meeting that a resolution has been carried, or has been carried unanimously, or by a particular majority, or lost, or not carried by a particular majority, shall be conclusive, and an entry to that effect in the minute book of the company shall be conclusive evidence thereof, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

64. If a poll be demanded in manner aforesaid, it shall be taken at such time and place, and in such manner, as the chairman shall direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

93. Subject as herein provided, if at any meeting at which an election of directors ought to take place, the places of the retiring directors, or some of them, are not filled up, the retiring directors, or such of them as have not had their places filled up, shall, if willing to act, be deemed to have been re-elected.

95. Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election.

On Sept. 23, 1943, the following letter was sent out to the shareholders:

To the shareholders. I have to remind you that the poll on the election of directors will be taken on Thursday, Oct. 28, 1943, at 2.30 p.m., at the offices of the company, at "Allington," Yeoman Lane, Bearsted. For Robert Batcheller & Sons, Ltd., Thomas R. S. Batcheller, Secretary.

C. T. Le Quesne, K.C., and *G. D. Johnston* for the plaintiffs.

Charles Harman, K.C., and *W. Gordon Brown* for the defendants.

Romer, J.: The company is a private company, and carries on business as English timber merchants at Maidstone, in the county of Kent. The plaintiff, Thomas Robert Shorter Batcheller, and the defendants, Robert Aubrey Batcheller and Hugh Gordon Batcheller are brothers. Their father, who was the governing director, died in 1927, and after his death the business, which was then apparently not in a flourishing state and owed money to its bank and on debentures, was managed by the three brothers; the plaintiff, Thomas Batcheller, being the managing director. In 1933 the defendants became managing directors for a period of ten years. The father had left his ordinary shares equally between his three sons, and his preference shares to his daughters, of whom, I think, there are six. In 1933 the plaintiff, Thomas Batcheller, purchased some of the preference shares and obtained control of the board. Shortly afterwards the powers of the defendants as managing directors were curtailed. No dividends have been paid on the preference shares since 1923, but I understand that the company's business is now in a healthy condition.

This action is the outcome of a struggle for power between the plaintiff, Thomas Batcheller, and those shareholders who support him, on the one hand, and the defendants and their sympathisers on the other hand. It arises directly out of the events which occurred at the 25th annual general meeting of the company, which was held on Aug. 25, 1943, and at a subsequent meeting of the shareholders which took place on Oct. 28 of the same year. The defendants' appointment as managing directors was determined in 1943 and, as a result, they became ordinary directors subject to retirement by rotation, and in the same year they did so retire; and the whole question in dispute is whether the plaintiffs, Mrs. Andrews and Dormer, were validly elected to be directors in their place, and, if not, what is the result of the two meetings to which I have referred, having regard to the articles of association of the company.

The matter depends primarily on the course of events at these two meetings. [His Lordship then read certain of the company's articles and continued:] Pursuant to a resolution of a board meeting called for Aug. 12, 1943, and adjourned to and continued on Aug. 16, a notice was sent out convening the 25th annual general meeting of the company. This notice was in the following terms:

> Robert Batcheller & Sons, Ltd., Bridge Wharf, Maidstone. Aug. 16, 1943. To the shareholders: Notice is hereby given that the 25th (twenty-fifth) annual general meeting of the company will be held at 'Allington,' Yeoman Lane, Bearsted, on . . . Aug. 25, 1943, at 2.30 p.m., when the following agenda will be submitted for adoption, *viz.*: 1. That the 25th annual directors' report, balance sheet, and statement of accounts for the year ended Mar. 31, 1943, together with the auditors' report thereon be approved and adopted. 2. That Miss M. Martyn, a new director who filled a casual vacancy, retires under the company's articles of association No. 95, and is recommended by the Board of directors to be re-elected. 3. R. A. Batcheller and H. G. Batcheller having ceased to be managing directors, have now become ordinary directors subject to retirement by rotation, and having been longest in office since their last election, under the company's articles of association, they both retire and, being eligible, offer themselves for re-election. 4. The board of directors recommend for election to fill the above vacancies the following persons, namely, Mrs. W. W. Andrews and Percy Edward Dormer . . . in place of R. A. Batcheller and H. G. Batcheller respectively . . .
> By order of the Board, T. R. S. Batcheller, Secretary.

The meeting was duly held, and the accounts given by the plaintiffs and by the defendants respectively as to what occurred at it, and as to what happened subsequently are conveniently summarised in paras. 6 and 7 of the statement of claim, and in paras. 4 and 5 of the amended defence, which I will read. Para. 6 of the statement of claim says:

> The said 25th annual general meeting of the company was held on Aug. 25, 1943, and the defendant Robert Aubrey Batcheller took the chair thereat as chairman. When the business reached item 3 on the agenda the chairman put to the meeting the names of himself and the defendant Hugh Gordon Batcheller for re-election and, on a show of hands, the proposition was lost. The defendant Hugh Gordon Batcheller then demanded in writing a poll on the re-election of the defendants to the board of directors. Item 4 was then adjourned till the date of taking such poll and the defendant Robert Aubrey Batcheller as such chairman stated that he decided that a poll be taken on Thursday, Oct. 28, 1943, at 2.30 p.m., at 'Allington,' Bearsted, to decide which two of the four candidates (the defendants and the plaintiffs Winifred Whiterose Andrews and Percy Edward Dormer) be elected to fill the two vacancies on the board.

Para. 7 is:

> At the adjourned meeting on Oct. 28, 1943, the defendant Robert Aubrey Batcheller again took the chair but he refused to issue the voting papers which had been prepared by the secretary containing the names of all four candidates, but issued to the members polling papers containing only the names of the defendants. On the poll being taken on these papers the votes cast were 10,860 for and 10,979 against the re-election of the defendants whereupon the said Robert Aubrey Batcheller as such chairman declared the defendants were re-elected directors under art. 93 and declared the meeting closed. The members present declined to accept this statement and proceeded with the election of the plaintiffs Winifred Whiterose Andrews and Percy Edward Dormer under item 4 of the agenda whereupon the defendants left the meeting and the meeting unanimously and duly elected the plaintiffs Winifred Whiterose Andrews and Percy Edward Dormer to be directors in the place of the defendants who had retired by rotation.

By para. 4 of the defence, the defendants pleaded:

> What in fact occurred at the annual general meeting on Aug. 25, 1943, was as follows: (*a*) When the business reached item 3 on the agenda the defendant Robert Aubrey Batcheller proposed a resolution that he and the defendant Hugh Gordon Batcheller be re-elected directors. That resolution was put to the meeting and declared by the defendant Robert Aubrey Batcheller as chairman lost upon a show of hands.
>
> (*b*) The defendant Hugh Gordon Batcheller as holder of more than one twentieth

> of the issue of ordinary shares thereupon in exercise of his right under art. 63 demanded a poll upon that resolution which was the only resolution before the meeting and the defendant Robert Aubrey Batcheller as chairman directed pursuant to art. 64 that the poll thereon should be taken on Oct. 28, 1943, at 2.30 p.m., at 'Allington,' Bearsted.
>
> (*c*) The remaining business upon the agenda was then proceeded with. Upon the item No. 4 upon the agenda being taken, no resolution for the election of the plaintiffs Andrews and Dormer as directors was proposed by any director or member present; and in the absence of any such resolutions the defendant Robert Aubrey Batcheller, as chairman, without objection on the part of any person present went on to item No. 5 on the agenda (*i.e.*, directors' remuneration) and that item and the subsequent items 6 and 7 were disposed of.
>
> (*d*) After item 7 had been disposed of the defendant Robert Aubrey Batcheller, as chairman, again without objection from any person present declared the meeting closed.

Para. 5 is :

> No resolution for the adjournment of the meeting held on Aug. 25, 1943, was proposed at that meeting or passed, and the defendants deny that there was any adjourned meeting on Oct. 29, 1943, or on any other date. The members attended at 'Allington,' Bearsted, on Oct. 28 (not Oct. 29) for the purpose of taking the poll on the resolution for the re-election of the defendants as directors directed at the ordinary meeting on Aug. 25, 1943, to be taken on that day and for that purpose only, and this was explained by the defendant Robert Aubrey Batcheller to the members attending when he declared the meeting closed, meaning thereby that the business of taking the poll was concluded. Save as aforesaid the defendants admit the allegations in the first sentence on para. 7 of the statement of claim. After the defendant Robert Aubrey Batcheller declared the meeting closed (meaning as aforesaid) the defendants and all other members who voted on the poll in favour of the resolution for the re-election of the defendants left the room, and the defendants have no knowledge and make no admission as to any of the allegations in the last sentence of the said paragraph as to what subsequently occurred.

[His Lordship then referred to the evidence given before him and continued :] I am satisfied that at the meeting on Aug. 25, 1943, it was understood and agreed by those present, and not least by the chairman himself, that item 4 on the agenda should stand over and be dealt with at the meeting on Oct. 28 and that it was in fact so adjourned. The precise manner in which item 4 was to be dealt with was left uncertain. The chairman in my judgment was acting improperly and in excess of his powers in subsequently declaring (if in fact he did declare) the meeting closed, if by so doing he intended to shut out item 4 from debate and decision at the October meeting ; and any such declaration if made was, in my opinion, of no effect and must be disregarded. The sense of the meeting was that item 4 should be adjourned, and as I find that the chairman was aware of this, he was not entitled in my judgment so to use his powers as to defeat the intention—a perfectly legitimate intention—of the shareholders. Item 4 was obviously a burning question and was very much linked up with item 3. It could not effectively arise until item 3 had been disposed of, for it was dependent upon item 3 being defeated. Item 3 was in fact defeated at the August meeting on a vote by show of hands but not fully defeated because of Hugh Batcheller's demand for a poll. To suggest, however, as Robert Batcheller would have me believe, that Thomas Batcheller's party having partially cleared the ground for their presentation of item 4 should, without protest or complaint, have allowed it to be eliminated, notwithstanding that item 3 was being kept alive is, in view of the bitterness which prevailed between the two contending camps, to strain credulity to breaking point.

I now turn to the question whether, assuming, as I have held to be the case, the meeting on Aug. 25, 1943, was adjourned to Oct. 28 for the purpose of dealing with item 4, a sufficient notice was given of the adjourned meeting. Cl. 62 of the company's articles provides that :

> Whenever a meeting is adjourned for ten days or more notice of the adjourned meeting shall be given in the same manner as in the case of an original meeting.

The only document sent out to the shareholders which could be treated as a "notice" within the article is the letter of Sept. 23, 1943, addressed to the shareholders.

Counsel for the defendants took the point that this document can in no sense be regarded as complying with art. 62. He said in the first place that it is not a notice of an adjourned meeting at all but is a mere reminder that the poll, which had been demanded by Hugh Batcheller at the August meeting, would be taken on Oct. 28.; that the words "in the same manner" in art. 62 incorporate in effect the requirements of art. 55; that under that article a notice must specify "in the case of special business the general nature of such business"; that the election of directors is "special business" (by virtue of art. 56); that the document of Sept. 23, 1943, does not give sufficient or any notice of the subject matter of item 4 and that it is accordingly invalid. He said also, in the second A place, that it is in any event invalid because it was signed and sent out by the secretary of the company without the authority of the board of directors.

It was objected by counsel for the plaintiffs that these contentions were not open to the defendants on the pleadings as they then stood. I upheld this objection but gave the defendants liberty to amend their defence and this they did, but without prejudice to the contention of counsel for the defendants which he desired to keep open that no amendment of his pleading was in fact necessary. B The points are now dealt with in the pleadings as follows:

> Alternatively if (which the defendants deny) the meeting of Aug. 25, 1943, was adjourned to Oct. 28, 1943, no notice of the adjourned meeting was given as required by art. 62. In the further alternative if (which the defendants also deny) any document purporting to be such a notice was sent out to the members the same was sent out by the plaintiff T. R. S. Batcheller, as secretary, without the authority of the directors of the company.

C By para. 2 of the amended reply the plaintiffs say:

> If (which is not admitted) the authority of the directors was necessary for the giving of the adjourned meeting held on Oct. 28, 1943, it was the duty of the directors to give such authority and to see that a valid notice was sent out. If (which is not admitted) no such valid notice was given and the company was thereby unable to proceed to the election of the plaintiffs Winifred Whiterose Andrews and Percy Edward Dormer after the taking of the poll on Oct. 28, 1943, such inability was due to the default of the D directors including the defendants in their capacity of directors and in the premises the defendants are not entitled to rely on the absence of or any insufficiency in any such notice and art. 93 does not operate in their favour or so as to cause them to be deemed to be re-elected thereunder.

The question of the sufficiency of the letter of Sept. 23, 1943, in point of form appears to me exclusively to depend on the meaning and effect of the relevant articles of association. Counsel for the plaintiffs contended that the words E in art. 62:

> Whenever a meeting is adjourned for ten days or more notice of the adjourned meeting shall be given in the same manner as in the case of an original meeting

are directory and not mandatory, and that nothing is said as to what is to happen if the notice indicated by the article is not in fact given. In this connection he referred me to some observations of STIRLING, J., in *Re Northern* F *Salt & Chemical Works* (1), at p. 482. Those observations do not, however, seem to me to be directed to the necessity, or form, of a notice convening an adjourned meeting of a company or to assist me in deciding the particular point now under discussion.

Art. 62 means, and can in my judgment only mean, that where a meeting is adjourned for ten days or more a similar notice of the adjourned meeting is G required as is necessary in the case of an original meeting under art. 55. That article (55) is peremptory in form and provides that:

> Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in the case of special business the general nature of such business, shall be given in manner hereinafter mentioned to such members as are under the provisions of these articles entitled to receive notices from the company.

I am unable, therefore, to accept the view that art. 62 is in this regard merely H directory; it is, in my judgment, mandatory and must be complied with.

Counsel for the plaintiffs next contended that even if he were wrong on his first argument nevertheless the letter of Sept. 23, 1943, did in fact in point of form sufficiently comply with art. 62, or, in other words, that it gave sufficient notice of the adjourned consideration of item 4. He pointed out that no notice of the poll demanded by Hugh Batcheller, and which was fixed to be taken on Oct. 28, was necessary; and that the shareholders, who must be taken to know the articles of association of their company, must, therefore, have gathered from the letter of Sept. 23, 1943, as a matter of natural inference that something connected with the election of directors, apart from and in addition to Hugh Batcheller's poll, was coming up for consideration on Oct. 28; that the letter uses the word "election" and not "re-election" and that it does not refer to the two directors by name who would be affected by the result of Hugh Batcheller's poll. From these considerations he argues that the letter of Sept. 23, 1943, sufficiently discloses the general nature of the special business to be taken on Oct. 28, that is to say, not only the taking of Hugh Batcheller's poll but also the adjourned consideration of item 4.

I am unable to take this view of the letter of Sept. 23, 1943. On the face of it, it does not profess to be a notice of a meeting at all; it purports to be merely a "reminder"—unnecessary perhaps but intelligible—of the taking on a particular day, and at a specified time and place of a poll; and a poll on a particular topic, namely, the election of directors. Such a poll, and on such a topic, had been demanded at the August meeting and *prima facie* it seems to me that the "reminder" can only fairly be read as referring to that poll and to nothing else. In my judgment it is not possible to relate it to a resolution which had never been voted on by show of hands, on which no poll, accordingly, had already been or could have been demanded and which indeed might never become the subject of such a demand. I am of opinion, therefore, that the letter of Sept. 23, 1943, was not a sufficient notice of an adjourned meeting within the meaning of art. 62 and that the result of this is that it was not open to the meeting of shareholders, which took place on Oct. 28, 1943, to deal with anything except the taking of Hugh Batcheller's poll. It is to be observed that the point is almost entirely technical, for all the members of the company were present at the meeting in October with the exception of one who was serving abroad and who was the holder, as I understand, of only one share. Nevertheless counsel for the plaintiffs rightly admitted that he could not suggest that, if no valid notice of the adjourned meeting had in fact been given, the irregularity had been cured or waived by the common consent of all the shareholders. Having arrived, as I do, at the conclusion that the letter of Sept. 23, 1943, was insufficient in point of form as a notice of an adjourned meeting, it becomes unnecessary for me to decide and I do not decide whether it was also invalid as counsel for the defendants secondly contended on the ground that it was signed by the secretary of the company without the authority of the board. It follows from what I have already said that the purported appointment at the meeting on Oct. 28 of Mrs. Andrews and Mr. Dormer, to be directors of the company in the place of the defendants was of no effect.

I must now consider whether, in these circumstances, the defendants are right in their contention that they must be deemed to have been re-elected to the board by virtue of art. 93. I will read this article again:

> Subject as herein provided, if at any meeting at which an election of directors ought to take place, the places of the retiring directors, or some of them, are not filled up, the retiring directors, or such of them as have not had their places filled up, shall, if willing to act, be deemed to have been re-elected.

The defendants' argument on this point certainly has the merit of simplicity. They say that there was a meeting, at which an election of directors ought to have taken place; that the places of themselves as the retiring directors were not filled up; that they were willing to act and that accordingly they must be deemed to have been re-elected. Articles similar to art. 93 were considered in two cases to which I was referred. The first of these is *Spencer* v. *Kennedy* (2). The relevant part of the headnote in that case is as follows, at p. 125:

> A private company was governed partly by special articles and partly by Table A. Table A, art. 70, fixed the qualification of a director as "the holding of at least one share." Special art. 20 empowered the directors to appoint any other "qualified person" either to fill a casual vacancy or as an addition to the board.
>
> At a full board meeting, on Saturday, Nov. 14, transfers of shares to two outsiders were duly passed for registration, after which the transferees were forthwith elected directors. The transfers were registered on the following Monday: *Held*, that, though before their appointment the transferees had acquired an absolute right to registration, they were not "qualified persons" before actual registration, and their appointment as directors was invalid.
>
> Table A, arts. 78 and 80, provide for one-third of the directors retiring by rotation at each ordinary meeting and being eligible for re-election, and art. 81 enables the company at that general meeting to fill up the office so vacated.

> Art. 82 provides that: " If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting."
>
> A director was due to retire by rotation at the annual general meeting of Wednesday, Nov. 11, and part of the business of which notice was given was the election of a director in his place. The retiring director's re-election was moved at the meeting, but the matter, though discussed, was not finally dealt with, and the meeting was adjourned successively to Thursday, Nov. 12, Saturday, Nov. 14, and Tuesday, Nov. 17. At the last adjournment the original motion for the retiring director's re-election was put and lost, and another shareholder was proposed and elected in his place.
>
> *Held* that, as the adjourned meeting was merely a continuation of the original meeting at which the question of the retiring director's re-election or replacement was considered, the proceedings were in order, and art. 82 had no application.
>
> *Semble.* Art. 82 only applies to a case where the retirement of a director by rotation and the necessity for his re-election or replacement is entirely lost sight of at the annual meeting.

The concluding part of the headnote appears to be founded upon the part of the judgment of ASTBURY, J., which is to be found at p. 135, where he says:

> The plaintiff Spencer relies upon Table A, art. 82, and contends that as he was neither re-elected nor replaced on Wednesday, Nov. 11, the meeting, so far as that portion of the business was concerned, was *ipso facto* adjourned to Wednesday, Nov. 18, and if the business was not dealt with on that day he was deemed re-elected . . . Though at first inclined to take that view of art. 82, I do not on consideration think it correct. It is true that Spencer retired by rotation and offered himself for re-election at the general meeting of Nov. 11. But that meeting was validly adjourned by successive stages to Nov. 17, and at that continued meeting the resolution for his re-election was put and lost, so that he was not re-elected. If the meeting of Nov. 11 had not been adjourned, or if the question of Spencer's re-election or replacement had been entirely lost sight of, art. 82 would have applied, and it would have been the directors' duty to adjourn the meeting to Nov. 18, and if he was not re-elected or replaced on that day he would have been deemed re-elected. But in the present case I think his re-election was validly dealt with and rejected at the adjourned meeting on Nov. 17, a continuation of the original meeting at which the re-election resolution was proposed, and therefore the plaintiff Spencer is not deemed re-elected under Table A, art. 82.

In the second case, *Holt* v. *Catterall* (3) MAUGHAM, J., expressed the view that the *semble* in the headnote to *Spencer* v. *Kennedy* (2) was not justified by the judgment of ASTBURY, J.; and this would indeed appear to be the case. *Holt* v. *Catterall* (3) is not very luxuriously reported, and there is rather a meagre account of the facts. The headnote is:

> By art. 97 of a company's articles, " At the second ordinary general meeting in each calendar year, one-third of the directors . . . shall retire from office. A retiring director shall retain office until the dissolution of the meeting at which his successor is elected." By art. 100, " If at any meeting at which an election of directors ought to take place the places of the retiring directors or some of them are not filled up, then, subject to any resolution reducing the number of directors, the retiring directors, or such of them as have not had their places filled up and may be willing to act, shall be deemed to have been re-elected." *Held*, that if a retiring director was not re-elected, and if his place was not filled up at the same meeting, he retained office until his retirement by rotation, since by art. 100 he was to be deemed to have been re-elected and, therefore, there was no vacancy to which a successor could subsequently be elected. [Then the headnote says:] This was a motion by which the plaintiff, Alfred Ernest Holt . . . claimed against the defendants, William Howarth Catterall . . . John Groves Bradburn . . . and the Drake Spinning Co., Ltd. . . . a declaration that the plaintiff was a director of the defendant company, and an injunction to restrain the defendants from preventing him from attending meetings of the directors of the company and from acting as a director.

I should assume, as this was brought on on motion, that the relief then sought was for the injunction and not for the declaration:

> [Counsel for the plaintiff] said that the first two defendants were directors of the company. The annual general meeting was held on Dec. 29, 1930. One of the items of business was the election of a director, Holt retiring by rotation and being eligible for re-election. It was common ground that he was not re-elected. The voting was by show of hands, and nobody demanded a poll. It was common ground also that nobody was elected in his place, so that the question arose whether he did not continue to be a director . . . [Counsel then referred to the articles and said] " The case of

> *Spencer* v. *Kennedy* (2) attributed to ASTBURY, J., a *dictum* which . . . was not accurate," [and he referred to that and to the decision of ASTBURY, J., on it. Counsel for the defendants said :] In the present case there had been a perfectly valid resolution and the company in general meeting had refused to elect Holt. That was on Dec. 29, 1930, and on Jan. 12, 1931, Williams was elected. Therefore, if the plaintiff was to be deemed to have been re-elected at all, he remained so only until a successor was elected. MAUGHAM, J. [said, at p. 333 :] I have no evidence that a successor properly so called has been elected. If there was no vacancy, the only thing that could be done was to elect an additional director, and the whole point against you is that there was no vacancy.
>
> Then [counsel for the defendants] said : The plaintiff must satisfy the court that he was entitled to remain a director until the time came for his retirement by rotation.

In giving judgment MAUGHAM, J., referred to the *semble* in the headnote in *Spencer* v. *Kennedy* (2), and then the report says :

> He (his Lordship) was not satisfied that ASTBURY, J., by his remarks at p. 135, meant to say anything of the kind. What ASTBURY, J., said, was [and he then cited the relevant passages in the judgment of ASTBURY, J.,] . . . In the present case art. 100 could not be cut down and made to apply only to the case of complete inadvertence of all the members of the company present at the meeting. The defendants, however, said that the plaintiff was, under art. 100, deemed to have been re-elected, and asked the court to read that article with art. 97, and to say that he was appointed only till his successor was elected. The defendants said also that under art. 78 the directors did in fact appoint Williams, whereupon the plaintiff ceased to be a director. He (his Lordship) did not think that that was a possible view. If a director was deemed to have been re-elected under art. 100, there was no casual vacancy. The result was that the plaintiff must be taken to succeed and the injunction be granted.

According to the report MAUGHAM, J., certainly did say that the article there under consideration :

> . . . could not be cut down and made to apply only to the case of complete inadvertence of all the members of the company present at the meeting.

But I do not think that, except for that proposition, *Holt* v. *Catterall* (3) is of any real assistance to me in deciding the present case. It does not appear that any other person had been nominated for election in the place of the plaintiff (the retiring director), and there was no adjournment of the meeting at which he failed to secure re-election ; it also seems to have been admitted by the defendants' counsel in argument that the plaintiff must be treated as having been re-elected by virtue of the article then under discussion, the only question being how long he subsequently remained a director. The article considered by MAUGHAM, J., in *Holt* v. *Catterall* (3) was for present purposes materially the same as art. 93 in the present case ; and having regard to what he said about it, it is not open to me to hold, even if I desired to do so, that its operation is confined to cases of accidental omission to fill the places of retiring directors. At the same time I cannot but think that such is the main object of an article so framed. But whatever the true scope of the article may be I am of opinion that it only operates when the known circumstances of a particular case are such as sensibly and legitimately to admit of its application. It is, of course, quite permissible to "deem" a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to "deem" that a thing happened when it is known positively that it did not. To deem, however, that a thing happened, when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to a subject-matter such as that of art. 93, amounts to a complete absurdity.

The poll demanded by Hugh Batcheller took place on Oct. 28, 1943, but by reason of art. 64 the result is to be regarded as the resolution of the meeting held on Aug. 25—the meeting at which the poll was demanded. The result of the poll was adverse to the defendants. The defendants nevertheless say that, notwithstanding that the majority of shareholders (in whom the power of re-election rested) explicitly refused to re-elect them at the August meeting and avowedly desired to appoint two other persons in their place, such majority must nevertheless be "deemed" under art. 93 to have exercised their voting power in a directly contrary sense to that in which they did in fact exercise it, and to have re-elected the defendants to the board. A conclusion so extraordinary is repugnant to commonsense, and in my view clearer language than that to be found in art. 93 would be required before the court was driven to accept it. Articles of association are for the use of business men and are not lightly to be construed, if any other interpretation be fairly permissible, in such a way as to lead to absurdity.

In my judgment the defendants' claim to be directors by virtue of art. 93 accordingly fails. In the result, I hold that neither the plaintiffs nor the defendants have made good their respective claims that the plaintiffs, Mrs. Andrews and Mr. Dormer on the one hand, and the defendants on the other, are directors of the company.

Counsel for the plaintiffs invited me to fix a date for the re-assembly of the meeting of Aug. 25, 1943, if I should come to the conclusion (as I have done) that the purported adjourned meeting on Oct. 28 was abortive. I know, however, of no inherent power vested in the court which would enable me to take this course, and the statutory powers conferred by the Companies Act, 1929, ss. 112, 115, are not applicable to the present case. It seems to me that it is for the company and for the company alone to take such steps as it may be advised to secure in accordance with its regulations the appointment of such additional directors as may be acceptable to the majority of the members.

I propose to make a declaration that neither of the defendants is a director of the company, and each of the defendants ceased to be such director on Oct. 28, 1943. I will also make a declaration that neither of the plaintiffs, Mrs. Andrews and Dormer, is, or has at any time since Oct. 28, 1943, been a director of the company. I will also give to the plaintiffs and the defendants respectively liberty to apply for an injunction, if necessary, in aid of the foregoing declarations.

Declarations accordingly. Defendants to pay one half of the plaintiffs' costs of the action. No order as to the costs of the counterclaim.

Solicitors: *Oswald Hickson, Collier & Co.* (for the plaintiffs); *Berrymans*, agents for *Whitehead, Thomas & Urmston*, Maidstone (for the defendants).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

SMITH *v.* A. BAVEYSTOCK & CO., LTD.

[COURT OF APPEAL (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **March 20, 1945.**]

Factories—Dangerous machinery—Absolute duty—Circular saw—Delegation of duty to operator—Woodworking Machinery Regulations, 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 21.

The appellant, an experienced circular saw operator, was employed by the respondent company to operate a circular saw in its factory. The guard of the saw complied with the Woodworking Machinery Regulations, 1922, and it was part of the appellant's duties to adjust the guard to his requirements. At the material time the appellant was cutting planks which varied in thickness and he had so adjusted the guard as to allow the thickest part of the plank free passage. Whilst sawing the wood the appellant's finger passed under the guard and was injured on the saw. The appellant brought an action against the respondent company alleging breach of the Woodworking Machinery Regulations, 1922, reg. 21, and/or breach of common law duty. It was contended on behalf of the appellant that notwithstanding that the adjustment of the guard was left to him it remained the adjustment of the respondents for which they must take responsibility if, in consequence, the appellant suffered injury. On behalf of the respondents it was contended (i) that they had delegated the duty under reg. 21 to the appellant; (ii) that the appellant had committed a breach of reg. 23; and (iii) that the appellant was guilty of contributory negligence:—

HELD: (i) the respondents were entitled to delegate and had delegated their duty under reg. 21 to the appellant, who was a competent person, therefore there was no breach of statutory duty by the respondents.

(ii) in all the circumstances there had been no negligence on the part of the respondents.

Decision of HILBERY, J., ([1945] 1 All E.R. 278) affirmed.

[**EDITORIAL NOTE.** The Court of Appeal here affirm the court below, holding that under the Woodworking Machinery Regulations an employer is entitled to delegate his duty to fence or adjust a guard to a competent man. The provision in reg. 10 that the worker must keep the guard properly adjusted except where the nature of the work makes this "impracticable" indicates that there may be occasions for altering the adjustment or dispensing with it altogether. There was, therefore, no breach of statutory duty by either party, and since the accident was due to the workman himself making the adjustment he was not entitled to recover damages.

As to Absolute Duty to Fence Dangerous Machinery, see HALSBURY, A Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to:

*(1) *Miller* v. *William Boothman & Sons, Ltd.*, [1944] K.B. 337; [1944] 1 All E.R. 333; 113 L.J.K.B. 206; 170 L.T. 187.

*(2) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430; Digest Supp.; 96 L.J.K.B. 597; 136 L.T. 513. B

Appeal by the workman from a decision of Hilbery, J., dated Dec. 21, 1944, and reported [1945] 1 All E.R. 278, where the facts are fully set out.

F. W. Beney, K.C., and *S. R. Edgedale* for the appellant.

N. R. Fox-Andrews for the respondent company.

Lord Goddard: This is another of those cases in which the court has to consider the effect of the rules made under the Factory Act, which are called C the Woodworking Machinery Regulations. I think it is not without importance to remember that this court in *Miller* v. *William Boothman & Sons, Ltd.* (1), explained what the object and effect of these Woodworking Machinery Regulations was. The Factories Act, 1937, imposes an absolute obligation upon the occupiers of factories where machinery is used to fence that machinery and to fence it securely. There is also a provision in the Act which enables the Secretary of State to make regulations which will have the effect of modifying the Act. D It is quite clear, and is obvious to anybody who knows what a circular saw is and how it is worked, that if a circular saw was fenced so as to be absolutely secure and safe it would be a useless tool because you would never be able to bring the wood against the teeth of the saw. Accordingly, probably for that reason, the Secretary of State has made regulations which are now embodied in these Woodworking Machinery Regulations which enable the occupier of a factory to have circular saws at work at his factory, although there is not the E absolute fencing which alone could prevent accidents. It follows from that that there must always be an element of danger and risk in working a circular saw, because however modern and good a fence or guard which is provided may be there must always be a place, which must vary according to the thickness of the wood which is being cut at the moment, in which it is possible, if the work slips or jams or something of that sort, for a man's hand to come into F contact with the saw. That, of course, is well known to everybody who works a circular saw.

In this particular case the action is brought by a man who was an experienced hand, indeed most of his working life had been spent cutting wood with the assistance of circular saws. The action is brought because on a particular day he unfortunately got a finger of his left hand caught by the saw and he lost his finger. It is a distressing sort of accident which not infrequently happens G at circular saw benches. He alleges that there was a breach of statutory duty on the part of the company who employed him, in failing to fence securely or at all the machine, or the dangerous parts thereof, failing to adjust such guard as there was upon the machine so as to enable the work to be carried on without unnecessary risk and then:

(*c*) did not give the plaintiff any or any sufficient warning that the said machine in its said unfenced condition was dangerous and unsafe; (*d*) adopted an unsafe system H of working in that they made no or no sufficient provision for seeing that the machines in their said factory were safe to use; (*e*) supplied improper plant in that they supplied a machine which was dangerous and unsafe; (*f*) required the plaintiff to work in a place or position which was dangerous and unsafe.

It is, of course, perfectly clear that an employer can delegate the duty of seeing that machines are properly fenced or adjusted to proper employees, that is to say, to employees who have the necessary knowledge and experience for them to see that the machine is fenced as securely as it is possible to do.

If an employer delegates that work to a competent man and the competent man does not carry it out, it follows from that, of course, that the employers' duty has not been discharged. In this particular case impliedly the duty of seeing that the fence is properly adjusted is delegated to the man who works the machine, who is an experienced person in relation to that particular job. It is very difficult indeed to see how it could be otherwise done. One has to try to interpret these rules and obligations in the light of a certain degree of common sense and also in such a way as to enable the machines to be used.

Parliament obviously has approved of the use of circular saws and recognises that circular saws may be used in industry at the present time. Then one has to consider how, in the ordinary and normal working of a factory, this business can go on of adjusting the guard. It would be quite impracticable, I suppose, for a foreman to go round every five minutes to see whether a workman had got his machine adjusted exactly to the last degree of safety. It must be left to the experience and common sense of the man to see that it is adjusted in that way as is most safe. If, of course, he does not adjust it properly and then is taken off the machine and somebody who has no knowledge of the machine, a labourer or somebody who has not been previously working the machine, is told to go and work it, the last thing he would probably do would be to interfere with the guard, and if it has not been properly adjusted and such a man lost his hand, no doubt he would be entitled to claim damages against his employer by saying it was the employer's duty, either by himself or some other person, to put this guard in a proper and safe condition and he had not done it. We have to consider how that applies to the plaintiff in this case, who is one of the men, part of whose duty it must be to see that the guard is put into such a condition as would be safe and would comply with the regulations.

The regulations that we have to consider are, first of all, reg. 10 which prescribes how the circular saws shall be fenced. There is no question here that the fence which was provided was a sufficient fence if properly adjusted. Reg. 21 provides:

> The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk.

That is a regulation which has to be observed by the employer. The regulation which has to be also observed by the person employed is:

> Every person employed on a woodworking machine shall (i) use and maintain in proper adjustment the guards provided in accordance with these regulations . . . except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable.

The use of the word "impracticable" showing that guards may be dispensed with or adjusted when it is not practicable to work the machine otherwise shows that there must be a certain amount of discretion left either in the employer or in the person to whom the duty is delegated to see that the machine is in a safe condition, and to the workman who has to work the machine, because if he finds during the course of his day that it is impracticable to cut the wood with the guard as it has been adjusted when he starts, he can alter the adjustment or in certain cases he can dispense with the guard altogether.

I should think one of the commonest things which must happen in a sawmill or a woodworking factory is that from time to time wood of varying dimensions and varying degrees of thickness have to be cut by circular saws and, accordingly, the guards must be adjusted from time to time, and I suppose occasionally taken off altogether. There is, therefore, always, as I have said, an element of risk attendant on the use of a circular saw.

In the particular case that we have to deal with to-day, the plaintiff was a man of, I might say, life-long experience in the use of these saws. He, and no one better than he, would know how to adjust his guard with due regard for his own safety. On the day in question he was cutting some boards, as he said, varying in thickness. It might be that the board would be, say, 1in. thick, and if the thickness of that board was entirely uniform then the guard could be adjusted so that it would be leaving a space between the guard and the platform or table on which the wood is rested for pushing against the saw of 1½ins. There must be, of course, some space between the guard and the plank, otherwise you could not cut it. But he says this wood was of uneven thickness. That again is a thing which I have said already must very often occur in the course of cutting. So he adjusts the guard, as I understand his evidence, at such a height that he thinks it will serve to cut this wood, whatever the thickness of the plank may be, so that he will not have to keep stopping and starting. It would have been perfectly possible for him when he was cutting an inch plank or a plank of which the end which was being first cut was 1in. thick to have adjusted it to 1½ins., and when it jammed against the plank because it was thicker in some places to have stopped his machine and re-adjusted the guard and started again. It is said if he did that he would have got into trouble. The foreman who was called, and whose evidence Hilbery, J., did not think was altogether satisfactory, said if that sort of thing was done he would have reprimanded the men. However, that state of affairs never had arisen. The plaintiff adjusted the guard at what he considered was a suitable height to enable him to cut through this plank which was of varying or irregular thickness without stopping the machine. For myself I should have thought, provided, of course, that he had not left a wholly unnecessary gap, that he would put an adjustment on the guard which, in the circumstances, was practicable. But in any case it seems to me that the delegated duty had been put on him to adjust this guard and if he did not adjust the guard in such a way as was safe, it seems to be pretty clear—and that was the foundation of the decision in *Vincent* v. *Southern Ry.* (2)—that he cannot complain of it. He cannot take advantage of his own wrong and say to his employer " Although you left me to adjust it and I did not adjust it, therefore I am going to claim damages against you." For myself I should say that there was no negligence in anybody in this case nor any breach of statutory duty. The employer had provided a perfectly proper machine and a perfectly proper guard. He had delegated the duty of seeing that the guard was properly adjusted to a perfectly competent person. He used the guard because the use of the guard was practicable and he adjusted it to such an extent that he considered it practicable for the work which he had to do. It does seem to me that if you are cutting one of these boards, which was to some extent of irregular thickness, that the guard was not unduly high. It was adjusted as far as practicable for the thickest part of the wood to pass through.

Under those circumstances it seems to me there is no breach of statutory duty on the part of the employer. If it could be said there was, then the plaintiff, who was the person who had the duty of adjusting this guard, cannot be heard to say that he was not negligent or in breach of his statutory duty in doing what he did. I think, therefore, on the whole that this judgment was perfectly right and the appeal fails and must be dismissed.

MacKinnon, L.J.: I agree, and I do not think I need add anything.

du Parcq, L.J.: I agree. I think it is of some importance to notice that when these regulations were made it was apparently realised not only, as my Lord has said, that some risk must inevitably attend the working of a circular saw, but that in some cases work would have to be done which would be of such a nature as to make the use of any guard or appliance impracticable. That appears from the words of regs. 21 and 23. No doubt the Secretary of State has felt that one has either got to say that certain classes of work cannot be carried out at all, which might, I suppose, have a crippling effect on industry, or permit them to be carried out without some of those safeguards which are regarded as desirable wherever they are possible. The conclusion arrived at has been that where it is impracticable to use guards a guard need not be used. It would not, therefore, be very startling to find, if sometimes a guard may be dispensed with altogether, that there may be some cases in which the guard cannot do its work with the utmost efficiency because of the nature of the material on which it is being used, and this case may be one of them. For myself I feel that there is very great force, if I may say so, in the view which has been expressed by my Lord that in this case there was no breach of statutory duty by anybody. This guard on the occasion in question was fixed properly, or to use the words of the regulation " maintained in proper adjustment," if those words are satisfied when one looks at all the circumstances and takes a reasonable view of the nature of the work being done. HILBERY, J., did not take that view. He thought there had been a breach of statutory duty and I just want to add this, looking at the case for the moment on that assumption. It is a little interesting, I think, and may not be without importance to observe what would have happened under the Act if the employers had been prosecuted for a breach of statutory duty. The section was referred to incidentally in answer to a question I put to counsel for the appellant, sect. 130 of the Act dealing with fences and penalties. A That provides by subsect. (2):

> Where there is a contravention by any person of any regulation made under this Act [and those regulations are made under the Act of 1901 and are to be taken to have been made under this Act] which expressly imposes any duty upon him that person shall be guilty of an offence and the occupier shall not be guilty of an offence in respect of that contravention unless it is proved that he failed to take all reasonable steps to prevent the contravention.

B

If there had been a prosecution in this case, I think one may assume that the defence would have been that the contravention was that of the workman because he had contravened reg. 23. The answer might have been that the employer had not taken all reasonable steps to prevent the contravention, but I doubt very much whether that contention could have succeeded. The workman when he gave his evidence, said that the foreman used to adjust the guards on C the unskilled labourers' machines and the skilled machinists adjusted their own machines. In answer to a question put to him by counsel for the respondents he agreed that he, the plaintiff, having regard to the length of his experience was regarded as a skilled circular saw operator. He was a skilled circular saw operator. He had been working on a circular saw for 2½ years since he left the Army and before that had been 12 years working, not indeed during the whole D of that time or anything like it, on circular saws, but during part of that time, though perhaps only a comparatively short part of it. He thoroughly understood circular saws. I do not see anything unreasonable in leaving it to him to make the necessary adjustment, and I should think it is highly probable that the defence of the employers would have succeeded. That throws a little light, it seems to me, on the position, assuming a breach of statutory obligation on their part when it comes to proceedings in a civil court for damages. I E think they are entitled to say: "The fault is really yours and not ours. We were quite entitled to rely on you. True, if somebody else had been injured by any failure on your part to fulfil your obligation we should have had to pay the penalty, we should have been responsible to him. We cannot rid ourselves of our obligation. But it is quite absurd to think that if you, who are really the person to blame because you were reasonably and properly entrusted by us with this duty, failed to carry it out, therefore, we have got to pay damages F to you."

That, in substance, I agree with my Lord is the way in which the case stands, and I agree that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the appellant); *Stanley & Co.* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ERNEST FREDERICK MOODY *v.* MAYOR, ALDERMEN AND BURGESSES OF POOLE.

[Court of Appeal (Lawrence and Morton, L.JJ., and Uthwatt, J.), **March 21, 1945.**]

Local Government—Urban sanitary authority—Road-making costs—Apportionment of costs—Recovery of costs by local authority from property owner—Action by local authority brought eleven years after date of final apportionment—Limitation of time for proceedings—Equitable relief—Interest on amount claimed—Private Street Works Act, 1892 (*c.* 57), *ss.* 13, 14—*Limitation Act,* 1939 (*c.* 21), *ss.* 2, 18, 31.

The respondents are an urban sanitary authority. Before 1933, they carried out certain private street works and became entitled, under the Private Street Works Act, 1892, to a charge on a house, owned by the appellant, in respect of the apportioned share of the expenses. The final apportionment of the expenses in question was made on June 27, 1933. On Nov. 17, 1944, the respondents brought an action against the appellant in the county court asking for a declaration that they were entitled under the Private Street Works Act, 1892, s. 13, to a charge on the appellant's premises for the sum of £129 12*s.* 1*d.*, the apportioned expenses incurred by the respondents in executing private street works, which sum was payable by the appellant together with interest at the rate of £5 per cent. per annum from June 27, 1933. They also asked for an order that for the purposes of enforcing the charge the appellant's premises should be sold. The county court judge gave judgment for the respondents in the terms asked for, and ordered the sale of the house. On appeal, it was contended on behalf of the appellant that a claim for a declaration of a charge followed by an order for sale of the property was an action to recover a sum of money within the meaning of the Limitation Act, 1939, ss. 2 (1) (*d*), 31, and could, therefore, not be maintained after the expiration of six years :—

Held : (i) since the claim was by a chargee of land asking the court to apply the equitable remedy of having the land sold and applying the proceeds in payment of the sum charged on the land, the action was for " other equitable relief " within the meaning of the Limitation Act, 1939, s. 2 (7). That being so, the Limitation Act, 1939, s. 18, applied, and the proceedings were not out of time.

(ii) so far as the action was brought to recover arrears of interest payable in respect of a sum of money secured by a charge, the amount of interest recoverable was limited by the Limitation Act, 1939, s. 18 (5) to the period of six years immediately preceding the date of the issue of the plaint.

[**EDITORIAL NOTE.** It is claimed here that proceedings by a chargee of land under the Public Street Works Act, 1892, s. 13, constitute an " action " within the Limitation Act, 1939, s. 2. The court holds that even if that is so, such proceedings amount to a claim for "other equitable relief" within sect. 2 (7), and the limitation period of six years is, therefore, excluded in favour of the twelve year period under sect. 18. The question of interest was not argued before the county court, but the court holds that as the charge extends to the whole of the interest, the Limitation Act, 1939, s. 18 (5) bars recovery of arrears of interest except that which became due within six years from the date of commencing proceedings.

As to Recovery of Sums Apportioned, see HALSBURY, Hailsham Edn., Vol. 16, pp. 461, 462, para. 669 ; and for Cases, see DIGEST, Vol. 26, pp. 545, 546, Nos. 2436-2442.

For the Limitation Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 225.]

Case referred to :

(1) *West Ham Corpn.* v. *Sharp*, [1907] 1 K.B. 445 ; 26 Digest 546, *2439* ; 76 L.J.K.B. 307 ; 96 L.T. 230.

Appeal by the defendant from an order of His Honour Judge Cave, K.C., made at Poole County Court, and dated Jan. 25, 1945. The plaintiffs, the urban sanitary authority in the borough of Poole, claimed a declaration that they were entitled under the Private Street Works Act, 1892, s. 13, to a charge on the defendant's premises for the sum of £129 12*s.* 1*d.*, being the balance of the sum of £132 12*s.* 1*d.*, the apportioned expenses incurred by the plaintiffs in executing private street works under sect. 6 of the 1892 Act and payable by the defendant together with interest at the rate of £5 per cent. per annum from

June 27, 1933, the date of the final apportionment of such expenses. The plaintiffs further asked for an order that for the purposes of enforcing the charge the said premises be sold and the proceeds of the sale applied in payment of the said charge. The date on which the expenses were incurred by the plaintiff, and from which they became entitled to recover them, was Mar. 18, 1933. The claim was brought on Nov. 17, 1944. The county court judge gave judgment in favour of the plaintiffs in the terms asked for by the plaintiffs, including the A arrears of interest, and ordered the sale of the premises. The facts and arguments are set out in the judgment of the court, delivered by MORTON, L.J.

Richard O'Sullivan, K.C., and *W. G. H. Cook* for the appellant (defendant).

G. D. Squibb for the respondents (plaintiffs).

MORTON, L.J. [delivering the judgment of the court]: As this case turns upon the interpretation of certain sections in the Private Street Works Act, B 1892, and the Limitation Act, 1939, it is convenient to refer first to those statutes before stating the facts of the case. The Private Street Works Act, 1892, is an adoptive Act, and it is common ground that the statute has been adopted by the plaintiffs in this action, the Mayor, Aldermen and Burgesses of the borough of Poole, and it is common ground that they are an urban sanitary authority. I need not, I think, refer to the definition of "street" in sect. 5, or to the provisions of sect. 6 because really the only point argued in this case is C how far the claim of the plaintiffs is barred by the Limitation Act. Sect. 7 gives certain powers for the owners of premises liable to be charged with part of the expenses of carrying out works, to raise objections on certain grounds. Sect. 8 provides for the hearing and determination of objections. Sect. 10 contains certain provisions as to the apportionment of expenses. Sect. 12 provides for the making of a final apportionment of expenses and provides for objection by the person charged upon certain grounds, but the really important D sections are sects. 13 and 14.

Sect. 13 (1) is as follows:

> Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under sect. 257 of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the E rate of four pounds per centum per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver.

It seems to me that that subsection falls into two parts. The first part ending with the words "four pounds per centum per annum" charges upon the premises the sums which are payable in respect of these premises under the final apportionment, F and the latter part of the subsection beginning with the words "and the urban authority shall" confers certain powers and remedies upon the urban authority. But to my mind the conferring of these powers and remedies in no way detracts from the rights which may already have been conferred on the urban authority by virtue of the charge created by the first half of the subsection. Subsect. (2) of sect. 13 provides for the keeping of a register of charges and I need not read it. Sect. 14 is as follows:

G

> The urban authority, if they think fit, may from time to time (in addition and without prejudice to any other remedy) recover summarily in a court of summary jurisdiction, or as a simple contract debt by action in any court of competent jurisdiction, from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion of such sum, together with interest at a rate not exceeding four pounds per centum per annum, from the date of the final apportionment till payment thereof.

H That gives a particular power to the urban authority to recover the sum in question by a particular form of action, but it does not in any way detract or take away from the powers already conferred by sect. 13.

Before referring to the Limitation Act, 1939, I think it is convenient that I should state exactly what is the nature of the proceedings before us. The plaintiff's claim is, so far as material, in the following terms:

> The plaintiffs' claim is as the urban sanitary authority within the Public Health Acts in the borough of Poole against the defendant Ernest Frederick Moody, the owner of the premises hereinafter referred to for (1) a declaration that the plaintiffs are

> entitled under the Private Street Works Act, 1892, s. 13, to a charge on the premises known as Retour, 34 Cornelia Crescent, within the said borough of Poole for the sum of £129 12*s.* 1*d.*, being the balance of the sum of £132 12*s.* 1*d.*, the apportioned expenses incurred by the plaintiffs in executing private street works under sect. 6 of the said Act and payable by the defendant in respect of the said premises together also with interest on the said sum of £129 12*s.* 1*d.*, at £5 per centum per annum, from June 27, 1933, the date of the final apportionment of such expenses, together also with the plaintiffs' costs of this action and that such charge is entitled to priority over any other mortgage or charge on the said premises (if any). A

Then the plaintiffs ask for: "An inquiry (if necessary)" as to any other incumbrances on the property. They ask, thirdly, for:

> An order that for the purpose of enforcing the said charge of the plaintiffs the said premises be sold and the proceeds of such sale applied in payment of the said charge including the costs of this action.

Fourthly, they ask for a receiver, and fifthly: "Such further or other relief B as the circumstances of the case may require." The claim then sets out that: "The defendant is sued as the owner of the above-mentioned premises," and it sets out the amount of the plaintiffs' claim to the date of the plaint, that claim being £129 12*s.* 1*d.*, and £72 8*s.* 0*d.* for interest, making a total sum of £202 0*s.* 1*d.*

In his defence the defendant admits that "he is the owner of the premises known as "Retour," 34, Cornelia Crescent, within the borough of Poole." Then there are certain other defences set up to which I need not refer because they C were not relied upon before this court, but para. 4 is as follows:

> In the alternative if any such sum was at any time due from the defendant to the plaintiffs such claim is barred by a Statute of Limitations.

I understand from counsel for the appellant, that there is no dispute that the date on which the expenses were incurred by the plaintiffs, and from which they became entitled to recover them, is Mar. 18, 1933. D

The appellant, the defendant before the county court judge, relied on the provisions of the Limitation Act, 1939. I should have said that the claim which I have read is dated Nov. 17, 1944. Sect. 2 of the Limitation Act, so far as material, is as follows: Subsect. (1):

> The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say [I do not think (*a*), (*b*) and (*c*) are material] (*d*) actions to recover any sum recoverable by virtue of any enactment, E other than a penalty or forfeiture or sum by way of penalty or forfeiture.

Subsect. (3) deals with actions upon a specialty the period for which is twelve years from the accrual of the cause of action; and subsect. (7), which is to my mind of great importance, is in the following terms:

> This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof F may be applied by the court by analogy in like manner as the corresponding enactment repealed by this Act has heretofore been applied.

Sect. 18 (1) is as follows:

> No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued. G

Subsect. (5) of that section is as follows:

> No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due . . . .

I should mention, though I do not think it affects the decision of this court, H that by an order made in 1933, an order which it is admitted by the defendant was properly made, the plaintiffs, reciting that they had incurred expenses amounting to the sum of £132 2*s.* 1*d.* in respect of the house known as "Retour" declared that:

> . . . such expenses shall be payable in ten annual instalments of £13 4*s.* 3*d.* each, on the first day of July in each year with interest computed from June 27, 1933, the date of the final apportionment, at the rate of £5 per centum per annum on the balance for the time being remaining due until the whole of such sum shall be paid, the first of such instalments with interest to be paid on the first day of July, 1934.

So that it is clear that the whole of these instalments had become payable before this action was brought. I should say that the county court judge based his judgment in favour of the plaintiffs very largely, if not entirely, upon the existence of that order for payment by instalments.

The contentions raised on behalf of the appellant, the defendant in the action, can be stated quite briefly. Counsel on his behalf points to the wide definition of "action" in the Limitation Act, 1939, s. 31. That definition is as follows:

> 'Action' includes any proceeding in a court of law, including an ecclesiastical court.

He then referred the court to sect. 2 (1) (*d*), and contended that this action is an action to recover a sum recoverable by virtue of an enactment, namely, by virtue of the Private Street Works Act, 1892. That being so, it is contended that the action is statute-barred as the period of six years has been exceeded.

I am prepared to assume in favour of the appellant that the action with which we are concerned is an action to recover a sum recoverable by virtue of any enactment, but to my mind it is quite immaterial whether that is so or not, because I am clearly of opinion that sect. 2 (7) applies. I have already read that subsection and it will be observed that it provides "This section shall not apply to any claim for," *inter alia*, "other equitable relief." To my mind, this action, not being a claim for specific performance of a contract or for an injunction, is quite plainly a claim for "other equitable relief." It is a claim by a chargee of land asking the court to apply the very ordinary equitable remedy of having the land sold and applying the proceeds in payment of the sum charged on the land. That is done over and over again by the court in the exercise of its equitable jurisdiction. One example of an exercise of that equitable jurisdiction to which we were referred is in *West Ham Corpn.* v. *Sharp* (1), but it is a perfectly ordinary jurisdiction where a man has a charge upon land to secure a particular sum, and it is to my mind essentially an equitable relief. In fact, if it is not equitable relief I have difficulty in seeing how it can be described.

That being so, sect. 2 of the 1939 Act is entirely out of the case and the appellant cannot rely upon it and one must look elsewhere to see what is the period of limitation in this particular action. To my mind, it plainly is the period laid down in sect. 18, that is to say, twelve years from the date when the right to receive the money accrued. That being so, the proceedings are not out of time and the plaintiffs, so far as the principal sum is concerned, are entitled to succeed.

As regards the interest, it does not appear to have been argued before the county court judge, at least, I can find no trace of it in his notes, as to whether the plaintiffs were entitled to recover the whole of the arrears of interest or only interest which became due within six years from the date when the proceedings were commenced. In fact, the judgment of the county court judge contains an order precisely as asked for by the plaintiffs, and that includes a statement that the charge extends to the whole of the interest, namely, the sum of £72 8*s.* 0*d.* I see no ground on which the plaintiffs can escape from the provisions of sect. 18 (5) of the Limitation Act, 1939. It seems to me that this is an action to recover arrears of interest payable in respect of a sum of money secured by a charge, and that the present case comes exactly within the terms of the subsection. I do not think that that position is affected in any way by the order for payment of instalments, and it seems to me that the order of the county court judge must be varied in the respect which I have indicated, so that the interest recoverable on a sale of the land and application of the proceeds is limited to the interest defined in the Limitation Act, 1939, s. 18 (5). To that extent I think this appeal succeeds, but as regards the rest of the claim I think the county court judge's decision is correct.

LAWRENCE, L.J.: I agree.

UTHWATT, J.: I agree.

Appeal dismissed with costs subject to a variation by limiting the interest recoverable to a period of six years immediately preceding the issue of the plaint.

Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the appellant); *Sharpe, Pritchard & Co., agents for Wilson Kenyon*, Town Clerk, Poole (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HECTOR STEAMSHIP CO., LTD. *v.* V. O. SOVFRACHT, MOSCOW.

[King's Bench Division (Atkinson, J.), **February 22, 1945.**]

Shipping—Charterparty—Time charter—Extension of period to complete voyage—Exercise of option on charter period extension—When period of charter ended—Whether hire after charter period ended payable at charter rate or market rate—Meaning of "will be exceeded."

By a charterparty dated June 1, 1939, the steamship Alex was chartered by the claimants to the respondents "for a period of about three calendar months." The last paragraph of cl. 6 provided that: "Should the steamer be ordered on a voyage by which the charter period will be exceeded charterers to have the use of the steamer to enable them to complete the voyage, but for any time exceeding termination date charterers to pay market rate if higher than rate stipulated herein." In cl. 26 the word "about" was defined as meaning "not exceeding ten days." Cl. 34 was as follows: "Charterers have the option of continuing this charter for a further period of about one month, option one further month, on giving owners five days' notice before the expiration of the third or fourth month in each case." The vessel was delivered to the respondents on June 7, 1939. While the vessel was at Archangel on Sept. 1, 1939, loading cargo, the respondents sent the claimants the following telegraphic notice: "Alex according to cl. 34 time-charter will use option one month. Confirm." Loading was completed on Sept. 4, 1939, and by the terms of the bill of lading the vessel was to proceed to Rotterdam or Velzen in Holland. It was found as a fact that it was reasonably contemplated that this voyage would be completed well within the contract time. There were various delays in the course of the voyage and the vessel was finally redelivered to the claimants on Dec. 16, 1939. In the proceedings before the arbitrator the two main issues were: (i) whether the charter period ended on Oct. 17, or on Oct. 27, 1939; (ii) whether hire, for the time after the charter period ended, was payable at the charter rate or at the market rate. The arbitrator found (1) that the charter period was extended to Oct. 27, 1939; (ii) that the last paragraph of cl. 6 never came into operation as the steamer was not ordered on a voyage by which the charter period would have been exceeded within the meaning of cl. 6:—

Held: the arbitrator was right in both his findings. The words "will be exceeded" in cl. 6, properly construed, only applied to voyages which should never have been ordered and which would inevitably lead to a failure to redeliver within the contract time.

[**EDITORIAL NOTE.** It is generally impossible to arrange that the last of a series of voyages shall finish precisely on the date mentioned in the charterparty. If the voyage ordered can reasonably be expected to be completed within the contract period and the failure to complete is not due to the charterer's default, he will not under a clause such as that here in issue be liable to pay market rate in excess of contract rate as damages. The court refused to read the clause as meaning "should the vessel be sent on a voyage which in fact exceeds the charter period."

As to Duration of Charter and Redelivery of Ship to Owner, see HALSBURY, Hailsham Edn., Vol. 30, pp. 299, 300, paras. 492, 493; and for Cases, see DIGEST, Vol. 41, pp. 363-366, Nos. 2115-2128.]

Cases referred to:

(1) *Gray & Co.* v. *Christie & Co.* (1889), 5 T.L.R. 577; 41 Digest 364, *2118*.

(2) *Watson S.S. Co., Ltd.* v. *Merryweather & Co.* (1913), 108 L.T. 1031; 41 Digest 365, *2122*.

Special Case Stated by a legal arbitrator for the decision of the court on two points of construction relating to a charterparty made on June 1, 1939. The facts are fully set out in the judgment of Atkinson, J.

Sir Robert Aske, K.C., and *A. J. Hodgson* for the claimants.

Patrick Devlin for the respondents.

Atkinson, J.: The charterparty was made on June 1, 1939, and, by it, the steamship Alex was chartered by the claimants to the respondents for a period of about three calendar months, starting on June 7, 1939. Cl. 5 provided that the charterers were to pay 3*s.* 9*d.* per ton deadweight per calendar month or *pro rata.*

Then part of cl. 6 said :

> Should steamer be ordered on a voyage by which the charter period will be exceeded charterers to have the use of the steamer to enable them to complete the voyage, [provided it could be reasonably calculated that the voyage would allow redelivery about the time fixed for the termination of the charter. These words had been deleted.] but for any time exceeding termination date charterers to pay market rate if higher than rate stipulated herein.

Cl. 26 said :

> It is understood that the period " about " is to read not exceeding ten days.

Cl. 34 said :

> Charterers have the option of continuing this charter for a further period of about one month, option one further month, on giving owners five days' notice before the expiration of the third or fourth month in each case.

The relevant facts which have been found are that the vessel was delivered on June 7, 1939, and carried out various voyages ; on Sept. 1 she was at Archangel loading a cargo of pulp-wood, and while there the charterers sent a cable to the claimants exercising the first of their options. The words of the cable were :

> Alex according to cl. 34 time charter will use option one month. Confirm.

Loading was completed on Sept. 4, on which day a bill of lading was issued, and under the terms the vessel was to proceed to Rotterdam or Velzen in Holland.

It is found as a fact that it was reasonably contemplated that this voyage would be completed well within the contract time, but for a number of reasons delivery was not achieved by that date. As indicated in para. 3 of the case, she was delayed from sailing until Sept. 22 ; she arrived at Narvik on Sept. 29 ; she had to wait for a convoy until Oct. 26 ; she got to the Tyne on Nov. 2, and remained there until Dec. 9, when she sailed for Holland, and was finally redelivered on Dec. 16.

There were a number of matters in dispute, but, in the end, the only issues remaining were three and I am only concerned with two of them. The first was the date the charter period ended. Was it Oct. 17 or Oct. 27 : in other words, when did the option which was to be exercised for a period of about a month, begin to run ? The arbitrator took the view that that extended the contract period up to Oct. 27.

The second question was : whether hire for the time after the charter period ended was payable at the charter rate or the market rate ? The freight rates had risen very considerably and it made a very substantial difference whether the freight was payable at the contract rate or at the market rate. As to the second question the case says :

> As to whether hire after the charter period ended was payable at the charter rate or the market rate depends partly upon the construction of the last paragraph of cl. 6 of the charterparty. The claimants contended that this paragraph must be read as though the words " will be exceeded " meant " is exceeded " and they further contended in support of that construction that the tribunal was entitled to look at and take into account the deleted words in the paragraph. The respondents on the other hand contended that the tribunal was not entitled to consider the deleted words and that the words " will be exceeded " must be read in their natural meaning, that is to say, the words " will be " relate to the time at which the voyage is ordered. [Then come these important words]. It was conceded on behalf of the claimants that if their construction of the clause was wrong the charterparty rate should apply throughout.

The arbitrator finds as a fact that the voyage was ordered on Sept. 4, and goes on to find :

> That on the date when the voyage was ordered as stated it was reasonable to conclude that it would be completed by Oct. 17. I was of opinion that I was not entitled to look at the deleted words. I was further of opinion that having regard to the facts found by me the paragraph in question never came into operation because the steamer was not ordered on a voyage by which the charter period would be exceeded within the meaning of cl. 6.

If the arbitrator was right in that view it is immaterial whether the final contract date was Oct. 17, or Oct. 27. I think he was right.

Both sides approach the construction of cl. 6 by a consideration of the position as if there were no such clause. Mathew, J., in *Gray & Co.* v. *Christie & Co.* (1), said this, at p. 577 :

> Looking at the terms, it was true that it was a time charter, but it was also a voyage charter, and it could not have been in the contemplation of the parties to do anything so unbusinesslike as to make it a breach of the charterparty to send the steamer on a voyage which could not be completed by the [due date].

Atkin, J., in *Watson Steamship Co.* v. *Merryweather & Co.* (2), at p. 300, stated the position quite clearly :

> Under a charterparty of this kind the general position is that in the absence of an express provision the parties are not bound to regard the period for terminating the contract as a time which is of the essence of the contract, but that the exigencies of maritime business demand that the charterers should have a reasonable time within which the hire shall continue after the date fixed for redelivery ; in other words, it is contemplated that the ship shall go on a succession of voyages, and as it is impossible to arrange that the last voyage shall end precisely at the date mentioned, the document must be construed reasonably, and it would not be a breach of the contract if the ship were redelivered within a reasonable time afterwards if it was the case that she was on a voyage on which she was reasonably sent during the subsistence of the contract.

Time may, of course, be made of the essence of the contract, and when it is so made the charterer must not order a voyage which cannot reasonably be expected to be completed by the fixed date. But clearly, on the same principle as that enunciated in the two cases to which I have referred, he must be entitled to order a voyage which can reasonably be expected to be completed within the contract period, and in so doing he is not guilty of a breach. If, in fact, the ship does not arrive within the time reasonably expected and not until after the contract date, it does not necessarily follow that the charterer is at fault. He must, of course, pay for it until redelivery, but not necessarily a market rate in excess of contract rate on the basis of damages for a breach. There may be many reasons for late redelivery for which the charterer is not responsible. For example, in this case cll. 2, 10 and 12 impose obligations upon the owner. The ship may be late for want of proper provisions or stores ; there may be a suspension of hire due to causes for which the owner is responsible ; there may be delay due to the ship not being seaworthy. Where the late redelivery is one for which the charterer is responsible the breach is not in the ordering of the voyage, providing it is one which could reasonably be expected to end within the contract period, but is in the failure to redeliver.

In this case there is no finding that the charterer has been guilty of a breach in not delivering by the due date. It is said that, in this charter, time was of the essence of the contract—and, without so deciding, I shall assume that it was—and that either Oct. 17 or Oct. 27 was the latest date for redelivery. Even so, the finding is that the voyage was one which could reasonably be expected to be completed so that the ship could be and would be redelivered within the contract time, and, as I repeat, there is no finding that the unexpected delay was a breach by the charterers. Therefore, apart from cl. 6, it seems clear that there is no liability for excess freight ; indeed, at the end of para. 8 of the case it says :

> It was conceded on behalf of the claimants that if their construction of the clause was wrong the charterparty rate should apply throughout.

It is not contended that this higher rate is payable as damages for non-delivery by the contract date. Junior counsel for the claimants has pointed out what has not been pointed out before, that the points of claim are based simply and solely upon cl. 6 and not upon a breach of contract for failure to deliver.

Therefore, I approach cl. 6 bearing in mind that the ordering of a voyage which cannot reasonably be expected to be completed by the contract date would be a breach of contract and that the charterer would not have a contractual right to have the use of the steamer to enable him to complete the voyage, and that, on the other hand, the ordering of a voyage which could reasonably be expected to be completed by the contract date would not be a breach of the contract. It seems to me plain that the clause is dealing only with something which is *ex necessitate* a breach, namely, an ordering of a voyage which the charterers have no right to order. In such a case the higher rate may be demanded. What is dealt with is clearly an ordering of a voyage which will, not which may—I do not care whether "will" means "shall" or not—*ex necessitate* exceed the charter period. I have no doubt myself that the ordinary business man, reading this clause, would give it the meaning I have ascribed to it.

It is said that I must read the clause as if the words were, "should the steamer be sent on a voyage which in fact, or which in the result, exceeds the charter period." All I can say is that it would have been very easy to say so, if that A was the intention. I cannot think of anything more easily put into simple language, and I can see no warrant for reading the clause as if it contained words other than those which it in fact contains. It seems to me that it is a fallacious principle of construction to change the words of the clause and proceed to construe the changed words. My duty is to construe the words which have been used. To my mind, the words "will be" suggest something inevitable at the time of ordering, and, so construed, the clause has a natural and reasonable B meaning. It deals with voyages which should never have been ordered and which would inevitably lead to a failure to redeliver within the contract time.

The construction contended for by the owners would turn the clause into an agreement to pay damages for not delivering in every case although the voyage was properly ordered and the delay was not a delay for which the charterers were responsible—indeed, for a delay for which the owners themselves were to C blame. I have to give a reasonable construction to this clause, and, to my mind, it is not reasonable to give it a construction which imposes upon the charterers the obligation of paying higher freight for a delay for which the owners themselves may be responsible.

Another argument used was that I must ignore the word "but," and read the final sentence as if there was a full stop after the word "voyage," starting a new sentence with the words, "for any time exceeding termination date charterers D to pay market rate." I am asked to read it disjunctively, as if those words were unrelated to what goes before. Again, there is no warrant for doing anything of the sort. I have got to construe what is there, not what the owners would like to have there.

Taking this view, it seems to me that it is unnecessary to consider on which date the contract terminated. My inclination, if I had to decide it, would be to agree with the arbitrator. It seems to me that the words, "charterers E have the option of continuing this charter for a further period of about one month," must indicate that the continuing does not begin until the charter period is ended. The whole claim of the claimants has been that this is a fixed time contract to be read as if it were a charter up to a fixed date, that is, Sept. 17. You can only continue that charter by starting from Sept. 17; anything up to Sept. 17 is not a continuation; and if you have a right to continue it from F Sept. 17 for about a month, that seems to me to add to the charterparty a month plus 10 days.

I think the award was right.

Solicitors: *Ince, Roscoe, Wilson & Griggs* agents for *Allen Pratt & Geldard*, Cardiff, (for the claimants); *Lawrence Jones & Co.* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

CLEGHORN *v.* SADLER.

[King's Bench Division (Croom-Johnson, J.), **March 6, 1945.**]

Libel and Slander—Slander—Firewatcher—Firewatcher entrusted with keys of houses—Allegation that keys improperly used—No proof of special damage—Whether firewatching an office or a duty.

Practice—Submission of no case—Words complained of not actionable without proof of special damage—No special damage alleged or proved—Whether judge's ruling necessary immediately after submission.

The plaintiff was a firewatcher and, as such, was entrusted with the keys of houses under her charge. The defendant in the course of an argument, alleged that the plaintiff had used the keys for the purpose of prying into rooms, cupboards and personal effects. In an action for slander of the plaintiff it was found that the defendant had uttered the words complained of. On behalf of the plaintiff it was contended that the words were spoken of the plaintiff in respect of her office as a firewatcher and, therefore actionable without proof of special damage. It was contended on behalf of the defendant (i) that there was no case to answer as there was no special damage proved or alleged ; (ii) that firewatching was a duty, not an office and, therefore, an imputation of misconduct was not actionable :—

Held : (i) since the circumstances of the case necessitated the hearing of all evidence for the purpose of ascertaining whether the plaintiff held an office or not, if there is a practice of giving a ruling immediately after counsel's submission of no case in an action of defamation it could not be followed.

Parry v. *Aluminium Corpn., Ltd.* (2) *distinguished.*

(ii) firewatching was a duty and not an office from which a person could be removed for misconduct. Therefore the words complained of by the plaintiff were not actionable without proof of special damage.

[**EDITORIAL NOTE.** This case raises a curious point in relation to slander actionable *per se*, alleging misconduct in office. It has been held that it must be established that the conduct assigned would be good ground for removal from office. Here, however, the occupation consisted in a public duty from which removal was impossible, even by order of the Government, and it is held, therefore, that it did not constitute an office of honour or credit within the ambit of the cases on this point. On the question of ruling on counsel's submission of no case the court distinguishes the *dictum* of Goddard, L.J., in *Parry* v. *Aluminium Corpn., Ltd.* (2) on the ground that in a slander action such as this the judge must hear all the evidence in order to ascertain whether the rule about special damage having to be proved applies or not.

As to Defamatory Statements Actionable *per se*, see HALSBURY, Hailsham Edn., Vol. 20, pp. 412-421, paras. 496-506 ; and for Cases, see DIGEST, Vol. 32, pp. 31-59, Nos. 233-866.

As to Submission of No Case, see YEARLY PRACTICE OF THE SUPREME COURT, p. 620.]

Cases referred to :

*(1) *Alexander* v. *Jenkins*, [1892] 1 Q.B. 797 ; 32 Digest 44, *463* ; 61 L.J.Q.B. 634 ; 66 L.T. 391.

*(2) *Parry* v. *Aluminium Corpn., Ltd.* (1940), 162 L.T. 236 ; Digest Supp.

Action for slander of a firewatcher. No special damage was alleged or proved. The point at issue was whether firewatching was a duty or an office. The material facts and arguments are fully set out in the judgment.

L. Freedman for the plaintiff.

R. T. Paget for the defendant.

Croom-Johnson, J. : The plaintiff said that the language used was that when she had been entrusted with the keys of houses up the road she used them for the purpose of prying into their rooms, cupboards and personal effects. The defendant said :

> No, I never said anything like that. I did not know anything about the fact that the plaintiff was a warden and had been a fire watcher. I did not say anything until the plaintiff shouted at me " You are a dirty woman."

Whereupon the defendant instead of responding in kind, remonstrated in a pained way to the plaintiff, saying :

I really do not know why you are being such a bad friend ever since we went for our holiday. You must be upset because I locked up the doors when away so that you could not pry into our things.

In these circumstances I can do no other than find, as I do find, that the words complained of in this action were uttered by the defendant. That being the position, no one suggested that anybody believed these words to be true. There was a lot of half-hearted suggestion that the action was A brought in order to stop the defendant repeating these words. I have not heard of any occasion when the defendant did, and I observed that in the statement of claim there was no claim for an injunction. What was submitted on behalf of the defendant was something which went to the root of the action altogether, namely, that the words were not actionable without proof of special damage, and none was alleged. The innuendo in this case alleged that these words were uttered to the plaintiff in respect of her firewatching duties and alleged B that in respect of her firewatching duties she had abused her duties; and it went on to say, had committed a criminal offence. A little examination of the possibility of those words imputing a criminal offence within the meaning of what has to be done in that matter induced counsel for the plaintiff to bow to the inevitable and to abandon that part of his claim. The claim was put in this way, that these words were uttered of the plaintiff in respect of her office of a firewatcher and touching her in that office. The words of the pleading were "falsely and maliciously C speaking and publishing of the plaintiff," and there was nothing about her office of a firewatcher at all. However, I have dealt with the case without objection as though the pleadings were in order, as though these pleadings said that these were words spoken of the plaintiff in her said office.

The question is: Has the plaintiff any such office? What is the position about it? No evidence has been called on behalf of the plaintiff to show that D there is an office of firewatching. If the words had been spoken of the plaintiff as an air-raid warden, or something of that sort, it is a possibility that that would have been an office, but what is the position with regard to a firewatcher? This is of some importance, because when looking to see whether an action lies for words without proof of special damage, one of the accepted exceptions in the judgment of LORD HERSCHELL, in *Alexander* v. *Jenkins* (1), at p. 802, is:

> . . . where the imputation is an imputation not of misconduct in an office, but of E unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office.

One of the difficulties I feel is that at most the imputation is an imputation of misconduct in an office, not of unfitness for an office with which LORD HERSCHELL F was dealing. I have to consider whether that makes any difference. I do not at the moment see how this being an office of honour or credit, if it is an office at all, makes any difference, and, that being so, I go back to consider the question, assuming that the words were spoken of the plaintiff as a firewatcher which, as I have said, is not pleaded—Is that an office within the meaning of the word? It has been said that in order to show that the words are actionable it has to be established that the conduct assigned would be good ground G for removal from the office if proved. As I have said already, I cannot think of any more dreadful way for a firewatcher to behave in his office, if any, than to use his powers with the custody of keys, and so on, to pry into his neighbour's affairs, prying being, according to the definition in the SHORTER OXFORD DICTIONARY, synonymous with spying, inquisitive, or impertinently peering.

Now what is the position about firewatching? Firewatching is a duty. Firewatching is something which, since the Civil Defence Duties (Compulsory H Enrolment) Order, 1942 (S.R. & O., 1942, No. 1654), is imposed upon all citizens, but I cannot see that it is anything other than a duty. I cannot see that there is any office from which a person is removable. Counsel for the defendant has told me, and I observe it has not been denied at the Bar, that in the Civil Defence Duties (Compulsory Enrolment) Order, 1942 (S.R. & O., 1942, No. 1654) there is no power either in the Home Secretary or anybody else—the Minister of Home Security, I suppose—to remove anybody from being a firewatcher. If there is no power to remove, how can it be said that conduct of the nature assigned makes him liable to removal? I confess I do not see the answer to that. I think the result of it is that these words, although spoken, were not spoken of the plaintiff in her office. She held no office. I have no doubt she did her duty as a firewatcher, as most citizens have to do, and that this particular citizen did it long before she was under any compulsion. But I still cannot see that she can make out her ground for saying that these words were words which affected her in any office. After all, what is the misconduct alleged ? What I may call social misconduct. It may be very unpleasant to have somebody who pries. To be a Paul Pry is perhaps an accusation of opprobrious conduct, but it is not misconduct ; it is not anything with regard to which you can be sued, it is not anything with regard to which you can be prosecuted, unless possibly your motive is a criminal motive, which, of course, is not suggested in a case of this sort. In these circumstances I am bound to give effect to the legal plea which is advanced in para. 2 of the defence :

> The said words are not actionable without proof of special damage and none is alleged.

I do not part from the case without adding a word on another part of it. At the conclusion of the case for the plaintiff, counsel for the defendant submitted to me that I must rule about that matter without his calling any evidence and that he was entitled to have my ruling at that stage, and he referred me to a judgment of GODDARD, L.J., as he then was, in the case of *Parry* v. *Aluminium Corpn., Ltd* (2). That case deals with a question of modern practice, when no case is submitted at the conclusion of the plaintiff's case of making the defendant elect whether to call evidence or to abstain, and if he elects to call evidence, to postpone the ruling on the submission until all the evidence is out. GODDARD, L.J., said this, at p. 237 :

> I do not say that it is the right course in every kind of action, because in defamation cases, for instance, I believe there is authority for saying that, if it is submitted that there is no evidence of malice, the judge is bound to rule. Also in slander cases the judge must rule if the submission is made that the words are not actionable without proof of special damage and no special damage is alleged.

I do not think GODDARD, L.J., had visualised, when he made those observations about a slander action, a case like the present where all the evidence had to be heard in order that I might ascertain whether the plaintiff had an office at all so as to see whether the rule about special damage having to be proved applied or not. I say nothing about the one about malice, although, of course, it is possible that evidence of malice when privilege is pleaded may be even found out of the defendant's demeanour in the witness box. The only other thing I have to say is that counsel has told me that they have not found the authorities to which GODDARD, L.J., referred. I do not know of one myself, although, of course, until the rule was in recent years laid down about the right thing to do upon submissions of no case, it was common practice to submit in a libel action or a slander action at the conclusion of the case and to ask for a ruling then and there, although judges very often said, " I will not rule now, I will wait until the conclusion of the case." That is what I feel in the present case. With great respect to the judgment of GODDARD, L.J., I did not feel myself bound, and I do not feel myself bound, to rule at the conclusion of the plaintiff's case in a case like the present. I did not do so. I thought it right that I should hear all the evidence so that the parties might go away feeling that the whole of their dispute had been dealt with by the tribunal which they wished to hear it. There will be no costs.

Action dismissed.

Solicitors : *Lattey & Dawe* (for the plaintiff) ; *Langlois, Harding, Tate & Johnson* (for the defendant).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re BOX'S SETTLEMENT, BOX *v.* PLAUT.

[CHANCERY DIVISION (Cohen, J.), **February 28, 1945.**]

Powers—General and special powers of appointment conferred by settlement—Powers exercisable by deed or will—Will—Testator devising and bequeathing all real and personal estate to future wife—Exercise of special power in will by appointing income of trust funds to future wife for life after testator's death—Residuary devise and bequest—General bequest of personalty operating as valid exercise of general power—Wills Act, 1837 (*c.* 26), *s.* 27.

By a settlement, made on Feb. 28, 1925, the testator directed the trustees to hold the settled property upon trust for him for life, and, after his death, for his issue as he should appoint, and in default of and subject to such an appointment, in trust for his children. By cl. 4 the testator was also empowered to appoint an interest for life in favour of any wife who might survive him. If the testator had no child who attained a vested interest, then, subject to an appointment under cl. 4, it was declared that the trustees should hold the trust funds and the income thereof in trust for such persons and purposes and in such manner as the testator might by deed or will appoint, and in default of or subject to such an appointment in trust for the testator's brothers or sisters. On Sept. 12, 1939, the testator, in contemplation of his marriage with A, made a will whereby he devised and bequeathed all his real and personal estate whatsoever and wheresoever to A absolutely. In exercise of the powers vested in him under the settlement, he appointed to her absolutely the capital and income of the trust funds comprised therein from and after the date of his death, if at such date he should be unmarried, or the income thereon from the date of his death during her life if the intended marriage had taken place and she should survive him. There was also a residuary devise and bequest in case A should predecease him and die unmarried. On Feb. 15, 1941, the testator married A, and on June 9, 1941, he died on war service. There was no issue of the marriage. The question for the determination of the court was whether, though the testator had duly exercised the special power to give A a life interest, there had been an exercise of the general power in her favour:—

HELD: in the circumstances the testator intended to exercise the general power in any event and had only refrained from doing so expressly because he had not contemplated the possibility of his predeceasing his wife and leaving no issue. A contrary intention not having been established, the general bequest operated, by the Wills Act, 1837, s. 27, as an exercise of the general power. The powers of appointment conferred by the settlement were, therefore, duly exercised in favour of the testator's widow.

[**EDITORIAL NOTE.** It was here suggested in regard to the exercise of a general power by will that a contrary intention within the Wills Act, 1837, s. 27, was established by the cumulative effect of the three points that (*a*) the testator appointed a life interest to his widow under a special power; (*b*) he distinguished between his own property and the settled funds; (*c*) the gift of his own property to his widow was not residuary in form. The court holds that looking at the will as a whole it was the intention of the testator to exercise the power in any event.

AS TO EXERCISE OF POWER BY WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 148-153, paras. 195-200; and FOR CASES, see DIGEST, Vol. 37, pp. 441-443, Nos. 459-472.]

Cases referred to:

*(1) *Scriven* v. *Sandown* (1862), 2 John. & H. 743; 37 Digest 442, *462*; 70 E.R. 1258.
*(2) *Re Stokes, Public Trustee* v. *Brooks*, [1922] 2 Ch. 406; 37 Digest 442, *465*; 91 L.J.Ch. 774; 127 L.T. 92.
*(3) *Re Elen, Thomas* v. *McKechnie* (1893), 68 L.T. 816; 37 Digest 466, *660*.
(4) *Re Spooner's Trust* (1851), 2 Sim. N.S. 129; 37 Digest 440, *447*; 21 L.J.Ch. 151; 18 L.T.O.S. 269.

ADJOURNED SUMMONS to determine the question whether the powers of appointment conferred on the testator by a settlement, made on Feb. 28, 1925, were duly exercised by his will, made on Sept. 12, 1939, in favour of his widow, the defendant. The testator died on June 9, 1941, and the summons was taken out by the surviving trustee of the settlement. The facts and arguments are sufficiently set out in the judgment.

H. O. Danckwerts for the plaintiff trustee.
Geoffrey Cross for the testator's widow and another defendant.
A. C. Nesbitt for the testator's brother and sister.

Cohen, J.: By a settlement made on Feb. 28, 1925, between Leslie Bowen Box, to whom I shall refer hereafter as "the testator," of the first part, Henry Thomas Box of the second part, and George Frederick Forsdike (who is now dead) and the plaintiff, as trustees, of the third part, the testator assigned to the trustees his reversionary interest under a settlement of Dec. 30, 1902, and his interest under the will and codicils of John William Alfred Stevens, who died on Nov. 17, 1909. By such settlement the trustees were directed to hold the settled property upon trust for the testator for his life, and after his death in trust for his issue as he should appoint and in default of and subject to such appointment, in trust for his children or child who being sons or a son should attain 21 or being daughters or a daughter should attain that age or marry and if more than one in equal shares. By cl. 4 the testator was empowered to appoint an interest for life or any less period in favour of any wife who might survive him. By cl. 5, if the testator had no child who attained a vested interest then, subject to any interest appointed to a wife under cl. 4, it was declared that the trustees:

> . . . shall hold the trust funds and the income thereof or so much thereof respectively as shall not have become vested or been applied under any of the trusts or powers herein contained or by statute implied in trust for such persons and purposes and in such manner as the settlor shall by deed or will or codicil appoint and in default of and subject to any such appointment in trust for all the brothers and sisters of the settlor who shall attain the age of 21 years and if more than one in equal shares.

In 1939 the testator was minded to marry a Miss Anne Ruth Allen, and with that in view on Sept. 12, 1939, he made his will which, so far as material was in the following terms:

> I hereby revoke all former wills and testamentary instruments made by me and in contemplation of my marriage with Miss Anne Ruth Allen devise and bequeath all my real and personal estate whatsoever and wheresoever to her absolutely and in exercise of the powers vested in me under my settlement of Feb. 25, 1925, I appoint to her absolutely the capital and income of the trust funds comprised therein from and after the date of my death if at such date I shall then be unmarried or the income thereon from the date of my death during her life if such marriage shall have taken place And I hereby declare that this my will shall be effective and shall remain in full force and effect whether such marriage takes place or not. If the said Anne Ruth Allen shall predecease me unmarried then I bequeath all my property and hereby exercise such power of appointment over the capital and income of the said trust funds to and in favour of the president and governors of the hospital founded at the sole cost and charges of Thomas Guy Esquire commonly called "Guys Hospital" London for the general purposes of the hospital.

Then the testator appointed the said Anne Ruth Allen and Christopher Herbert Renny Reeves the executors of his will.

On Feb. 15, 1941, the testator married Miss Allen, and on June 9, 1941, the testator died on war service. There was no issue of the marriage. The testator's will was proved on June 5, 1943, by the executors there named, and they are the first two defendants to this summons. The testator had one brother and one sister, who are the last two defendants. The testator's widow remarried and is now the defendant, Mrs. Plaut. The estimated value of the property comprised in the settlement is about £3,400, and the net value of the testator's estate is only about £150.

The question raised by the summons is whether the powers of appointment conferred on the testator by the settlement of 1925 were duly exercised by his will in favour of his widow, the defendant, Ruth Plaut. It is not disputed that he duly exercised the special powers to give her a life interest, but it is said that in the events which happened there was no exercise of the general power in her favour. This question turns on the Wills Act, 1837, s. 27, which, so far as material, reads as follows:

> . . . a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall

operate as an execution of such power, unless a contrary intention shall appear by the will.

The effect of this is stated in JARMAN ON WILLS, 7th Edn., p. 785, as follows :

> The effect of sect. 27 is to reverse the old rule, and to throw on those who deny that a general devise or bequest executes a general power the burden of proving by what appears on the face of the will the testator's intention that it shall not do so. This intention must, it seems, be clearly expressed.

How is it sought to discharge that onus ? Counsel for the last two defendants relied on the following points : (i) The appointment of a life interest to the widow ; (ii) the fact that the testator distinguishes between his own property and the settled funds, and (iii) the fact that the gift of his own property to his widow is not residuary in form. The third point has in my view no substance, for counsel for the last two defendants was compelled to admit that the words : " I devise and bequeath all my real and personal estate whatsoever and wheresoever to her " constitute a bequest of the personal estate within the meaning of the section. The other points require more consideration. Neither by itself would be conclusive. As regards the first point, while the gift of a particular interest may be inconsistent with an appointment of the whole to the same person (see *per* PAGE WOOD, V.-C., in *Scriven* v. *Sandown* (1)), it is by no means conclusive. As PAGE WOOD, V.-C., said in the same case, at p. 744 :

> There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was made as an execution of the power. It would not be a safe rule to proceed upon, to pick out little circumstances, and infer from them whether the testator had or had not in his mind the intention of exercising the power ; there ought to be shown something which can fairly be described as inconsistent with such an intention.

In *Re Stokes* (2) the testatrix exercised a special power enabling her to appoint a life interest in a settled fund to her husband and bequeathed her residuary estate upon trust for her husband for life with remainder to her two brothers. It was held :

> That as the subject matter of each appointment was not necessarily the same, and as, under the circumstances, there was no inconsistency between the two parts of the will by reason of a double gift of a life interest to the husband there had been no such expression of a contrary intention within the Wills Act, 1837, s. 27, as to defeat the gift of the residue ; and the will was a good exercise by the testatrix of the general power of appointment under her father's will.

At p. 412 EVE, J., said :

> Is there then anything in the will inconsistent with the opinion that the testatrix meant the residuary bequest to operate as an execution of the power ? I have already pointed out that the residuary bequest does not give the whole of the fund to the husband, he only takes a life interest thereunder and there is certainly no inconsistency between the appointment of a life interest to him under the special power and the appointments to the sister and brothers ; again the special power could be effectually exercised whether the testatrix had issue or not, and the effect of its exercise was to give her surviving husband a life interest in the whole fund ; the appointment under the general power, on the other hand, could only take effect in default of issue attaining a vested interest and would only operate on the fund subject to the payment of the testatrix's debts. The subject matter of each appointment was not, therefore, necessarily the same, and the fact that the residuary bequest extends to appointees who took no interest under the exercise of the special power outweighs, in my opinion, any inconsistency which might otherwise be held to arise by reason of the double gift of a life interest to the husband. Had the special power been exercised by codicil it could not I think have been argued that the general power was not exercised by the will, and this is perhaps a good test whether the exercise of the special power in the will is in this case inconsistent with an intention to exercise the general power by the residuary bequest.

That case is distinguishable from the case before me in that the general gift of personalty is to the wife absolutely, whereas in *Re Stokes* (2) the residuary bequest did not give the whole of the fund to the husband, but only a life interest. The two cases have, however, many features in common, and if this was the only point, I should certainly not be prepared to hold that counsel for the last two defendants has discharged the onus which rests upon him.

I turn to the second point. *Re Elen* (3) is an authority for the proposition that the fact that the testator deals separately with his own property and the settled fund does not necessarily prevent a residuary bequest operating as an exercise of a general power of appointment. In that case :

> By a settlement a general power of appointment over certain stocks, funds, and securities was given to P.W.E., and it was provided that in default of appointment the settled property should go to the next of kin of P.W.E. By his will, dated in 1866, P.W.E., after making an appointment of part of the property, appointed the residue to J.T. and R.S., upon trust to convert and pay certain legacies, and to pay the ultimate residue to E.T., if she should be living at the death of C.M.E., and he constituted H.J.E.S. his residuary legatee. E.T. survived P.W.E., but predeceased C.M.E. Held, that H.J.E.S., the residuary legatee, was entitled to the ultimate residue of the settled property.

In that case Stirling, J., stated the question which he had to decide in these terms, at p. 817 :

> The question is, does an attempt on the part of the testator to exercise a power in an incomplete manner operate as an indication of a contrary intention within the meaning of the Act ?

And on the authority of *Re Spooner's Trust* (4) he answered the question in the negative. But counsel for the last two defendants rightly said that I must not take each point separately, and I must look at the will as a whole. He argued that the cumulative effect of the points that he made was to establish a contrary intention within sect. 27. I am unable to agree. I think that the true view is that which counsel for the executors of the testator's will put before me, namely, that the testator was minded to exercise the power in every event and that he had only refrained from doing so expressly because he had not contemplated the event which happened of his marrying Miss Allen and predeceasing her leaving no issue. Had he contemplated that event he would I think have expressly appointed the settled fund to her absolutely on its occurrence. I must not, of course, make a new will for him, but I am, I think, justified in giving full effect to sect. 27 and refusing to infer from the terms of his will that the general bequest of personalty shall not operate as an exercise of the general power in the event which happened. I shall, therefore, declare that the powers of appointment expressed by the said settlement of Feb. 28, 1925, upon the testator were duly exercised by his will dated Sept. 12, 1939, in favour of the defendant Anne Ruth Plaut.

Declaration accordingly. Costs to be paid out of the settled fund.

Solicitors : *Church, Adams, Tatham & Co.* (for the plaintiff) : *Herbert Reeves & Co.* (for the defendants).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

Re MARSHALL'S WILL TRUSTS.

[Chancery Division (Cohen, J.), **February 21, 1945.**]

Trusts and Trustees—Judicial trustee—Power of court to appoint judicial trustee for purposes of Settled Land Act, 1925*—Judicial Trustees Act,* 1896 (*c.* 35), *s.* 1 (1)*—Settled Land Act,* 1925 (*c.* 18), *ss.* 23, 30.

By his will made in 1912, the testator appointed two executors and trustees thereof and devised the residue of his estate to them on trust to pay a certain weekly sum to his granddaughter and to apply for her benefit so much of the balance of the income as they should think fit, and subject thereto to hold the residue on trust for certain charities. The testator died in 1913 and his will was duly proved. Both executors had now died, and the personal representative of the last surviving executor had been asked to appoint new trustees of the will but had neglected to do so. The Official Solicitor as next friend of the testator's granddaughter, who was a person under disability, applied to the court to be appointed judicial trustee of the testator's will and judicial trustee for the purposes of the Settled Land Act, 1925, of the freehold and leasehold properties comprised in the estate :—

Held : the court had power to make the appointment under the Judicial Trustees Act, 1896, s. 1 (1). There being no definition of " trust " in the Act of 1896, the word must be given its ordinary meaning, and Settled Land Act trustees were trustees of a trust within the ordinary definition of the word.

[**EDITORIAL NOTE.** There is no definition of "trust" in the Judicial Trustees Act, 1896, but the court here gives the word its ordinary meaning and holds that Settled Land Act trustees are trustees of a trust within that meaning. There is, therefore, power to appoint a judicial trustee for the purposes of the Settled Land Act, and the result is achieved by an order appointing the Official Solicitor trustee for those purposes and directing that in that capacity he shall be a judicial trustee.

As to Judicial Trustees, see HALSBURY, Hailsham Edn., Vol. 33, pp. 332-335, paras. 574-585; and for Cases, see DIGEST, Vol. 43, pp. 1032, 1033, Nos. 4721-4732.]

A Adjourned Summons asking for the appointment of the Official Solicitor as judicial trustee of the testator's will and judicial trustee for the purposes of the Settled Land Act, 1925, of the freehold and leasehold properties comprised in the testator's estate. By his will made in 1912 the testator, George Marshall, appointed F. Moss and J. Potter to be executors and trustees thereof, and devised the residue of his estate to them on trust to pay £1 a week to his granddaughter and to apply the balance of the income or so much as they should B think fit for her benefit; and subject thereto to hold the residue in trust for two charities. The testator died in 1913 and his will was duly proved. The testator's granddaughter was a person under disability and the Official Solicitor had been appointed receiver of her estate. Both executors were now dead. The personal representative of J. Potter, the last surviving executor, had been asked to appoint new trustees of the testator's will but had neglected to take any action in the matter. She was made a respondent to the summons but did not appear.

C *W. F. Waite* for the applicant.

Cohen, J.: This summons asks for the appointment of the Official Solicitor as sole judicial trustee of the will of the testator and also as sole judicial trustee for the purposes of the Settled Land Act, 1925, of the freehold and leasehold properties comprised in the estate of the testator. Normally an application for the appointment of new trustees would be dealt with by the judge in chambers, D but when this application came before the judge in chambers a doubt was raised as to the power of the court to appoint a judicial trustee for the purposes of the Settled Land Act, 1925. The summons was, therefore, adjourned into court for decision of this point.

In my opinion, the court has power to make the appointment. The Judicial Trustees Act, 1896, s. 1 (1), provides as follows:

> E Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

The Act contains no definition of "trust" and I must therefore give to that word its ordinary meaning. For the purposes of this case I think that I can take F the definition in Underhill on Trusts, 9th Edn., p. 3, which reads as follows:

> A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.

In my opinion, Settled Land Act trustees are trustees of a trust within that definition. The land is not vested in them, but capital money must be paid to them and G they hold the investments representing capital money in trust for the persons who are entitled under the settlement. Moreover, they have certain other definite duties and powers. For instance, their consent is required in some cases to the sale of the mansion house or to the cutting of timber or to the compromise of disputes. In giving such consents the settled land trustees are clearly under the equitable obligation to do so for the benefit of the persons entitled under the settlement or in connection with the statutory provisions.

H I need not go into the facts of the present case. It is sufficient to say, first, that under the will there is no tenant for life, with the result that under the Settled Land Act, 1925, s. 23, the trustees for the purposes of that Act have the powers of a tenant for life and, secondly, that this, in my opinion, is a proper case for the appointment of the Official Solicitor as trustee. The form of the order will require some consideration. If I appoint the Official Solicitor judicial trustee of the will, the effect, having regard to the terms of the will and to the Settled Land Act, 1925, s. 30, will be to make the Official Solicitor automatically a trustee, though not a judicial trustee, of the settlement. The Official

Solicitor is anxious that he should be a judicial trustee of the settlement, *i.e.*, for the purposes of the Settled Land Act. In the circumstances of the case before me, he is, in my opinion, justified in this desire. I think that the way to achieve that result is to appoint him to be a trustee for the purposes of the Settled Land Act, 1925, of the freehold and leasehold properties specified in the schedule to the summons, being properties forming part of the estate of George Marshall, deceased, and direct that in that capacity he shall be a judicial trustee. Then I will appoint him also judicial trustee of the will. A

Order accordingly.

Solicitor: *The Official Solicitor* (for the applicant).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

B

Re FEATHER, HARRISON *v.* TAPSELL.

[CHANCERY DIVISION (Cohen, J.), **March 27, 1945.**]

Will—Construction—Bequest to employee—Legacy on condition that legatee still employed at testator's death and not under notice—Military service—Continuation of employment—Gift of residue to "legatees hereinbefore named"—Whether legatee subject to unfulfilled condition entitled to participate—Whether annuitant included in direction as to distribution of residue. C

Evidence—Admissibility—Statement in affidavit sworn to by trustee of will—Testator's declaration that legatee still in employ—Admissible to determine question of employment.

By his will, dated Oct. 14, 1937, the testator gave, *inter alia*, a number of pecuniary legacies to relatives and friends. By cl. 10 he bequeathed a legacy of £2,000 to the defendant T. "if still in my employ and not under notice", and, subject to the same condition, he gave a sum of £200 to the defendant C. By cl. 13 the trustees were directed to give to the testator's housekeeper, the defendant M., sufficient money for the proper upkeep of his house and garden until it could be sold. The testator then, by cl. 14, gave her an annuity, free of legacy duty and income tax, of £52 during her life. By cl. 15 he gave and bequeathed the residue of his real and personal estate and effects "not hereinbefore specifically bequeathed" to his trustees upon trust for sale and conversion and directed them after the payment of his "debts, funeral and testamentary expenses, and the legacies hereinbefore bequeathed . . . and after making provisions for the said annuity, to divide the residue amongst such of the legatees hereinbefore named as may be living at my death, and in such proportions as the trust estate bears to the amount of the legacy bequeathed to such legatees respectively." The testator died on July 16, 1943. The following questions arose in connection with the legacies and the annuity given to the three defendants respectively:— D E F

(i) The defendant T. had been employed by the testator as a general handyman, performing such duties as gardening and rent-collecting, at £3 10*s*. 0*d*. a week. On Aug. 3, 1940, T. was called up to join the army. After Sept. 4, 1940, the testator paid him £2 a week on the understanding that T's wife should, on his behalf, continue to collect the rents. It was further agreed that T's wife should keep a cottage rent-free and that T., during his periods of leave, should perform any such duties as the testator might assign to him. On these occasions T. was paid extra wages. In support of the contention that T. was in the testator's employment at the time of the testator's death, an affidavit, sworn by one of the trustees of the will, was tendered in evidence that the testator had, during an interview with the trustee on or about July 16, 1942, when the legacy to T. was under discussion "emphatically affirmed that T. was still in his employ." It was contended by counsel for one of the other legatees who had been joined in a representative capacity, (*a*) that in the circumstances the defendant T. was not in the employ of the testator at the time of the testator's death, and (*b*) that the paragraph in the affidavit was inadmissible. G H

(ii) the defendant C. left the employment of the testator in 1938. It was admitted that he could not, therefore, take the legacy. The point at issue was whether C. could participate in the residue under cl. 15, although he had not become an effective legatee.

(iii) with regard to the defendant M. the point at issue was whether she was entitled to participate in the residue by reason of either the direction given by cl. 13 or by virtue of the annuity left to her, and whether, upon a true construction of the testator's will, the expressions "legatee" and "legacy" in the direction as to the division of the residue included annuitants and an annuity :—

Held : (i) (*a*) on the facts, T. was under a contract of employment with the testator at the time of the testator's death. T. was entitled, therefore, to the legacy bequeathed to him and to a participation in the residue distributable under cl. 15.

(*b*) the statement by the testator contained in the affidavit, while inadmissible as evidence of intention, was admissible in determining the question of fact whether T. was, at the time of the testator's death, in his employment.

Herbert v. *Reid* (3) *followed.*

(ii) a legacy bequeathed to a legatee subject to a condition which was not fulfilled was not a legacy within the meaning of cl. 15 in the will, and C. was, therefore, not entitled to participate in the distribution of the residue.

(iii) on the true construction of cl. 15 of the will, the testator did not intend the term "legatees" to include any persons other than those who received pecuniary legacies. The defendant M. was, therefore, not entitled to participate in the distribution of the residue.

Bromley v. *Wright* (7) *applied.*

[**EDITORIAL NOTE.** The first point here is whether an employee who is absent on war service is still in the testator's employ within the meaning of a bequest. It is clear from *Re Cole* (2) that the legatee need not be rendering actual service, but it is established by *Re Drake* (1) that there must be a subsisting contract of employment. Even a contract which has been wrongfully broken by the testator will not suffice to save the right to the legacy (*Darlow* v. *Edwards* (1862) 1 H. & C. 547). It becomes, then, a question of fact, and the court holds that on the evidence, including a declaration of the testator himself, there was here a contract of employment. The other questions turn upon the disposition of the residuary estate " in such proportions as the trust estate bears to the amount of the legacy bequeathed to such legatees." This involves the construction of " legatee " and " legacy." There is apparently no authority upon the question whether " legatee " includes one whose bequest fails, but the court holds that it is limited to an effective legatee. Again, it is held on authority, particularly the *dicta* of Wigram, V.-C., in *Bromley* v. *Wright* (7), that " legatee " refers to a pecuniary legatee and not an annuitant, and the context here, especially the use of the word " amount," is sufficient to exclude the annuitant.

As to Gifts to Employees, see HALSBURY, Hailsham Edn., Vol. 34, pp. 323-325, para. 373 ; and for Cases, see DIGEST, Vol. 44, pp. 899-903, Nos. 7584-7629.

As to Designation of Donee by Description, see HALSBURY, Hailsham Edn., Vol. 34, pp. 232-234, para. 289 ; and for Cases, see Digest, Vol. 44, pp. 829, 830, Nos. 6814-6817.

As to the Ordinary Meaning of Legacy, see HALSBURY, Hailsham Edn., Vol. 34, pp. 252, 253, para. 305, ; and for Cases, see DIGEST, Vol. 44, p. 584, Nos. 4060-4074.]

Cases referred to :

*(1) *Re Drake, Drake* v. *Green*, [1921] 2 Ch. 99 ; 44 Digest 900, *7602* ; 90 L.J.Ch. 381 ; 125 L.T. 461.

*(2) *Re Cole, Cole* v. *Cole*, [1919] 1 Ch. 218 ; 44 Digest 472, *2912* ; 88 L.J.Ch. 82 ; 120 L.T. 374.

*(3) *Herbert* v. *Reid* (1810), 16 Ves. 481 ; 44 Digest 902, *7624* ; 33 E.R. 1067.

(4) *Re Florence, Lydall* v. *Haberdashers' Co.* (1917), 87 L.J.Ch. 86 ; 44 Digest 328, *1590* ; 117 L.T. 701.

*(5) *Cornfield* v. *Wyndham* (1845), 2 Coll. 184 ; 44 Digest 584, *4070* ; 14 L.J.Ch. 375 ; 5 L.T.O.S. 494.

*(6) *Heath* v. *Weston* (1853), 3 De G.M. & G. 601 ; 44 Digest 584, *4071* ; 43 E.R. 236.

*(7) *Bromley* v. *Wright* (1849), 7 Hare 334 ; 44 Digest 829, *6816* ; 68 E.R. 137.

(8) *Nannock* v. *Horton* (1802), 7 Ves. 391 ; 44 Digest 524, *3413* ; 32 E.R. 158.

(9) *Sibley* v. *Perry* (1802), 7 Ves. 522 ; 44 Digest 532, *3487* ; 32 E.R. 211.

Adjourned Summons to determine questions arising under the will of George William Feather. The summons was taken out by the trustees of the will which was dated Oct. 14, 1937. The testator died on July 16, 1943. The testator gave, *inter alia*, a number of legacies to friends, some of whom were also his employees. The first part of the judgment deals with a legacy of £2,000 given to the defendant William Thomas James Tapsell "if still in my employ and not under notice." On Aug. 3, 1940, Tapsell was called up to join the army, and the question arose whether in those circumstances, and in the events which happened after his call up, he was entitled to the legacy bequeathed to him. The second part of the judgment deals with a legacy of £200 given to the defendant Arthur Carradice "if still in my employ and not under notice." Carradice left the employment of the testator in 1938. By cl. 15 of the will the testator gave and bequeathed the residue of his real and personal estate and effects "not hereinbefore specially bequeathed" to his trustees upon trust for sale and conversion with the direction "to divide the residue amongst such legatees . . . as may be living at my death, and in such proportions as the trust estate bears to the amount of the legacy bequeathed to such legatees respectively." The question arose whether Carradice, who could not, by reason of his having left the testator's employment, take the legacy bequeathed to him, was, nevertheless, entitled to participate in the residue. The third part of the judgment deals with the question whether the defendant Sarah Jane Mitchell, employed by the testator as a housekeeper, was entitled to participate in the distribution of the residue. Under the testator's will, cl. 13, the trustees were directed to give her "sufficient money to enable her to keep Thorn Villa occupied and the garden properly kept" until the trustees should sell the dwelling house and furniture therein. By cl. 14 the testator gave her an annuity free of legacy duty and income tax of £52 during her life. The relevant facts are set out in the judgment.

Sir Norman Touche, Bt., for the plaintiff trustees.

R. H. Landman for the defendant William Thomas James Tapsell.

G. A. Russo for the defendant Arthur Carradice.

Ingram J. Lindner for the defendant Sarah Jane Mitchell.

Geoffrey Cross for the defendant Hannah Maria Bennett.

Cohen, J.: This summons raises a number of questions on the will of George William Feather, who died on July 16, 1943. By his will, which was dated Oct. 14, 1937, he appointed the plaintiffs as trustees. By cl. 7 he said that if he had not, during his lifetime, sold the mills and stock belonging to him, he desired his trustees to continue the employment of the defendant Tapsell until the said mills and stock were sold. By cl. 8 he gave a number of pecuniary legacies free of duty, as to which no question arises. By cl. 9 he gave another series of legacies free of legacy duty to a number of half-cousins, and in this case also no question arises; but I should mention that among them is the defendant Mrs. Bennett, who has been joined to represent those legatees as to whose legacies there can be no question. By cl. 10 he again gave a number of legacies to friends, some of whom were also employees, including two whom I must specifically mention, (*a*) to the defendant Tapsell the sum of £2,000 "if still in my employ and not under notice"; and (*g*) to the defendant Arthur Carradice the sum of £200 "if still in my employ and not under notice." By cl. 11 he gave a number of charitable legacies. By cl. 13 he directed his trustees to give to his housekeeper, Sarah Mitchell, sufficient money to enable her to keep Thorn Villa occupied and the garden properly kept "until his trustees should sell the dwelling house and furniture therein." By cl. 14 he gave an annuity free of legacy duty and of income tax at the standard rate for the time being in force to the defendant, the said Sarah Mitchell, of £52 "during her life and to be paid on the first day of each calendar quarter commencing from the date of his decease." By cl. 15 he gave and bequeathed the residue of his real and personal estate and effects "not hereinbefore specifically bequeathed" to his trustees upon trust for sale and conversion as therein mentioned and directed that they should:

> . . . out of my ready money pay my debts, funeral and testamentary expenses, the legacies hereinbefore bequeathed and any legacies that may be given by any codicil to this my will and legacy duty payable in respect thereof and after making provision for the said annuity [he directs his trustees] to divide the residue (hereinafter called

> "my trust estate") amongst such of the legatees hereinbefore named as may be living at my death and in such proportions as the trust estate bears to the amount of the legacy bequeathed to such legatees respectively.

And then he specifically states that the charities are not to participate in the distribution of the trust estate.

His gross estate was about £135,000 and the scheme of his will is that, after paying his debts and testamentary expenses, etc., as I have mentioned, the pecuniary legacies, which, omitting all lapsed legacies, amount to £17,100, and the charitable legacies amounting to £8,500 and the annuity of £52 per annum, the residue is to be divided amongst the legatees in accordance with cl. 15 of his will.

The first question that arises is as to the legacy of the defendant Tapsell. It arises because that defendant was called up to join the army on Aug. 3, 1940. The first question, therefore, is whether, in those circumstances, and in the events which happened on his being called up and thereafter, he is entitled to the legacy which was bequeathed to him "if still in the testator's employ and not under notice." Counsel for Mrs. Bennett, a representative defendant, who is bound to present any argument that can be advanced against the defendant Tapsell, says, and I think rightly, that it is a condition of the defendant's taking the £2,000 legacy that he should be in the employ of the testator and not under notice at the date of the testator's death. He cited the case of *Re Drake, Drake* v. *Green* (1), as an authority for the proposition that it is not sufficient that the legatee to whom the legacy is bequeathed left the testator's employ to join the army on the understanding that he would be taken back into employment at the conclusion of his military service. That case is, I think, an authority, as counsel for Mrs. Bennett pointed out, for the proposition that that is not a compliance with the condition. On the other hand I think it is true to say that if the legatee was under a contract of employment with the testator it matters not that he was not at the time, being still in military service, required to render any actual service to the testator. I think that is established by the authority of the case of *Re Cole* (2), before SARGANT, J. The head note in that case says:

> A testator gave a legacy of shares in a company to each of his three sons who should, prior to attaining 20, enter the employ of a named company, and remain in such employ until the age of 33. One of the sons, who was born in 1895, in 1913, before attaining the age of 20, entered the company's employ, but in September, 1914, he voluntarily, but with the consent of the company's directors, joined His Majesty's forces, from which he had not obtained his discharge [at the time the summons was taken out].

SARGANT, J., held:

> That the son had not ceased to be in the employ of the company, although from the time when he entered the army he had not actively served the company.

The relevant portion of the judgment of SARGANT, J., is at p. 223, where he says:

> Now it seems to me that the question whether he is in the employment of the company is not the same thing as the question whether he is in fact rendering actual service to the company. Suppose that he had fallen ill, and had had to be away for a year, or two, or three years. Under those circumstances, the company might be justified in dismissing him, and very likely would dismiss him, and in that case he would certainly cease to remain in the company's employment. But, on the other hand, it is quite possible that the company, valuing his services, would desire to retain him in its employment, and would make arrangements under which that employment should continue, although no actual services were rendered. And whether or not they paid him a salary during that time would not be in any way conclusive; it would only be one of the *indicia* from which one might gather whether the employment did continue or did not.

Then on the facts of that case, he held that the employment had not been terminated.

Those being the two authorities which may have some bearing, I have to decide that which counsel for the defendant Tapsell, says is really a question of fact: Was Tapsell on the testator's death, on July 16, 1943, in the employment of the testator? Tapsell himself has given evidence and said that he originally joined the firm in which the testator was a partner as a spinner, but in 1930 the testator discontinued the business of spinning "but retained the mills and stocks for gradual realisation." Tapsell then became a warehouseman. Down to that stage with the company no more than a week's notice on either side would have been necessary to terminate his employment. After that, when the stocks had been realised, he was employed "as a general handyman performing any jobs," such as gardening and rent collecting "as and when required by the testator," including the duties of warehouseman. Tapsell then says he was called up for military service on Aug. 3, 1940 :

> On receipt of my calling up papers I informed the testator, who agreed with me, that during my absence he would pay me £2 a week and in addition would allow my wife to occupy one of the seven cottages known as the Holme Mill Cottages rent free. He proposed that my wife should continue on my behalf to collect the weekly rents of the other six cottages and account to the testator for the same, and that, when on leave, I should assist him in whatever manner the testator required. It was never at any time contemplated either by the testator or myself that my employment by the testator was terminated on my calling up.

He says then that he accepted the testator's proposal and that the latter paid him £2 a week until his death—meaning the testator's death—and allowed his, Tapsell's wife to keep the cottage rent free. Then he goes on, in para. 7 of his affidavit, to say :

> Up to the date of the testator's death I had ten periods of leave of between 7 and 9 days each, in addition to other periods not exceeding 72 hours. Whilst on leave I was employed during the morning either working in the testator's garden or in his house or at Holme Mill as a handyman, where my duties included inspecting the unoccupied part of Holme Mill and reporting on dilapidations. On these occasions the testator paid me extra wages from about £2 on a 72 hour period of leave to £5 on a 7-day leave.

Then, finally he says that neither the testator nor anyone on his behalf terminated his employment, and he continued to be employed by the testator until the testator's death. I do not think I ought to pay too much attention to that last factor, because if there had been no arrangement made when he left the employment, I think it could fairly have been argued that the fact of his going into the army automatically would determine the employment. But I do not think the case rests on that alone. I have no doubt if I accept Tapsell's evidence that there was a contract of employment under which his wife acted as the agent —that is the agent for Tapsell—to collect certain rents, and under which Tapsell was to receive £2 a week and his wife occupied a cottage. If I accept that, that is definite proof of a contract of employment and none the less because his duties were intermittent.

But, as counsel for Mrs. Bennett very properly pointed out, the onus is upon Tapsell, and I might perhaps have hesitated to accept his uncorroborated evidence. What evidence is there from the trustees' side ? That depends on the affidavit of Clifford Harrison, one of the executors, the affidavit being sworn on Feb. 2, 1944. In that affidavit Harrison says that the defendant Tapsell was employed by the testator until he joined the army on Aug. 3, 1940 :

> . . . thereafter the testator continued to make weekly payments to the said defendant or to the wife of the said defendant until the testator's death.

He also admits the intermittent payments referred to by Tapsell.

The books are before me, and it appears therefrom that down to Sept. 4, 1940, the testator continued to pay to Tapsell his former wage of £3 10*s*. 0*d*. a week and thereafter he paid him £2 0*s*. 6*d*. which he described in the book as "Mrs. Tapsell's war allowance." Of course, that does not entirely tally with the way Tapsell says the payment was made to him. But I think that is a difference in form rather than in substance because there is no doubt it would have been arranged that the money should be paid to Mrs. Tapsell for her upkeep while her husband was away in the army. I do not think that that description in the book justifies me in not accepting Tapsell's definite oath. There was a smaller book which disclosed the other supplementary payments referred to by Tapsell, which appeared to have varied from £5 down to 10s. I think counsel for Mrs. Bennett was right in saying that I ought not to attribute much weight to those payments because they are consistent rather with spasmodic separate employment than with general employment, including the employment at the date of the death of the testator.

On the whole, however, I have come to the conclusion that I have the definite oath of Tapsell as to the arrangement which undoubtedly brings him within the category of people who were in the employment of the testator at the date of his death, and I see nothing in the other evidence which would justify me in rejecting that oath ; indeed, on the whole I think in substance it supports it.

I must, however, refer to a particular paragraph in Harrison's affidavit, para. 6, in which he says this:

> On or about July 16, 1942, during an interview I had with him, the testator discussed with me certain matters relating to his said will and the legacy of £2,000 to the said W. T. J. Tapsell was mentioned. I suggested to the testator that he should alter the terms of his will with regard to the defendant Tapsell to remove any doubt there might be as to whether the said defendant, being then in the army, would be considered as still in the employ of the testator. The testator at this interview emphatically affirmed that the defendant Tapsell was still in his employ.

Counsel for Mrs. Bennett disputed the admissibility of that paragraph, and I think it is clear that it cannot be admitted as evidence in any way varying the terms of the will. On the other hand, *Herbert* v. *Reid* (3) is authority for the proposition that a statement by the testator is admissible in determining the question of fact whether the defendant Tapsell was in the service of the testator at the time of the testator's death. The headnote in that case is in the following terms:

> Legacy to A. if in the testator's service at the time of his decease. Parol evidence admitted to shew, that, though she had quitted his house, she continued, and was considered by him as, in his service; and upon that evidence the legacy was established.

That legacy was a legacy of the plaintiff "if in his service at the time of his decease." There was tendered in evidence in support of the bill a deposition by one Dutton that the testator had said:

> I have still regard for her [that was the plaintiff]: I do not owe her the least ill-will; for I have left her £500 by my will; and when I get better in health she is to come home again.

This evidence was objected to, and, dealing with that objection, Lord Eldon, L.C., said, at p. 488:

> The first objection to the evidence is, that these three witnesses are proposed to prove the declarations of the testator; that, according to the rules of evidence, particularly with reference to the statute, evidence of this kind cannot be read. Certainly it could not be read if proposed to prove the testator's intention that the plaintiff should have the legacy, though she should not be in his service at his death; but, if to determine whether in fact she had left the service, it is clear, that the declarations of the testator, one of the parties to the contract, may prove, whether he considered her as having left it, and whether she had left it in fact especially where, whatever belief the defendants suggest, they produce no evidence or fact beyond the mere circumstance, that she quitted the house . . .

It seems to me that here, while I cannot accept that paragraph in question as evidence of intention, I can accept it as confirming the evidence which I should be inclined, even apart from it, to draw from the affidavit of Tapsell, that he remained in the service.

I, therefore, propose to declare that the defendant Tapsell is entitled to the legacy of £2,000 free of legacy duty as mentioned in cl. 10 (*a*) of the said will. I think it is common ground that if I so decide he would be entitled to participate in any property comprised "in my trust estate."

The second question is as to the bequest in cl. 15 of the will dividing the trust estate amongst such legatees:

> . . . hereinbefore named as may be living at my death and in such proportions as the trust estate bears to the amount of the legacy bequeathed to such legatees respectively and the charities hereinbefore mentioned shall not participate in my trust estate.

The defendant Carradice left the employment of the testator in the year 1938. It is admitted that he cannot, therefore, take the legacy bequeathed to him by cl. 10 (*g*) of the will. The question is, is he entitled to participate in the residue? I find this an extremely difficult question. Am I justified in finding, as in quite a different context Younger, J., found in *Re Florence* (4), that the description "legatees" is merely a convenient compendious method of inserting a number of names and of giving directions as to the proportion in which a division is to take place; or does it imply that the persons in question so named must become effective legatees; that is to say, they must have fulfilled the condition which is the condition precedent to their taking anything under cl. 10 (*g*) of still being "in my employ and not under notice." On the whole I have come to the conclusion that the legacy bequeathed to a legatee on a condition which is not fulfilled is not a legacy within the meaning of cl. 15 of the will, and I therefore must hold that he is not entitled to participate in the distribution of residue. As I say, I think it is an extremely difficult question, but that is the decision to which I have come.

The next question is whether the defendant Sarah J. Mitchell is entitled to participate in the distribution under cl. 15 by virtue of either of the directions in cl. 13 to give :

> . . . to my housekeeper, Miss Sarah J. Mitchell, sufficient money to enable her to keep Thorn Villa occupied and the garden properly kept until my trustees shall sell the said dwellinghouse and the furniture therein . . .

or, by virtue of the annuity bequeathed to her free of legacy duty and of income tax at the standard rate, which is in these terms :

> To the above mentioned Miss Sarah J. Mitchell £52 during her life . . .

which is given her by cl. 14 of the said will.

Counsel for the defendant Mitchell rested his case in the first instance on cl. 14, placing cl. 13 in the background. I should like to say, like the other questions which have been argued before me in this case, this has been extremely well argued on all sides. Personally, having heard the argument, I do not feel the same doubt as I did on the previous questions as to what is the proper conclusion to reach. I must, as counsel for the defendant Mitchell said, approach this question bearing in mind what was said by KNIGHT BRUCE, V.-C., in *Cornfield* v. *Windham* (5), at p. 187 :

> " Legacies " is a word under which annuities bequeathed may, without impropriety, be comprised. It has, familiarly and colloquially, a more restricted meaning. It may receive, according to the circumstances, either the more general or more restricted sense.

Then that is carried a stage further by TURNER, L.J., in *Heath* v. *Weston* (6), where he said, at p. 606 :

> The general rule is that the word legacies will comprehend annuities.

In the end it must be a question of construction on the facts of each case to determine whether, upon the true construction of this will, the expression " legatee " and the expression " legacy " in the direction as to division includes anything except pecuniary legatees.

The case which is nearest to this case is *Bromley* v. *Wright* (7). In that case real and personal estate were ;

> . . . given to trustees, upon trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others . . .

The residue was given in these terms, at p. 336 :

> And as to all the rest, residue, and remainder of the several trust-monies and premises which shall remain in the hands of my said trustees or the survivors or survivor of them, under the devises and bequests aforesaid, after duly satisfying and paying the several annuities and legacies hereinbefore bequeathed, I give, devise, and bequeath the same and every part thereof unto and between all and every the several legatees hereinbefore named (except Elizabeth Ashley Bailey and her family, Mrs. Sly and her daughters, and Mrs. Kennel), and that the same shall be divided and paid by my said trustees or the survivor of them to the several legatees, rateably and in proportion to the amount of the respective legacies bequeathed to them in and by this my will.

It is to be observed that Mrs. Kennel had only received an annuity and not anything else which fell within the description of legacy. No meaning could therefore, be given to the words " and Mrs. Kennel " unless the court took the view that in their absence Mrs. Kennel, by virtue of her annuity would have shared in the distribution. On this aspect of the case WIGRAM, V.-C., said this, at p. 340 :

> The next case is that of the annuitant for life, Elizabeth Bromley. That the testator intended her to share in the residue is in the highest degree improbable. Throughout his will he speaks both of legacies and annuities. The legacies he calls " legacies or sums of money " ; the annuities he calls " annuities or yearly sums." In the case of the Cowleys he substitutes a legacy of £500 for their annuities. In the case of Elizabeth,

he makes no substitution, but leaves her in possession of an annuity for life. And he uses the word " amount " by which to measure the proportion of the residue which his residuary legatees are to take, a term not applicable to an annuity. But against this I must set the established proposition that, in a case of this description, annuities are legacies unless the context of the will shews that such was not the intention of the testator: *Nannock* v. *Horton* (8) and *Sibley* v. *Perry* (9). But the exception in the residuary clause of Mrs. Kennel from the legatees enforces by the very words of the testator the sufficiency of the word " legacy " to include the annuity. By excepting an annuity for life from the legatees, to whom he gives the residue, he declared that an annuity for life is in his vocabulary a legatee of a share of the residue; and I cannot think that the word "amount," though in strictness inapplicable to annuities, is of such unbending force as to justify me in excluding from a share of the residue an annuitant who would otherwise be entitled to share in it; *Nannock* v. *Horton* (8).

I think that is all I need read from that judgment.

The assistance I derive from it in this case is the use WIGRAM, V.-C., made of the word " amount." I find that expression here, and I agree entirely, with respect, with what WIGRAM, V.-C., said, that, *prima facie*, that word refers to a pecuniary legacy and not to an elaborate calculation such as would have to be made if I were to hold that the term " legatees " included annuitants and legatees or legacies and annuities within the meaning of this clause.

The matter does not rest on that alone, because the direction of the testator, after making provision for the annuity, is this. He directs the trustees to divide the residue among the legatees " hereinbefore named." Although it is true that that may be only a method by which the testator indicated that the trustees were to have power to appropriate a fund, I think, reading the clause as a whole, that the testator does not intend in this clause the term " legatees " to include anyone but those persons who receive pecuniary legacies.

That being so, I propose to declare that the defendant Sarah J. Mitchell is not entitled to participate " in the property in the said will called ' my trust estate '." That will be the declaration, and I think I have given sufficient reasons for the conclusion at which I have arrived.

Declarations accordingly. Costs of all parties as between solicitor and client to be raised, taxed and paid out of the estate.

Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the plaintiff trustees); *Gibson & Weldon*, agents for *F. W. Butterfield & Co.*, Keighley (for the defendants W. T. J. Tapsell, Arthur Carradice and Sarah Jane Mitchell); *Corbin, Greener & Cook*, agents for *Morrish, Nelson & Co.*, Leeds (for the defendant Hannah Maria Bennett).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re RALPH GEORGE CARLTON AND *Re* THE NATURALIZATION ACT, 1870.

[CHANCERY DIVISION (Cohen, J.), **March 28, 1945.**]

Aliens—Certificate of naturalization granted to applicant's father—Children included in the certificate—Applicant over 21 years of age when father naturalized—Whether applicant deemed to be a naturalized British subject—Meaning of " child " determined by context in section and by cross-heading preceding section—Naturalization Act, 1870 (c. 14), *s.* 10 (5).

The applicant, Ralph George Carlton, was born in Roumania in 1887. In 1894 he and his parents, who were also born in Roumania, came to England, which has since been the applicant's permanent place of residence. On Apr. 18, 1910, when the applicant was over 21 years of age and still residing with his parents, his father obtained a certificate of naturalization. The applicant now sought a declaration that he should be deemed to be a naturalized British subject and relied on the Naturalization Act, 1870, s. 10 (5) which provided that: " Where the father . . . has obtained a certificate of naturalization in the United Kingdom, every child of such father . . . who during infancy has become resident with such father . . . in any part of the United Kingdom, shall be deemed to be a naturalized British subject." On behalf of the Crown it was contended that (i) the word " child " was of ambiguous import and should be construed, by reason of its context, as " infant child "; (ii) any ambiguity was removed by the cross-heading preceding sect. 10 which referred to "infant children":—

Held: on a true construction of sect. 10 (5) the word "child" meant a child under 21 years of age. Further, the reference to "infant children" in the cross-heading to sect. 10 removed any ambiguity of interpretation.

Inglis v. *Robertson* (1) *and Toronto Corpn.* v. *Toronto Ry. Co., Toronto Ry. Co.* v. *Toronto Corpn.* (2) *applied.*

[**EDITORIAL NOTE.** The word "child" is an ambiguous one, depending for its meaning upon the context in which it appears. Here the court, in deciding that "child" in the Naturalization Act, 1870, s. 10 (5) means a child under twenty-one, arrives at this result by considering the intention of the legislature as shown by the consequences of a contrary conclusion, and by giving due weight to the cross-heading in the statute. As Lord Herschell said in *Inglis* v. *Robertson* (1): "These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them."

As to Effect of Certificate of Naturalization on Children, see HALSBURY, Hailsham Edn., Vol. 1, pp. 470, 471, para. 795; and for Cases, see DIGEST, Vol. 2, pp. 124, 125, Nos. 25-29.

As to Cross-Headings in Statutes, see HALSBURY, Hailsham Edn., Vol. 31, p. 464, para. 565; and for Cases, see DIGEST, Vol. 42, p. 606, Nos. 61-64.

As to Children, see BUTTERWORTH'S WORDS AND PHRASES, Vol. 1, pp. 429-433 [1143].]

Cases referred to:

*(1) *Inglis* v. *Robertson*, [1898] A.C. 616; 42 Digest 606, *63*; 67 L.J.P.C. 108; 79 L.T. 224.

*(2) *Toronto Corpn.* v. *Toronto Ry. Co., Toronto Ry. Co.* v. *Toronto Corpn.*, [1907] A.C. 315; 42 Digest 655, *640*; 76 L.J.P.C. 57; 96 L.T. 794.

(3) *Hammersmith & City Ry. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 42 Digest 655, *638*; 38 L.J.Q.B. 265; 21 L.T. 238; *revsg. S.C. sub nom. Brand* v. *Hammersmith & City Ry. Co.* (1867), L.R. 2 Q.B. 223.

Summons by the applicant, Ralph George Carlton, for a declaration that under the Naturalization Act, 1870, s. 10 (5), he should be deemed to be a naturalized British subject. The facts and arguments are fully set out in the judgment.

The applicant appeared in person.

H. O. Danckwerts for the Crown.

Cohen, J.: By this summons Ralph George Carlton applies for a declaration that, having regard to the Naturalization Act, 1870, s. 10 (5), he is deemed to be a British subject.

The facts are not in dispute. The applicant was born in Roumania in 1887 of parents both born in Roumania without Roumanian citizenship. They took up residence in England in 1894, bringing the applicant with them, and he continued to reside with them there until 1912. His permanent residence has throughout been in the United Kingdom. On Apr. 18, 1910, the father of the applicant was granted a certificate of naturalization on an application made in 1909. I was informed at the hearing that an earlier application had been made in 1907 which was not granted but was renewed in 1909. The certificate of naturalization was not before me but I was informed by counsel for the Crown that it granted naturalization to the applicant's father and mother and their seven infant children. Such a certificate according to its terms would not include the applicant, since on Apr. 18, 1910, he was over 22 years of age. The applicant, however, contends that by reason of the Naturalization Act, 1870, s. 10 (5), he automatically became a naturalized British subject. The cross-heading immediately preceding sect. 10 and the marginal note to that section is in the following terms: "National status of married women and infant children." The section itself so far as material is as follows:

> The following enactments shall be made with respect to the national status of women and children: . . . (3) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject: (4) Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have

> resumed the position of a British subject to all intents : (5) Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject.

That Act was amended in 1895, but the amendment is not material to the question which I have to decide.

The determination of the question before me depends on the meaning I place on the words " children " and " child." The applicant, who appeared in person, says that " child " means every son or daughter of the father, or the mother being a widow, as the case may be, that this is the natural meaning of the word " child " and that this construction is fortified by the requirement that the child must have " during infancy become resident with such father or mother in any part of the United Kingdom," since if " child " means " infant child " the words " during infancy " would be redundant. Counsel for the Crown argued that the word " child " is of ambiguous import and that on the true construction of sect. 10 it means " infant child." He called my attention to the observations on this subject in STROUD'S JUDICIAL DICTIONARY, 2nd Edn., p. 302, where under the heading " child, children " the following passage appears :

> A " child " is ordinarily a synonym for infant, a person under the age of 21 years, *e.g.*, " poor child " . . . So " children " in the Matrimonial Causes Acts means, children until they attain 21 ; though an order for custody (as distinguished from one for maintenance or education) would only in very special circumstances be made against the wishes of a child who has attained years of discretion . . . But though the idea that a " child " is one who has not reached full age runs through all the statutory definitions, yet, generally, the period of childhood is made to terminate *before* the age of 21 ; *e.g.*, *qua* the Factory and Workshop Act, 1901, " child " means a person who is under the age of 14 years, and who has not (being of the age of 13 years) obtained the certificate of proficiency or attendance at school mentioned in Part 3 of this Act.

It is, however, to be observed that in wills, as the counsel for the Crown admits, the word " child " normally means all sons and daughters irrespective of their age. In my opinion the meaning of the word " child " must in every case depend on the context in which it appears. I have come to the conclusion that the context in sect. 10 indicates that the word " children " or " child " means infant children or infant child.

First, it must be borne in mind that a change of nationality involves an important change of status on which a person of full age is entitled to make his own decision. It would be strange indeed if a man of full age were to be liable to have British nationality forced on him as the result of an application made by his father after he came of age although he might be unaware of the application. It would be stranger still if a British national of full age were to find that by his father's action taken without his knowledge he had been made the subject of a foreign State, and deprived of British nationality. Yet such a result might ensue if I were to give to the word " child " the meaning for which the applicant contends. Suppose the following state of circumstances : (1) that A., a British subject, went to reside in Germany in 1884, taking with him a son aged 10 ; (2) that in 1895 that son being of the age of 21 returned to England and took up permanent residence there ; (3) that in 1910 the father applied for and obtained German nationality, the son being unaware of that application ; (4) that German law in 1910 contained a provision similar to sect. 10 (5). If the applicant's contention be sound, the son would, under sect. 10 (3), in the eyes of the English law against his will, and indeed without his knowledge, have become a German subject and ceased to be a British subject.

Secondly, it is to be observed that under sect. 7 the minimum period of residence in this country necessary to qualify an alien for naturalization is five years. An adult child could himself apply for naturalization if he satisfied this condition, but not otherwise. Yet if the applicant's contention be right, he could obtain naturalization on application by his parent if he had resided in England during infancy notwithstanding that he had been resident in a foreign State since he attained 21. This again seems to me a result that the Legislature cannot have intended.

For these reasons I should have been inclined, even if there were nothing more, to hold that in its context in sect. 10 " child " means " infant child." But the matter is I think placed beyond doubt by the cross-heading " National status of married women and infant children." If I can give any weight to this cross-heading, all possible doubt is removed. How much weight then ought I give to the cross-heading ? In *Inglis* v. *Robertson* (1), where the documents of title to goods had been pledged by someone who was not a mercantile agent, the pledgee sought to rely on the Factors Act, 1889, s. 3, which is in these terms :

> A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

The language of the section is quite general, but it appears in a group of sections headed " Dispositions by Mercantile Agents " and the House of Lords held that sect. 3 only applied to pledges by mercantile agents. The Earl of Halsbury, L.C., said, at p. 624 :

> I cannot doubt that each of the sections included in this separate portion of the statute must be read as only applicable to the cases of persons indicated by that separate part of the statute ; and, if so, it seems to me that the case is free from doubt, since under the circumstances of this case there was no disposition by a mercantile agent.

Lord Herschell said, at p. 629 :

> The section mainly relied on is the third, which is in these terms : " A pledge of the documents of title to goods shall be deemed to be a pledge of the goods." [Then after finding that there was a pledge he goes on] I think the enactment has no application to the present case, inasmuch as the pledge was not a disposition by a mercantile agent, and, in my opinion, it is to such dispositions only that the section applies. It is true that it is general in its terms, but it is one of a group of sections headed " Dispositions by Mercantile Agents." The Act is divided into parts. The first, headed " Preliminary," consists of a definition clause. The last part, headed " Supplemental," contains provisions as to the mode of transfer " for the purposes of this Act," and certain savings. The other two parts are headed respectively " Dispositions by Mercantile Agents," and " Dispositions by Buyers and Sellers of Goods." These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them. It appears to me that the Legislature has clearly indicated the intention that the provisions of sect. 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents.

Counsel for the Crown very properly pointed out that Lord Herschell's language might be interpreted as meaning that the cross-heading was a part of the statute, whereas according to Parliamentary procedure cross-headings like marginal notes cannot be the subject of amendments : but he suggested that cross-headings could properly be used at least to the extent indicated in the Privy Council by Lord Collins in *Toronto Corpn.* v. *Toronto Ry.* (2). Lord Collins delivering the judgment of their Lordships, said, at p. 324 :

> This clause is the last of a fasciculus, of which the heading is " Track, etc., and Railways," and, as was held in *Hammersmith Ry. Co.* v. *Brand* (3), such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation.

I respectfully agree with this statement of the law. Applying the principle thus laid down to the present case, the expression " children " is of ambiguous import ; it may mean all children or it may mean children under 21. The cross-heading removes the ambiguity and makes it clear that in subsect. (5) " child " means child under 21. The applicant was over 21 on the date on which his father obtained a certificate of naturalization. That must be the material date for the purpose of determining whether an infant child has become naturalized under sect. 10 (5). Accordingly while I feel some sympathy with the applicant, it is clear to me that he is not entitled to the relief he seeks and the application must be dismissed. It was agreed between the parties that I should make no order as to costs.

Application dismissed.

Solicitor : *Treasury Solicitor* (for the Crown).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

D. & L. CATERERS, LTD., AND JACKSON *v.* D'ANJOU.

[COURT OF APPEAL (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **March 28, 1945.**]

Libel and Slander—Slander—Defamatory statements relating to company's business—Limited liability company—Whether slander of company actionable without proof of actual damage.

Practice—Justification of slander not pleaded—Notice given to call evidence in mitigation of damages—Whether cross-examination on specific instances of misconduct admissible—Evidence of general bad reputation only admissible—R.S.C., Ord. 36, *r.* 37.

On Oct. 27, 1943, and on Nov. 3, 1943, the appellant made certain statements to one L., alleging that the respondent company and its managing director J. were conducting a restaurant business illegally and in contravention of the Defence of the Realm Regulations, and also that the respondent J. was taking part personally in a criminal course of conduct punishable by imprisonment. It was found that the statements made on the two occasions were slanders on the respondents published by the appellant. The respondents obtained damages and an injunction against the appellant in the lower court. On appeal, it was contended on behalf of the appellant (i) that the statements did not bear a defamatory meaning ; (ii) that without proof of actual damage resulting from the publication of defamatory statements, a limited liability company could not sue for slander even if it reflected on the company's business ; (iii) that the judge was wrong in not allowing the cross-examination of the respondent J. as to specific facts in mitigation of damages, as the questions were for the purpose of showing the general bad reputation of the respondent company and the respondent J. :—

HELD : (i) the statements published by the appellant were defamatory.

(ii) a limited liability company could sue for slander without proof of actual damage where the slander related to its trade or business because in such a case the law implied the existence of damage to found the action.

South Hetton Coal Co. v. *North-Eastern News Assocn.* (1) *extended.*

(iii) in actions for defamation, cross-examination as to credit was admissible in the same way as in any other action ; but in order to mitigate damages, evidence of specific instances of misconduct could not be given, although evidence of a generally bad reputation was admissible. Therefore the judge was right in ruling against the cross-examination.

Scott v. *Sampson* (2), *and Hobbs* v. *Tinling (C. T.) & Co., Ltd., Hobbs* v. *Nottingham Journal, Ltd.* (3) *applied.*

[**EDITORIAL NOTE.** The court here affirms the decision of STABLE, J., that on the question of slander relating to the conduct of business the law presumes special damage, and it is, therefore, irrelevant whether the slander is spoken of an individual or a limited company. In the words of LORD SUMNER in *Jones* v. *Jones* ([1916] 2 A.C. 481), " the classification is one of words, not of persons." In the court below, STABLE, J., held also, that a company may sue without proof of special damage for slander imputing a criminal offence punishable by imprisonment, his view being that the exception to the rule requiring proof of special damage applies to the type of crime and not to the " person " to whom it is imputed. The Court of Appeal, however, hold that a discussion of this point is unnecessary for the purpose of their decision. On the practice point, it has been held that in cases of defamation it is not permissible to give evidence of specific instances in order to show bad reputation. Here there was no plea of justification, and it is held, applying this principle, that specific instances may not be put in cross-examination in order to get the facts in in mitigation of damages, where the circumstances if true would amount to justification although notice had been given of intention to call evidence in mitigation of damages.

AS TO DEFAMATORY STATEMENTS CONCERNING A COMPANY'S BUSINESS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 390-391, para. 473 ; and FOR CASES, see DIGEST, Vol. 9, p. 648, Nos. 4285-4289.

AS TO R.S.C., ORD. 36, r. 37, see YEARLY PRACTICE OF THE SUPREME COURT, p. 618.]

Cases referred to :

*(1) *South Hetton Coal Co.* v. *North-Eastern News Assocn.*, [1894] 1 Q.B. 133 ; 9 Digest 648, *4286* ; 63 L.J.Q.B. 293 ; 69 L.T. 844.

*(2) *Scott* v. *Sampson* (1882), 8 Q.B.D. 491 ; Digest Practice 16, *127* ; 51 L.J.Q.B. 380 ; 46 L.T. 412.

*(3) *Hobbs* v. *Tinling* (*C. T.*) *& Co., Ltd.*, *Hobbs* v. *Nottingham Journal, Ltd.*, [1929] 2 K.B. 1, 2, 17-18 ; Digest Practice 30, *249* ; 98 L.J.K.B. 421 ; 141 L.T. 121.

(4) *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859), 4 H. & N. 87 ; 9 Digest 648, *4285* ; 28 L.J.Ex. 201 ; 32 L.T.O.S. 283.

Appeal by the defendant from a decision of Stable, J., dated Jan. 16, 1945. The facts are fully set out in the judgment of Lord Goddard.

T. F. Davis for the appellant.

N. L. Macaskie, K.C., and *Robert Fortune* for the respondents.

Lord Goddard : This is an appeal in an action brought by a limited company which owns a very well-known West End restaurant called the Bagatelle, and by a second plaintiff, Jackson. who is the managing director of the plaintiff company. The defendant is a gentleman who was formerly closely connected with the Bagatelle restaurant ; and apparently his relations with Jackson have been the subject of considerable trouble because two previous actions were brought by Jackson for slander, although they were not pursued. In one of them Jackson paid the defendant's costs, and in both cases, I think, undertakings were given not to repeat the slanders. Just as it was thought, perhaps wrongly, that he had repeated the first one, now it seems that he certainly did utter some slanders. The words that the judge finds that he used are these :

> I advise you [that is Mr. Levene, to whom he was speaking] to disassociate yourself from Mr. Leonard Jackson and the rest of them. When Mr. Jackson has a few drinks he talks a good deal and says how he can get supplies of food or otherwise for the restaurant. The restaurant is being watched. It is better to lose your money that way than have to pay a fine of £500. Get out of the Bagatelle Restaurant.

The second allegation is that, after a conversation about some experiences with the Customs and Excise officials, which had nothing to do with the Bagatelle restaurant, he said :

> I am in a very strong position with the Ministry of Food. The restaurant is being watched. My advice is, get out and stop supplying for 3 or 4 months. Jackson is no good ; his word means nothing to him. Get out of the Bagatelle.

In those circumstances, the judge having found that those words were used, it seems to me that it is impossible to ask this court to say either that those words were not capable of a defamatory meaning or that they were not defamatory. Of course they were defamatory ; they were meant to be defamatory ; and they are saying, as I read them, that the company and Jackson are carrying on the Bagatelle restaurant in a questionable manner, calling for the specific attention of the Ministry of Food, and obviously implying that the rationing orders made under the Defence of the Realm Regulations have been broken, and I think also indicating that Jackson is buying food in the black market, as it is commonly called. I do not think that anybody with a modicum of common sense could have any doubt that that is so. That is clearly and obviously defamatory and actionable with regard to Jackson. So too is it defamatory and actionable with regard to the company, although it seems curious that this precise point does not ever seem to have been decided. In the well known case *South Hetton Coal Co.* v. *North Eastern News Assocn.* (1) it was argued that a limited company could not bring an action for defamation. It is true that in that case it was written defamation. The court held that a company or a corporation could sue for defamation which related to its business. For instance, if you said of a company, " It is a murderer," or if you said of a company, " It is a forger," I have no doubt the company could not bring an action because a company cannot forge and a company cannot murder. But in the ordinary way it would not be actionable to write something of a company which might be actionable in the case of individuals unless what is written reflects upon the company in the way of its business.

Oral defamation, as a general proposition, is not actionable without proof of special damage. But there are certain cases in which the law implies damage, and one of those is oral defamation in respect of a man's business. Therefore, I can see no reason at all why, if you orally defame a company in the way of its business, the company should not have an action just as much as a private individual because undoubtedly it could have an action for any defamation if it could prove damage. I will not say that, because I think the same limitation and the same principles must apply to slander as to libel in respect of a limited company, that is to say, the slander must relate to the company's business. If it does, I see no principle upon which any distinction can be drawn between written defamation and oral defamation. It seems to me that an action lies at the suit of a company. I do not think that it is necessary to discuss the question as to whether or not the company could maintain an action on the ground that it has been charged with a criminal offence. Jackson obviously could, if the words bear that meaning, as I think they do. These two matters seem to me as clear as daylight; and I think, therefore, that the judgment so far was perfectly right.

Another point is raised. There was no plea of justification in this case. In substance what was pleaded was that the words were not defamatory and were not actionable. But at the trial junior counsel for the defendant sought to cross-examine in respect of matters of which notice had been given that the defendant intended to call evidence in mitigation of damages and the judge stopped him. The notice, which was served under R.S.C., Ord. 36, r. 37, stated that the defendant intended to give evidence that the plaintiff company was convicted at Bow Street Police Court on Mar. 30, 1944, and fined £220 and ordered to pay costs for failing to make entries in the stock book of purchases of spirits and for buying spirits from the plaintiff Jackson who had no authority to sell or licence to deal in spirits; and that the plaintiff Jackson was on the same date fined £15 and ordered to pay costs for dealing wholesale in spirits without a licence. Then it stated that certain other servants of the company were also prosecuted on the same day; and that in the following week, on Apr. 6, 1944, the plaintiff company was at Bow Street Police Court fined a total of £523 and ordered to pay costs for selling lager beer at prices exceeding the maximum price. That was a statement that after the uttering of the slander the plaintiff company was twice convicted and the individual plaintiff was once convicted—that the plaintiff company was convicted of a Customs offence, failing to make entries in the stock book for the purchase of spirits and also for selling lager beer at over the maximum price. It is said that the judge was wrong in stopping the cross-examination when those matters were being put to the plaintiff, Jackson; and I also gather that, in view of the judge's ruling, counsel then for the defendant, did not tender the evidence in support of the matters which were set out in the notice. I think it is said that the judge had clearly indicated that the evidence could not be given, and, therefore, I think there was no necessity for counsel for the defendant actually to tender the evidence. Had I thought that the evidence was admissible, speaking for myself, after the judge's very clear intimation when objection was taken to the cross-examination, I should have thought it was necessary for counsel then for the defendant formally to tender the evidence, and I should not decide the question on the ground that he had not formally tendered it.

The law with regard to cross-examination on such matters as this in libel actions is, I think, established, and the law as to the right to give evidence in mitigation in actions of defamation is also clear. Whether the law is wholly satisfactory it is not for me to say; we have to take the law as we find it, and certainly for a great many years it appears that the law has been this. You can cross-examine a plaintiff in a libel action in exactly the same way that you can cross-examine a plaintiff in any other action: therefore, if you want to put questions to him including questions as to whether he has been convicted of offences, for the purpose of destroying his credit, you can do so. If a plaintiff goes into the witness box and poses, for instance, as a man of unblemished reputation, and not only a man of unblemished reputation but a man who ought to be believed, you can put to him any questions you like to show that he is in fact a rascal whom the court or the jury ought not to believe—that is to say, to use a common expression, you can cross-examine to credit. But you are bound by his answers, and if he denies some matter you cannot call evidence to contradict it. It has always been said that you cannot use the fact that you have given notice to call evidence in mitigation of damages in order to cross-examine a person, in effect, to set up a justification. Now, counsel for the appellant says, "I do not seek to do that because I could not justify, but I do say that I could use this to destroy the plaintiff's reputation." It has been laid down both in *Scott* v. *Sampson* (2) and *Hobbs* v. *Tinling* (3) that you can only give evidence of general bad reputation, that you cannot give evidence of specific instances to show that in certain specific matters the plaintiff has been convicted of or has done that which is dishonest or wrong, although you may give evidence to show that he is a man who is generally known as a person of bad reputation.

It seems to me (and it was not contended otherwise) that the object of attempting in this case to put the conviction to the plaintiff was not on a matter of credit, that it was not to test his credibility or to endeavour to destroy his credibility; it was to get in these facts by cross-examination in mitigation of damage.

I think the judge applied the right rules here. I think it is equally clear that counsel for the successful plaintiff in *Hobbs* v. *Tinling* (3) felt too that he was in a difficulty about it, and I think he was justified in so feeling. I think the judge gave a right decision. He did not give large damages in this case. Considering the nature of the libel, he might have given very heavy damages, but he did not. I think, therefore, that there is no fault to find with his judgment, and that the appeal must be dismissed with costs.

The judge gave the plaintiff Jackson £2 and the plaintiff company £4 in respect of breaches of the undertaking to which I have referred, which had been given when it was alleged that there had been previous slanders. In my judgment, that was wrong because this action was not brought for breach of contract and there is no allegation of breach of contract. However, we dismiss the appeal, and we direct that the order be amended by substituting £50 in each case for £52 and £54. I do not know how it came to be done below but there seems to have been no protest about it, as the matter was not raised. It is quite clear that neither on the writ nor in the statement of claim is there any allegation that the action was brought for breach of contract. I think the judge acted perfectly properly in awarding that small sum. It makes no difference to the merits of the appeal.

MacKinnon, L.J.: I agree, and I do not think it necessary to add anything.

du Parcq, L.J.: I agree. It is not necessary to decide whether the judge was right in the view that:

> . . . a limited company [I am reading his words] without proof of actual damage can sue for a defamatory spoken word imputing the commission of a criminal offence for which, if it were a natural person, it could be sentenced to a term of imprisonment.

I wish to say nothing one way or the other about that but to reserve my opinion upon it. I have no doubt, however, that a slander of a company in the way of its business is actionable without proof of special damage. I think that that follows logically from the earlier decisions. The question whether a corporation could bring an action for libel in any circumstances was dealt with as early as 1859, and it was then held, in *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (4) that it could maintain an action for libel by which its property was injured. At that time in that case it was not necessary to decide whether or not proof of special damage was necessary because special damage there was alleged. Later it was established in the *South Hetton Coal Co.* case (1) that in the case of a libel it is not necessary for the company to prove special damage. A company cannot sue either for libel or for slander unless it is defamed in the way of its business. In the case of a libel it is not necessary to prove special damage, and there can be no reason in principle why in the case of a slander it should have to prove special damage. It is quite true that the judges in the *South Hetton Coal Co.* case (1) do not specifically say that the rule is the same for slander as for libel. That was because it was unnecessary to decide that point as they were dealing with an action for libel. As I say, it occurs to me that for this particular purpose libel and slander in the case of a company are indistinguishable. I entirely agree with all that my Lord has said on the other points.

Appeal dismissed with costs.

Solicitors: *E. C. Randall* (for the appellant); *B. A. Woolf & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

B. O. MORRIS, LTD. *v.* PERROTT AND BOLTON.

[COURT OF APPEAL (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **March 12, 1945.**]

Estoppel—Res judicata—Same subject matter—Different causes of action—Judgment against one defendant without satisfaction no bar to judgment against another defendant.

Practice—Judgments and orders—Form of judgment—Defendants joined on different causes of action in respect of some subject matter—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 41—*Rules of the Supreme Court, Ord.* 16, *r.* 4.

The respondent company agreed to buy from P. certain patents in respect of a pump for £5,000. A cheque for this sum was given to the appellant who undertook to hold it or the proceeds until a good title to the patents was transferred to the respondent company. The appellant however paid the cheque into an account which was drawn upon and no title to the patents was ever made out. Subsequently P. agreed to repurchase the pump from the respondent company and gave them a cheque for £5,000 which was not honoured. The respondent company brought an action against P. on the cheque and the agreement to repurchase and against the appellant as stakeholder. Before trial P. became bankrupt and the company proved in his bankruptcy for the amount. At the trial simultaneous judgments were given; against P. on the cheque and against the appellant for £5,000 and interest in respect of the sum deposited with him as stakeholder. On appeal it was contended on behalf of the appellant that the respondent company was not entitled to judgment against him (i) because by taking judgment against P. the company had elected to pursue their remedy against P. and (ii) because the company would be able to recover double satisfaction:—

HELD: (i) as both judgments were signed simultaneously no question of election could have arisen.

(ii) although the subject matter was the same, since the causes of action were different judgment without satisfaction against one defendant was no bar to an action against the other defendant.

Isaacs & Sons v. *Salbstein* (2) *applied.*

(iii) where different causes of action in respect of the same subject matter are joined it is desirable that the judgment should clearly state that the plaintiff may not obtain double satisfaction.

[**EDITORIAL NOTE.** The rule that an unsatisfied judgment against one defendant is no bar to judgment against another defendant on a different cause of action is already settled by authority and the chief point of interest here to which attention may be directed is the expression of the court that, in cases where one person has causes of action against several in respect of the same subject matter, a judgment against one should make it clear that the plaintiff is not to have double satisfaction. This was formerly effected by restraint of execution by the Chancery Court, whose jurisdiction in this matter is now exerciseable by any Division by virtue of the Judicature (Consolidation) Act, 1925, s. 41. The court therefore adds here to the judgment the words "so however that the plaintiff is not to recover more than [the sum claimed] in all." The rule in *Kendall* v. *Hamilton* (4) referred to in the judgment, that in case of liability on joint contract, judgment against one contractor is a bar to an action by another, is subject to many exceptions, as to which, see the HALSBURY reference next following.

AS TO ESTOPPEL BY RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-419, paras. 465-472; and FOR CASES, see DIGEST, Vol. 21, pp. 198-225, Nos. 434-581.]

Cases referred to:

(1) *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1941] A.C. 1; [1940] 4 All E.R. 20; Digest Supp.; 109 L.J.K.B. 919.

*(2) *Isaacs & Sons* v. *Salbstein*, [1916] 2 K.B. 139; 21 Digest 225, *586*; 85 L.J.K.B. 1433; 114 L.T. 924.

*(3) *King* v. *Hoare* (1884), 13 M. & W. 494; 21 Digest 218, *538*; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174.

*(4) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 21 Digest 218, *540*; 48 L.J.Q.B. 705; 41 L.T. 418.

(5) *Morris* v. *Robinson* (1824), 3 B. & C. 196; 21 Digest 226, *589*.

Appeal by the defendant Bolton from a decision of Lewis, J., dated Sept. 27, 1944. The facts are fully set out in the judgment of the court delivered by Lord Goddard.

R. Fortune for the appellant.

D. A. Scott Cairns for the respondent company.

Lord Goddard [delivering the judgment of the court]: This is an appeal by the defendant Bolton from a judgment of Lewis, J., in an action brought to recover a sum of £5,000 and interest thereon, money deposited by the plaintiffs with him as a stakeholder with which it is alleged he had parted contrary to the mandate under which it was deposited with him. There was a second defendant, one Perrott, who did not appear to the writ and is now bankrupt. It will be necessary to refer in due course to the nature of the claim made against him as Lewis, J., at the trial acceded to the request of the plaintiff to have judgment entered against Perrott also.

The facts are that the company is managed and controlled by Morris who acted throughout on their behalf. The company deals in pumps and Morris became interested in a pump which had been invented by Perrott and of which he was alleged to own the patent rights. Morris appears to have been much impressed with the pump and was anxious to buy the patent rights, acting no doubt somewhat precipitately as he had had no report on them from a patent agent. Bolton was acting as Perrott's accountant. I think he introduced the business to Morris, and at any rate, though this is really immaterial, it is common ground that he was to receive some remuneration from both. The patents were, however, in the hands of a receiver for debenture holders in a company called Fluid Transport, Ltd.; he had a claim on them and was only willing to part with them on payment of £3,000. Perrott's price was £5,000, out of which the receiver would have to be paid, and a share in the subsequent profits, if any, along with one Dickenson.

A somewhat informal agreement setting out the conditions of sale of the patents, said to be 15 in all, was executed on Aug. 29, 1942, by Morris, Perrott and Dickenson. Then it was arranged that Morris should give Bolton a cheque for £5,000 and that he was to hold it or the proceeds until a good title to the patents was made out and transferred to the plaintiff company. It is unnecessary to set out all the facts elaborately because the terms on which Bolton received the cheque are stated in the clearest possible terms in a letter he wrote to Morris on Sept. 5. After acknowledging receipt of the cheque he wrote:

> I shall part with no money until I receive an absolute title in your company's favour to all the patents. I am in hopes this will be done early next week.

It is at least arguable that it was Bolton's duty to retain the cheque itself until the title to the patents had been made out and the assignment was ready, but it was plainly his duty, if he cashed it, to retain the money. It is certain that the receiver had some right, probably a lien, on those patents till he was paid and it looks as though Dickenson certainly, and possibly others, would have had to join in the assignment before a good title could be passed to the company. Bolton, however, having got the cheque, paid it into a joint account of Perrott and himself and £3,000 was then drawn out and paid to the receiver on the latter agreeing to assign the patents which he held to Perrott or as the latter should direct, and Perrott authorised the receiver to assign the patents to the plaintiffs by a letter dated Sept. 9. For whatever reason, the patents never were assigned and no title to them was ever made out, and what has become of them is by no means clear, nor is it at all clear whether the receiver ever held all the 15 patents referred to in the August agreement.

Meanwhile Morris received a very unfavourable report on the patents from a patent agent, and, believing that the matter was not as had been represented to him, he resolved to have no more to do with it. Whether if a title had been made out and an assignment had been executed by the transferors Morris could have objected to Bolton paying over the money on the ground that he was dissatisfied with his bargain we need not enquire. It is clear beyond controversy that Bolton had no business to part with the money when he did. Not only did £3,000 go to the receiver, but the rest of the money appears for the most part to have been shared between Perrott, Dickenson and Bolton.

It was contended on behalf of Bolton that as soon as he had got an undertaking by or agreement with the receiver to part with the patents he was entitled to part with the money, but that is not the condition on which he received it as stakeholder. If that were the only point in the case it would be simple indeed. But when Morris became dissatisfied with his purchase and found that his money had gone he proceeded to negotiate with Perrott. According to a letter written by Perrott on Oct. 29, he agreed "to repurchase the pump" from Morris (that is how he himself put it in the letter) for the sum of £5,000 payable on Nov. 19, 1942, and he gave Morris his cheque for that amount, but the cheque was never honoured, and after this action was brought, but before trial, he became bankrupt and Morris has proved in his bankruptcy for that amount.

In this action the plaintiffs sued Perrott on the cheque and also on the agreement to repurchase. The judge has found that the true agreement which was made between Morris and Perrott was that if the latter would repay £5,000 he would give up all claims to the pump. The patent rights had never been vested in the company, but the contract was still in existence on which the plaintiffs could have insisted had they chosen so to do, so there is no question that there was consideration for the promise by Perrott and also for the cheque which he gave.

Counsel for the plaintiff company applied to us for leave to amend his statement of claim by setting out the contracts as found by the judge, and we allowed it as it would not in any way prejudice the defendant Bolton. Of course, if Morris had taken an assignment of the patents and then assigned them back to Perrott very different considerations would have arisen, but in the circumstances it may be doubted whether there is any difference in substance between what was originally pleaded and the amendment.

At the trial counsel for the plaintiff company asked also for judgment against Perrott, who had not appeared to the writ but against whom judgment had not been signed. The judge acceded to this request, saying:

> I am satisfied that he can claim against Bolton as a stakeholder and against Perrott on his dishonoured cheque, which are two different causes of action.

And later on he said:

> The plaintiffs are entitled to recover the £5,000 against Perrott and also the £5,000 as money had and received to the use of the plaintiff company by Bolton.

And he gave interest but only against Bolton. The judgment as drawn up is against Perrott for £5,000 and against Bolton for £5,379 14*s.* 6*d.*, and as against both defendants for costs.

Counsel for the appellant has contended that as the plaintiffs have taken judgment against Perrott they cannot have judgment against Bolton. As I understood his argument, his first contention was that by taking this judgment he had elected to pursue a remedy against Perrott and could not, therefore, pursue one against Bolton. As he took judgment at the trial against both I am unable to see how he elected between them. Perrott could say, had he appeared, exactly the same. The plaintiffs did not make any election, but sued both to judgment. Then is their position prejudiced because they proved in the bankruptcy of Perrott before the trial? In my opinion the authorities plainly show that they are not, and that nothing but satisfaction by Perrott would be a bar to their proceeding against Bolton. This appears, I think, from the reasoning in *United Australia, Ltd.* v. *Barclays Bank, Ltd.* (1). A very clear authority on the subject and one which I think solves any difficulty in this case is *Isaacs & Sons* v. *Salbstein* (2). It lays down that where there is no joint contract or relation of principal and agent an unsatisfied judgment against one person for the price of goods sold is not a bar to a subsequent action against another for the price of the same goods. It is clear that the test is not whether the subject matter of the contract is the same in both actions but whether the cause of action is identical in both. If it is, as is the case if the liability arises on a joint contract, judgment against one contractor is a bar to an action against another, as laid down in *King* v. *Hoare* (3), and *Kendall* v. *Hamilton* (4). If the causes of action are different, judgment without satisfaction against one is no bar to an action against the other, and this is so even if the plaintiff deliberately refrains from proceeding to execution on the first judgment. The same is true in tort, as, for instance, where there have been successive conversions of the same goods, trover lies against all persons guilty of conversion and recovery of damages against one is no answer by the defendants in subsequent actions, though a second or subsequent defendant is entitled to credit for what may have been recovered in a former action and as soon as full satisfaction has been obtained the plaintiff has exhausted his rights. It is enough to cite *Morris* v. *Robinson* (5) as authority ; the causes of action in that case were based on conversion.

That case and *Isaacs* v. *Salbstein* (2) also dispose of the matter that was much argued on this appeal. It was objected that this judgment allows the plaintiff to recover in all £10,379 and not only £5,379. The answer is, as pointed out by Bayley, J., in *Morris's* case (5), that equity would interfere to prevent a double satisfaction, and Bankes, L.J., in *Isaacs*' case (2), at p. 155, said :

> It is said that, if this is the rule of law, a person may recover a number of judgments against different persons for the same sum of money. I see no great objection to this, having regard to the fact that a plaintiff cannot receive the amount claimed more than once.

Before the Judicature Act it would not have been possible to sue in one action two defendants against whom there were different causes of action though in respect of the same subject matter, nor indeed until Ord. XVI was in its present form. Successive actions would have had to be brought and separate judgments taken : now the two defendants can be sued in one action and judgment can be given against them according to their several liabilities and the principles which applied to separate judgments in this respect equally apply to a judgment in the present form for the several liabilities. The plaintiff can levy execution against either or both, so however that he does not recover more than the real amount of his claim. Had he been able to recover, say, £2,000 from Perrott he could recover no more than £3,379 from Bolton. Formerly had a plaintiff endeavoured to recover by execution on both judgments more than the real amount the Court of Chancery would have restrained him, exercising the jurisdiction it possessed of restraining proceedings at law.

A prayer to restrain a judgment creditor from exercising his right of execution to the full extent of the judgment seems to have been quite common and precedents will be found in Van Haythuysen's Equity Draftsman, a work which I am informed by Uthwatt, J., was regarded as an authority on chancery pleading. There is, for instance, on p. 108 of the second edition a precedent for a bill by the grantor of an annuity, secured by a bond for double the amount, praying for relief. The bill recites that the grantee had entered judgment in the King's Bench under a warrant of attorney given by the plaintiff for the full amount of the bond and the prayer is that on payment by the plaintiff of the amount advanced with interest the defendant might be decreed to enter satisfaction on the record and in the mean time be restrained from proceeding to execution on his judgment. From this it is plain that Chancery could and would restrain execution beyond what was in truth due. This jurisdiction can now be exercised by any Division of the High Court, the material section of the Judicature (Consolidation) Act being sect. 41, and as execution is a part of the proceedings in an action an application in the action could be made to the court to prevent the plaintiff from executing for more than was really due. In the present case the plaintiffs have no intention of executing for more than £5,379, nor is it in the least likely they could as Perrott is bankrupt and has no assets. But to prevent the same question arising in other actions where such a judgment as we are now considering may be given, the court thinks it desirable that some words should be added making it clear that the plaintiff cannot have double satisfaction. In the present case this can be effected by adding " so however that the plaintiff is not to recover more than £5,379 in all," and the court directs that this should be done.

The appeal is dismissed with costs, but the order is varied by the addition of these words.

Order accordingly.

Solicitors : *Page, Moore & Page*, agents for *Freeland & Passey*, Birmingham (for the appellants) ; *Norman Chinn, Son & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re KEMP.

[KING'S BENCH DIVISION (Tucker, J), **April 11, 1945.**]

Emergency Legislation—Compensation—Personal injuries—Merchant seaman fatally injured by army vehicle travelling in convoy—"War injury"—"In combating the enemy"—Restricted interpretation—Actual or imagined engagements with enemy—Fatal injury not due to "any other injurious act . . . A *in combating the enemy"—Personal Injuries (Emergency Provisions) Act,* 1939 (*c.* 82), *s.* 3—*Pensions (Navy, Army, Air Force and Mercantile Marine) Act,* 1939 (*c.* 83), *s.* 10.

The appellant was the widow of a merchant seaman who had been killed in a street accident in Alexandria. The following facts were found by the tribunal: The appellant's husband was the chief steward in a motor vessel operated by the P. & O. Steam Navigation Co., for the Sea Transport B Division of the Ministry of War Transport. On Dec. 20, 1941, the vessel was at Alexandria and the appellant's husband was permitted to go ashore. On the morning of Dec. 21, 1941, at about 12.45 a.m., on making his way back to the ship, he was run down by a British army vehicle travelling in convoy. At the time, a blackout was in force in Alexandria. The appellant's husband received fatal injuries and died the next day. The C name of the driver of the vehicle, which did not stop, was not ascertained. On these facts the tribunal held that the death of the appellant's husband was not due to a war injury. On appeal, the question for the determination of the court was whether or not this was a war injury within the meaning of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10, caused by the "doing of any other injurious act . . . in combating the enemy":—

D HELD: (i) the words in the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10, "the doing of any other injurious act . . . in combating the enemy" ought to receive a narrow interpretation, restricted to an injury suffered during an actual or imagined engagement with the enemy, because the Personal Injuries (Emergency Provisions) Act, 1939, s. 3, deprived persons who suffered war injuries of their right to claim under the Workmen's Compensation Act or at common law.

E *Greenfield* v. *London & North Eastern Ry. Co.* (2), and *Adams* v. *Naylor* (3) *followed.*

(ii) applying this restricted interpretation to the facts here, the death of the appellant's husband was not due to a war injury within the meaning of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939 s. 10.

F [**EDITORIAL NOTE.** This case considers the construction to be put upon the phrase "injuries caused . . . in combating the enemy" in the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939. It is held to be undesirable to define the precise limits of the phrase; a restricted interpretation is adopted, and the court holds that the driving of an army vehicle in convoy at a place near the scene of active military operations is not within the meaning of the words which, as SCOTT, L.J., said in *Adams* v. *Naylor* (3), seem to import active fighting. The Pensions Appeal Tribunal held that "any other injurious act" in sect. 10 of the Act must be construed *ejusdem generis* G with "the discharge of any missile (including liquid and gas) or the use of any weapon, explosive or other noxious thing", but TUCKER, J., refuses to express an opinion on this matter, deciding the case on his interpretation of "combating the enemy."

FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, s. 3, see HALSBURY STATUTES, Vol. 32, p. 1061.

FOR THE PENSIONS (NAVY, ARMY, AIR FORCE AND MERCANTILE MARINE) ACT, 1939, s. 10, see HALSBURY STATUTES, Vol. 32, p. 1067.]

H Cases referred to:

(1) *Cameron* v. *Minister of Pensions*, [1944] Session Notes 56.
*(2) *Greenfield* v. *London & North Eastern Ry. Co.*, [1944] 2 All E.R. 438; 171 L.T. 337.
*(3) *Adams* v. *Naylor*, [1944] 1 K.B. 750; [1944] 2 All E.R. 21; 171 L.T. 105.
(4) *Taylor* v. *Sims and Sims*, [1942] 2 All E.R. 375; 167 L.T. 414.

APPEAL of the applicant by way of case stated from a decision of No. 1 Pensions Appeal Tribunal. The applicant was the widow of a merchant seaman who was killed in a road accident in Alexandria on Dec. 21, 1941, while on shore leave. The tribunal disallowed the applicant's appeal from the rejection by the Minister of Pensions of her claim for compensation in respect of her husband's death under the provisions of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10, and the Personal Injuries (Emergency Provisions) Act, 1939, s. 3. The facts are fully set out in the judgment.

John Busse for the appellant.

Hon. H. L. Parker for the Crown.

Tucker, J.: This is an appeal by way of case stated by the No. 1 Pensions Appeal Tribunal, and the facts set out in the case are as follows: The appellant, who is the widow of a merchant seaman, claimed that the death of her husband at Alexandria on Dec. 22, 1941, as a result of internal haemorrhage and head injuries, was directly attributable to a war injury within the meaning of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, and the Personal Injuries (Emergency Provisions) Act, 1939, or to a war risk injury within the meaning of the Pensions (Mercantile Marine) Act, 1942. Her claim was rejected by the Minister of Pensions and she appealed, and after a hearing and an adjournment and a further hearing, the Tribunal rejected her appeal and found the following facts:

> (i) The appellant's husband was a merchant seaman and chief steward in the M.V. Prince Baudouin. (ii) At all material times the vessel was being operated by the P. and O. Steam Navigation Co. for the Sea Transport Division of the Ministry of War Transport upon special government service in the Eastern Mediterranean. (iii) On Dec. 20, 1941, the vessel was at Alexandria, and sometime during that day the deceased went ashore with another member of the crew upon the ship's business. (iv) Having transacted the ship's business the deceased remained ashore for the evening upon his own affairs. He had permission to do so and was not due back that evening at any particular time. (v) Upon the morning of Dec. 21, 1941, at about 12.45 a.m. the deceased was making his way back to his ship when he was run down in the street by a vehicle belonging to the British army. (vi) The deceased suffered physical injuries, namely, internal haemorrhage and head injuries, from which he died in the Anglo-Swiss hospital, Alexandria, on Dec. 22, 1941. (vii) The accident occurred on the Rue Ibrahim Ier, near the Kora Mosque, in Alexandria. (viii) The vehicle was one of a convoy of British army vehicles and did not stop. The convoy was in two parts and the second part was stopped when the officer in charge gave information to the police. (ix) There was a "blackout" in force at the time in Alexandria. (x) There is no evidence as to the precise constitution of the convoy or where it was going or where it came from except that it came from the direction of Ninet el Bassal and was travelling in the direction of Manshieh. The name of the driver of the vehicle is either unknown or has not been disclosed. (xi) A claim was made by the appellant against the War Office. By letter dated Oct. 8, 1943, the War Office replied stating: "The case of the widow of the late H. B. Kemp was fully investigated some months ago by this department and also by the claims commission M.E.F. The result of these investigations brought to light the fact that there was no negligence on the part of any War Department personnel and no payment in respect of compensation could, therefore, be recommended from army funds." (xii) There was no dispute between the parties upon these facts.

On those facts the tribunal held as a matter of law that the applicant had not shown that the death of her husband was due to a war injury. "War injury" is defined in the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10, as follows:

> "War injuries" means physical injuries (*a*) caused by . . . (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy.

I have read the words which are relevant to the present claim. The contention here of the applicant was that on the facts found by the tribunal, the tribunal should have held that the deceased's injury was a war injury, because it was said it had been caused by the "doing of any other injurious act in combating the enemy." The tribunal has held that on those facts it was not a war injury. I should add that the original claim that this was a war risk injury within the meaning of the Pensions (Mercantile Marine) Act, 1942, was abandoned by the appellant's representative before the tribunal, and was not argued before me by counsel. So I am only concerned with the question whether or not this was a war injury within the meaning of sect. 10 of the Act to which I have referred.

The tribunal have attached to the case their written decision on this matter. It is not necessary that I should read it all, but the paragraphs in point are as follows:

> Since the judgment of the Lord Justice-Clerk in the Court of Session in *Cameron*

v. *Lord Advocate* (1) as representing the Minister of Pensions, it is clear, if indeed it were not clear before, that the maintenance of a " blackout " is not, *per se*, " the doing of any other injurious act in combating the enemy." But it is said that the driving of an army vehicle in convoy at a place not far removed from the scene of active military operations, and in the circumstances hereinbefore set out, is such an " injurious act in combating the enemy." There are two reasons why we cannot accept this view. In the first place, the phrase " any other injurious act " must, we think, be construed *ejusdem generis* with the " discharge of any missile (including liquid and gas) A or the use of any weapon, explosive or other noxious thing." Applying this method of construction, as we must, it is not possible, in our view, to regard the driving of an army vehicle, with or without negligence, in the streets of Alexandria as such an injurious act as is contemplated by the section. It is an act which, in its nature, is far removed from the other kind of acts contemplated. If we are wrong upon this point, we think that the phrase " in combating the enemy " limits the injurious acts contemplated to those within the sphere of active military operations and excludes the more remote spheres of manufacture or supply behind the lines. No doubt it is difficult to draw B the line between acts done in " combating the enemy " and those outside this definition and no useful purpose would be served if we attempted so difficult a task ; it is sufficient to say that we hold that the driver of the vehicle which killed the deceased was not engaged at the time in combating the enemy. Perhaps we should add that we are constrained to this construction of the section not only for the above reasons but because of the general reasoning of the Court of Appeal in the recent case of *Greenfield* v. *London & North Eastern Ry.* (2), and the observations upon this matter by SCOTT, L.J., in C *Adams* v. *Naylor* (3). For these reasons we must hold that the deceased did not meet his death as the result of a war injury, and the appeal must accordingly fail ; but as this decision depends entirely upon the proper construction of the definition of a war injury, and the matter is not entirely free from difficulty, the appellant may have leave to appeal.

I do not think it is necessary for the purpose of this case to express any opinion as to whether or not the tribunal was right in holding that the *ejusdem generis* D rule must be applied in construing cl. (*a*) (iii) of sect. 10 of this Act. I will assume for the purpose of this case that the other injurious act may be an act not within the *genus* constituted by the matters referred to in cl. (*a*) (i) and (ii), but even so, and on this assumption, before it can be a war injury it must be an injurious act done in combating the enemy. Those are the words applicable to the present case. As to that, there is no binding decision yet of which I am aware, as to the limitation, if any, to be placed upon those words, but the E matter was considered by the Court of Appeal in *Adams* v. *Naylor* (3). In that case SCOTT, L.J., and MORTON, J., as he then was, expressed their view upon the interpretation to be put upon these words. The observations were *obiter*, because the actual decision proceeded upon the basis that the boys in that case were trespassers. But in dealing with this matter it is to be observed that the defendant in that case was represented by the Solicitor-General, the defendant being the army officer nominated to defend the proceedings that F were brought, and I am told by counsel for the Crown that the argument put forward by the Solicitor-General in that case was an argument put forward on behalf of the Government, including the Minister of Pensions as well as the War Office, as to what was the proper construction to be put upon this Act of Parliament. The submission made by the Solicitor-General was that it is impossible to put any limit on the phrase " in combating the enemy " as long as the war is continuing and a minefield is kept in existence. The subject G matter of that case was a minefield on the coast of Lancashire and some children had suffered injury by trespassing upon this area where the minefield was. That was the argument put forward by the Solicitor-General, and it was not accepted by the Court of Appeal. SCOTT, L.J., says this, at p. 759 ([1944] 2 All E.R., at p. 26) :

> In my view, these two actions would be barred by subsect. (1) of that section if H the death and injuries caused to the two boys were " war injuries " as defined by sect. 8, which, leaving out immaterial words, defined them as injuries " caused by . . . the use of (*inter alia*) any . . . explosive . . . either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy." The Solicitor-General submitted that it is impossible to put any limit on the phrase " in combating the enemy " as long as the war is continuing and the minefield is kept in existence. Had that been the intention of Parliament it would have sufficed to enact the first seven lines of para. (*a*) in the definition of war injuries, with the addition of " either by the enemy or by His Majesty's Forces for the purpose of the war." The exegetic words " in combating the enemy, etc.," are also words of limitation. They seem to me to import active

fighting, but, if they be ambiguous, the alternative about repelling unreal but supposed attacks seems to me to make it clear that they relate to the risks of an actual or imagined engagement. I cannot think it was the intention of Parliament to take away a civilian's right of action in such a case as the present, and on ordinary principles of statute interpretation the fundamental right of the subject of coming to the King's courts for redress of wrongs should not be treated as taken away by Parliament except by quite clear language. Unless the definition is limited in the way I suggest I cannot see where else to draw the line, and the very fact that Parliament has not made the deprivation of the civilian's rights dependent on the making of a scheme for an equivalent right of compensation under s. (i) affords a strong confirmation of the limited interpretation of sect. 3, with its careful definition in sect. 8.

The difference in the numbering of the sections is that in that case Scott, L.J., was dealing with the Personal Injuries (Emergency Provisions) Act, 1939, which is in exactly the same language as the section I am dealing with, but in that statute it is sect. 8, whereas, in the present statute, it is sect. 10. MacKinnon, L.J., did not deal with this point at all, but Morton, J., at p. 765, ([1944] 2 All E.R., at p. 30), used this language :

> Cassels, J., though he was very much inclined to think that the boys were trespassers, based his judgment on the Personal Injuries (Emergency Provisions) Act, 1939, s. 3. On this branch of the case I cannot agree with Cassels, J., and I accept the view of Scott, L.J., as to the interpretation of that Act. In one sense the engineers who laid these mines along the coast were combating the enemy as the mines were placed there with the intention of preventing the enemy from invading this country and of killing him if he did land on our shores. If the words were interpreted in this sense, it might well be held that a person who performs the vital work of filling a shell at a factory is "combating" the enemy. Such a person is certainly doing work directed to killing the enemy and protecting this country. This is not, however, in my view, the sense in which these words are used in the Act. Having regard to the context, I think that in this Act these words, so far as land operations are concerned, can only apply to a situation arising from the actual presence of an enemy on the soil of this country. Different considerations may well arise in the case of operations at sea or in the air. Putting the matter at its highest in favour of the defendants, the words are ambiguous and I agree with Scott, L.J., that a fundamental right of the subject should not be treated as having been taken away by statute unless the language used clearly has that effect.

Although those observations were *obiter*, I think they are observations and expressions of opinion which I ought to follow. I very much regret that it is not possible for decisions of mine on matters of this kind to reach the Court of Appeal, so that they can express their views upon these matters when they arise in connection with pensions appeals, but there it is. That is the position. I think I ought to follow those expressions of opinion by the Lords Justices. Furthermore, in *Greenfield* v. *The London & North Eastern Ry. Co.* (2), Lawrence, L.J., said this, at p. 441 :

> The interpretation I put on the words of sect. 8 accords with all the authorities with the exception of that in *Taylor* v. *Sims and Sims* (4), and I am unable to agree with the view of the judge in that case on this point. In particular, the view of the majority in the minefield case, *Adams* v. *Naylor* (3), supports my view of the words "combating or repelling the enemy" being limited to actual fighting.

Applying that language to the facts of this case, it seems to me to be quite impossible to say that the tribunal have arrived at an erroneous decision as a matter of law. I think that on the facts set out in this case, and applying the law as expressed by the Court of Appeal, this injurious act was clearly one which was not done in combating the enemy. I think it is very undesirable to attempt to define the precise limits of what is or is not "combating the enemy." In most of these pensions appeals it will become a question of fact upon which side of the line any particular case falls. It seems to me that this case clearly falls on the wrong side of the line, as far as the applicant is concerned. The view which I take of this case, having regard to what has been said by the Court of Appeal, involves a somewhat restricted and narrow interpretation of this Act, because the Court of Appeal have in terms stated that such a narrow or limited interpretation should be put on these words because of the provisions of these Acts, namely the Personal Injuries (Emergency Provisions) Act and the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, whereby persons who have suffered war injuries are deprived of the right to claim under the Workmen's Compensation Act and at common law. It is sect. 3 of the Personal Injuries (Emergency Provisions) Act, 1939, which has this result, and the Court of Appeal have said that any Act which deprives a man of rights such as those, the right at common law to claim damages or to claim compensation under the Workmen's Compensation Acts, should receive a limited interpretation, but the result of applying a limited or narrow interpretation to this Act will have the result, as it has in this case, of depriving a man of the right to a pension which he might otherwise have received. However, it is impossible to put a wide interpretation on the Act in one class of case, and a narrow interpretation upon it in another, and I feel bound to put the interpretation upon it which the Court of Appeal have indicated is the proper one. That has the result in this particular case that the widow of this merchant seaman is unable to receive a pension.

The only other observation I have to make is that counsel for the appellant says that there really was not sufficient material here upon which the tribunal could come to a final conclusion. The facts with regard to this convoy and the other vehicle concerned in the accident are very scanty. I do not think that it would be right to send this case back to the tribunal. The applicant and the Minister of Pensions were content for it to be dealt with by the tribunal on the facts available, and I do not see any reasonable prospect of further facts being elicited, and I do not think that that is a course which I ought to take, where a case comes before me raising a clear-cut point of law, which is all I have to consider. In the result the appeal fails.

Appeal dismissed.

Solicitors: *Neil Maclean & Co.* (for the appellant); *Treasury Solicitor* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

NOTE.

CONTINENTAL GRAIN CO., INC. *v.* TWITCHELL.

[COURT OF APPEAL (Lord Goddard, du Parcq, L.J., and Uthwatt, J.), **March 6, 1945.**]

An appeal by the plaintiffs from the decision of ATKINSON, J., dated Dec. 4, 1944, and reported in [1945] 1 All E.R. 357, was dismissed.

P. A. Devlin and *C. Fletcher-Cooke* for the appellants (plaintiffs).

Sir Robert Aske, K.C., and *R. E. Gething* for the respondents (defendants).

Solicitors: *William A. Crump & Son* (for the appellants); *Ince, Roscoe, Wilson & Glover* (for the respondent).

Re DRAKE.

[King's Bench Division (Tucker, J.), **April 10, 1945.**]

Emergency Legislation—Compensation—Civil defence volunteer—Shock on finding company officer hanging dead in station's store room—Resulting nervous debility—" War injury "—" War service injury "—Injury arising out of and in the course of performance of duty—" Physical injuries " excluding purely mental injuries—" Physical injury " need not be traumatic in origin—Shock resulting in immediate physical consequences " physical injury "—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), *s.* 8.

The appellant was a full time member of the National Fire Service. On July 17, 1943, the appellant, while on duty, discovered his company officer hanging dead in the store room of the South Wharf National Fire Station, Rotherhithe Street. The appellant suffered a severe shock and was subsequently placed on the sick list with nervous debility. On those findings, the Minister of Pensions having rejected the claim, the tribunal upheld the decision of the Minister on the ground that there was no physical injury, traumatic in origin, which caused the appellant's disablement, and also, for the same reason, no war service injury. On appeal, it was contended for the respondent (i) that the injury, assuming it to be a physical injury at all, did not arise out of the performance by the appellant of his duties as a member of the National Fire Service; (ii) that the injury was purely mental, and not a " physical injury " within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8 :—

Held : (i) since it was within the ambit of the appellant's duties to be in the store room, the injury, if it was a physical injury within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, arose out of and in the course of the performance of the appellant's duties.

Powell v. *Great Western Ry. Co.* (5) *followed.*

(ii) the finding by the tribunal concerning the original cause of the appellant's disability, that the appellant suffered a great shock, was insufficient to determine whether the shock was purely mental or whether it had immediate physical consequences. The case must, therefore, be remitted to the tribunal for consideration whether the appellant's injury was purely mental or physical within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8.

Re Haines (1) *followed.*

[**EDITORIAL NOTE.** The question of whether a war service injury arises " out of and in the course of " the performance of duty is here decided by reference to the workmen's compensation cases involving locality risk. The decisions are difficult to reconcile but the case is held to fall within *Powell's* case (5) since there was, in effect, something peculiar to the locality which might have caused such an injury to anyone entering it. The injury here, being caused by the sight of something which caused shock, is analogous to that in *Young* v. *Minister of Pensions*, [1944] 2 All E.R. 308, and in *Re Haines* (1), it was held that mental injury alone is not a physical injury for the purpose of this legislation. As it is not clear from the finding of the Pensions Tribunal whether there was a mental or a physical injury, the case is sent back for this to be considered.

As to Accidents arising out of and in the course of Employment, see HALSBURY, Hailsham Edn., Vol. 34, pp. 832-839, paras. 1168-1171; and for Cases, see DIGEST, Vol. 34, pp. 315-321, Nos. 2580-2626.

For the Personal Injuries (Emergency Provisions) Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1061.]

Cases referred to :

*(1) *Re Haines*, [1945] 1 All E.R. 349; 172 L.T. 132.

*(2) *Holden* v. *Premier Waterproof & Rubber Co., Ltd.* (1930), 144 L.T. 519; Digest Supp.; 23 B.W.C.C. 460.

(3) *Allcock* v. *Rogers* (1918), 87 L.J.K.B. 693; 34 Digest 315, *2582*; 118 L.T. 386; 11 B.W.C.C. 149.

(4) *Thom (or Simpson)* v. *Sinclair*, [1917] A.C. 127; 34 Digest 320, *2619*; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220.

*(5) *Powell* v. *Great Western Ry. Co.*, [1940] 1 All E.R. 87; Digest Supp.; 162 L.T. 35; 32 B.W.C.C. 293.

(6) *Challis* v. *London & South Western Ry. Co.*, [1905] 2 K.B. 154; 34 Digest 315, *2585*; 74 L.J.K.B. 569; 93 L.T. 330; 7 W.C.C. 23.

APPEAL by way of case stated from a decision of No. 1 Pensions Appeal Tribunal. The Tribunal disallowed the applicant's appeal from the rejection by the Minister of Pensions of his claim to compensation under the Personal Injuries (Emergency Provisions) Act, 1939. The facts are fully set out in the judgment.

R. Marven Everett for the appellant.

Hon. H. L. Parker for the respondent.

TUCKER, J.: This is an appeal by way of case stated from a decision of the No. 1 Pensions Appeal Tribunal given in the case of a man named Edward Harold Sidney Drake. The appellant was at all material times a member of the National Fire Service and was engaged on full time duty. The case finds that "on July 17, 1943, the appellant, while on duty, discovered his company officer, named Lloyd, hanging dead in a store room in the South Wharf National Fire Station, Rotherhithe Street." The case goes on to state that "The appellant states that he sustained 'a great shock' and that he was placed sick with nervous debility." On those findings the Minister of Pensions, having rejected the claim, the appeal tribunal upheld the decision of the Minister on the ground, as stated in the case, that there was no physical injury producing the appellant's disablement and also, for the same reason, no war service injury, namely, on the ground that there had been no original physical injury. The case finds that the tribunal adopted entirely the arguments set up by the Ministry of Pensions and they were to the effect that a physical injury cannot exist in the absence of any physical blow or physical contact unless the case is brought within the extended definition in the Pensions (Mercantile Marine) Act, 1942, which includes tuberculosis and any other organic disease and the aggravation thereof. The tribunal finds that those words do not apply in this case and they reject the claim primarily on the basis that the injury had no physical origin in the sense that there was no physical blow or physical contact between the appellant and anything or anybody else; in other words, the tribunal find that there was no traumatic origin to the appellant's present disability. That finding is contrary to the decision which I arrived at in the case of *Haines* v. *The Minister of Pensions* (1). *Haines*' case (1) was decided by me subsequent to the decision of the Appeal Tribunal in this case. Therefore, the tribunal's decision cannot be sustained on that ground.

On the facts stated in this appeal it is clear that this claim cannot be supported on the ground that the appellant suffered a war injury within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8. A war injury has to be a physical injury caused by certain specified matters therein enumerated, and this case does not come within that definition at all. But it was necessary for the tribunal to direct its attention to the question as to whether or not this claim could be supported on the basis that the appellant had suffered a war service injury, which is something quite different. A war service injury is defined as follows in the Personal Injuries (Emergency Provisions) Act, 1939, s. 8:

> "War service injury" in relation to a civil defence volunteer, means any physical injury which the Minister certifies to have been shown to his satisfaction to have arisen out of and in the course of the performance by the volunteer of his duties as a member of the civil defence organisation to which he belonged at the time when the injury was sustained and (except in the case of a war injury) not to have arisen out of and in the course of his employment in any other capacity.

Counsel for the respondent took the point here that in any event on the facts as set out in this case the appellant's claim must have been rejected on the ground that the injury that he suffered, assuming it to be a physical injury at all, did not arise out of the performance by the volunteer of his duties as a member of the civil defence organisation to which he belonged at the time when the injury was sustained. It was conceded that the injury arose in the course of the performance of his duties, but it was argued that it did not arise out of such performance on the ground that the shock which he received from the sight of his superior officer hanging dead did not result from some risk incidental to or inherent in the performance of his duties as a member of the civil defence organisation.

I have been referred in this case to several of the cases decided under the Workmen's Compensation Acts, because it is quite clear that the language of this Act with which I am dealing has been taken from the Workmen's Compensation Acts. Counsel for the respondent referred me particularly to the case of *Holden* v. *Premier Waterproof & Rubber Co., Ltd.* (2). That was the case of a workman who in the course of his employment, was murdered by a fellow workman who was attacked by sudden homicidal mania. It was held that the risk of being attacked by a madman did not arise out of the employment either by reason of the duties performed by the workman or by reason of the locality in which they were performed. Slesser, L.J., summarises the matter in these words, at p. 524 :

> The evidence here is that the danger resulted in the place in the sense that the judge has found that, it being the duty of Holden and the madman to go together to this room, that was a place in which the madman unfortunately lost his reason ; but it was not a danger connected with the place, as a place. Therefore this case of *Allcock* v. *Rogers* (3) decides, if it had not been already decided implicitly in *Thom* v. *Sinclair* (4), that when they are speaking of the dangerous place they are speaking of the place as such—something inherent in the place as dangerous, and not having regard merely to the accident that some man may, by losing his reason, cause a danger to somebody else in that particular place which may just as well be caused to the British workman or the world at large in any other place. That being so, on this ground that here there was a locality risk, I think the judge was wrong when he said the deceased was specially exposed to a risk because his duty took him to the drug store. His duty took him to a risk which was common to everybody, and in no way connected with the employment. There was nothing in this drug store which made it a place dangerous so as to produce a locality risk. I think the judge has misdirected himself on the authorities, and, therefore, this appeal should be allowed.

On the other hand, counsel for the appellant has referred me to a more recent decision of the Court of Appeal in the case of *Powell* v. *The Great Western Ry. Co.* (5), a decision of a court consisting of Slesser, L.J., MacKinnon, L.J., and Goddard, L.J. That was a case of a fireman employed by a railway company being hit by a pellet shot from an airgun by a young man 19 years of age, who was aiming at the engine and hit the fireman. In that case *Holden's* case (2) does not appear to have been referred to. Slesser, L.J., there referred to several of the authorities on these words, namely, " arising out of the employment," and then proceeded as follows, at p. 89 :

> If one applies those principles to this case, this man was required, as part of his employment, to be on this engine. While on this engine, he was subjected to a particular peril, in that a misguided youth aimed at the locality where this man was required to work. In my opinion, the problem in the cases of assault of whether the assault on the man arises out of some danger which exists by reason of his employment, or whether it arises out of a quarrel which had no relation to the employment, does not arise here. This is a case of a man being, by reason of his work, brought into a locality which was dangerous. Whether it was dangerous when he went into the locality, as in the case, for example, of certain ships being required to go into a mine-infested area, or whether it became dangerous after he got into the locality, by reason of somebody shooting at him, or dropping a bomb on the engine, or whatever it may be, matters nothing. This man suffered this casualty in the course of his employment, and it arose out of the employment, because he was at that place. It was by its very nature a place which was rendered dangerous by the shooting of the gun, and, therefore, it follows that the judge was right in awarding his compensation.

Goddard, L.J., agreed and said, at p. 89 :

> I only want to say one word with regard to *Challis* v. *London & South Western Ry. Co.* (6), because that was much relied upon below, and indeed, the judge based his judgment upon it. *Challis's* case (6) was decided at a time when the courts were proceeding to lay down the principles, so far as they were to govern the interpretation of this Act, and, naturally were proceeding cautiously. For the first time, I think it is right to say, in *Challis's* case (6) this court was faced with the problem of whether or not an injury which is caused by a criminal act committed by a third party can be said to be an accident arising out of and in the course of a man's employment? Both Collins, M.R., and Cozens-Hardy, L.J., in the judgment which they delivered are really seeking to show how the criminal act of the third party could have been treated as an accident. [Then he proceeds, at p. 90] In this particular case, the accident arose because a boy shot an air gun deliberately at a locomotive engine on the railway, and, missing that somewhat large target, he hit the fireman standing on the cab of the engine. The fireman had to be there. If he had not been there, he would never have been injured. His service and duty required him to be there. Therefore, I entirely fail to see how it can be argued that this accident did not arise out of his employment, quite apart from the question of whether or not trains are an allurement to children.

It seems to me that that does not matter. The deliberate act which here caused the accident was the firing at the engine. The accident happened to the workman because the workman's duty required him to be on the engine. Thus, it seems to me to follow that the accident arose out of his employment.

I do not think it is altogether easy to reconcile all the decisions which have been given upon those words from time to time. I find it a little difficult to reconcile altogether the case of *Powell* (5) with the case of *Holden* (2) to which I have already referred. But in the face of this recent decision of the Court of Appeal in *Powell's* case (5), I think that it would be wrong for me to say that the facts of this case do not bring the appellant within the words of the Act which I have to interpret, namely, "to have arisen out of and in the course of the performance by the volunteer of his duties." It seems to me the duty required, or at any rate clearly permitted, this appellant to be in the store room. When he got there, and before he had got there, something had happened in that room which tended to make that room a place where anybody entering was liable to receive a severe shock. It seems to me that the facts bring it within the language used by SLESSER, L.J., and GODDARD, L.J., in *Powell's* case (5). I, therefore, think that point taken by counsel for the respondent which I confess attracted me considerably at the outset, fails and this must be taken to have been a case where the injury, if it was a physical injury within the meaning of this Act, is one which did arise not only in the course of but out of the performance by the volunteer of his duties.

It remains, however, to consider a further matter. At the end of para. 5 of the case stated the tribunal say as follows:

> The court also followed the opinion of its medical member to the effect that the appellant's disability was functional and not organic. They referred also to TABER'S MEDICAL DICTIONARY which defines "neurosis" as "a functional disorder of the nervous system without demonstrable physical lesion."

Counsel for the respondent submits that that is tantamount to a finding by the tribunal that this man's injury, the injury which he received on July 17, 1943, when he saw his company officer hanging dead, was purely a mental injury without there being anything physical in it at all and that accordingly the appellant's claim should have been rejected having regard to my decision in *Haines*' case (1) that a purely mental injury is not a physical injury within the meaning of this Act. I think it is highly probable that that is what the tribunal are in effect intending to state but they have not in terms so stated. In terms they appear to be dealing with the appellant's resulting disability rather than with the original cause. As to the original cause the case is somewhat deficient in its findings because there is merely a finding that the appellant states that he sustained a great shock. I do not know whether the tribunal accepted the appellant's evidence with regard to that or what their finding is with regard to the nature of the shock that he received and its immediate effect upon him. If the tribunal find that the shock that he received on July 17, 1943, when he saw his superior officer hanging dead, was purely mental, then his claim should fail. If on the other hand, it was a shock which had immediate physical consequences to the appellant, then it appears to me his claim should succeed. As to *quantum*, of course, I am not concerned.

I think, therefore, on the whole the case must go back to the tribunal for them to decide whether or not this was a purely mental injury or a physical one within the meaning of the definition which I endeavoured to lay down in *Haines*' case (1). I do not desire the case to come back before me again. I desire the tribunal to dispose of it in the light of my present observations and in the light of *Haines*' case (1).

Case remitted to the tribunal.

Solicitors: *W. H. Thompson* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

FINCH *v.* FINCH.

[King's Bench Division (Macnaghten, J.), **February 22, 1945.**]

Husband and Wife—Separation agreement—Payment of weekly sum to wife—Failure to continue payments under separation agreement—Summons for maintenance—Magistrates' order for weekly sum less than that stipulated for by separation agreement—Order operating to extinguish obligations to pay under separation agreement—Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 5.

By a separation deed, dated Mar. 11, 1931, the defendant husband covenanted to pay the plaintiff wife a weekly sum by way of maintenance, amounting, at the material times, to £2 15*s.* 0*d.* During the year 1939 the defendant was so far in default in making payments that the plaintiff was forced to have recourse to the Public Assistance Committee. Subsequently she took out a summons for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, and, on Dec. 20, 1939, the magistrates made an order against the husband for the maximum weekly sum payable, *i.e.*, £2, under the Act. It was understood by the plaintiff and the magistrates, who were aware of the husband's obligations under the covenant, that the order was in substitution for the covenant. In 1942, the defendant still being in arrears with the payments he had covenanted to make, the plaintiff issued a writ to recover the arrears due, but in making that claim the plaintiff limited it to such payments only as were outstanding down to the date when the magistrates' order was made. In the present action to recover sums due under the separation deed it was contended on behalf of the plaintiff that the magistrates' order was in substitution for the covenant *pro tanto*, and that the defendant was, therefore, under the covenant still obliged to pay 15*s.* per week :

Held : as the plaintiff had treated the order made by the magistrates for £2 a week as operating to extinguish the obligations of the defendant under the separation deed to pay £2 15*s.* 0*d.* per week, her claim failed.

[**EDITORIAL NOTE.** It is held in the circumstances of this case that the effect of a summary order for maintenance is to extinguish the right to payment under a separation deed. Although the sum ordered to be paid by the magistrates was less than that payable under the deed the wife is, therefore, estopped from claiming that that it is an extinguishment *pro tanto* only.

As to Orders for Maintenance, see HALSBURY, Hailsham Edn., Vol. 10, pp. 838-841, paras. 1340-1342 ; and for Cases, see DIGEST, Supp., Husband and Wife, Nos. 6124b-6179c.]

Action brought by a wife against her husband for the recovery of money alleged by her to be due under a separation deed dated Mar. 11, 1931. The facts and arguments are sufficiently set out in the judgment.

B. M. Goodman for the plaintiff.

B. B. Stenham for the defendant.

Macnaghten, J. : This is an action brought by a wife against her husband to recover money alleged by her to be due under a separation deed dated Mar. 11, 1931. The parties had then been married for a number of years. They had two children, one of whom was nearly of age and the other was in her teens. Unhappily, the differences between the parties were such that they were compelled to separate. The separation deed is in the ordinary terms. They are not to molest one another and they agree to live separately, and so long as the plaintiff conducts herself properly the husband covenants to pay her a weekly sum which so long as the younger child is of tender years, that is up to the age of 16, will be £3 5*s.* 0*d.*, but, on that child attaining the age of 16, the weekly payment is to fall to £2 15*s.* 0*d.*

According to the evidence, which I do not think was really disputed, the defendant was irregular in the payment of the amounts which he had covenanted to pay, and during the year 1939 he was so far in default in making payments that the plaintiff had no choice but to have recourse to the Public Assistance Committee. Apparently the public assistance officer was aware of the fact that the plaintiff's unhappy position was due to the circumstance that the defendant, her husband, was failing to pay what he had covenanted to pay, and he advised her to go and consult the clerk to the magistrates. The clerk to the magistrates, too, knew that the predicament in which the plaintiff found herself was due to the default, and apparently the wilful default, of her husband, because he was in a good position and quite able to pay the covenanted sum. Under those circumstances the clerk to the magistrates advised the plaintiff to issue a summons for maintenance against her husband under the Summary Jurisdiction (Married Women) Act, 1895. The limit of the amount which the magistrates could give was £2 a week, and that was less than the amount that she was entitled to receive under the covenant ; but, if the clerk was right in thinking that a magistrates' order for £2 could be enforced more promptly and more effectively than the defendant's covenant to pay £2 15*s.* 0*d.*, it may have been quite sound advice on his part, because he might have thought that an order by the magistrates for £2 was more likely to be met than a covenant by a defaulting husband for £2 15*s.* 0*d.* Anyhow, whether she understood the position or not (and I am disposed to think that she did understand the position) she took out a summons and the husband was served ; but he did not appear. I am told that the magistrates also knew about the covenant ; they knew that their order was for a sum less than the covenant, but they did not say anything on the subject to the applicant. They, too, apparently, must have thought that it was better to have an order from them than a covenant by the defendant. Anyhow, an order was made. I am quite satisfied that everybody then thought that the order of the magistrates was in substitution for the covenant. Counsel for the plaintiff recoiled from the proposition which I put to him : Was the order to be in addition to the covenant ? He said : No, he could not maintain that. It was not that she should have £4 15*s.* 0*d.* a week ; it was to be in substitution for the covenant *pro tanto*, that is to say that the covenant was no longer to be a covenant to pay £2 15*s.* 0*d.* per week, but a covenant to pay only 15*s.* per week.

I find no warrant whatever for that proposition. It is intelligible that the order for £2 a week was to be in addition to the covenant for £2 15*s.* 0*d.* ; it is intelligible and I think the parties so understood it, that the magistrates' order for £2 a week payable in the manner prescribed by the magistrates and enforceable in the way in which such an order can be enforced was to be in substitution for the covenant to pay £2 15*s.* 0*d.*, but the view that it was to be in reduction of the covenant from a covenant to pay £2 15*s.* 0*d.* to a covenant to pay only 15s. a week seems to me to be a view that cannot be supported, and indeed it is not the view which the plaintiff herself or her advisers took of the matter.

The defendant was in arrear with the payments which he had covenanted to make, and in June, 1942, the plaintiff, no doubt advised by her solicitors, issued a writ to recover the arrears due under the covenant, because in regard to the order which the magistrates had made, the defendant was considerably in arrear. In making that claim the plaintiff limited it to Dec. 20, 1939, the date when the magistrates' order was made. By that time, if the covenant was still valid as to 15*s.* a week, there was quite a considerable sum due in respect of the failure to observe the altered covenant ; but it did not occur to the plaintiff or to her advisers to make any such claim. She treated it and they treated it as being quite clear that the order for £2 a week made by the magistrates operated to extinguish the covenant, which was to pay £2 15*s.* 0*d.* a week.

Judgment for the defendant with costs.

Solicitors : *Zeffertt, Heard & Morley Lawson* (for the plaintiff) ; *E. D. K. Busby & Co.* (for the defendant).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

I. V. FLETCHER *v.* J. S. FLETCHER.

[Probate, Divorce and Admiralty Division (Denning, J.), **February 7, 1945.**]

Divorce—Desertion—Removal of matrimonial home to religious movement with refusal of sexual intercourse—Offer to resume cohabitation in a "community"—Unreasonable in the circumstances.

The parties were married in December, 1931, the respondent husband being at that time a member of the Tramp Preacher movement. For one year after the marriage the parties lived a normal married life in a home of their own. Then, at the wish of the respondent, the parties went to live at the headquarters of the Tramp Preacher Movement, where the husband's religious convictions compelled him to withdraw from sexual intercourse. As a result of the conditions of living not being so good as when the parties were in their own home, the petitioner became ill and left the headquarters of the movement to recuperate. The respondent remained at the headquarters and his religious convictions were such that he did not ask the petitioner to return. After a while the respondent left the movement and joined the Bruderhof community which did not advocate celibacy and he approached the petitioner in the hope that she would become a member of the community. Whilst the respondent was in Germany with the community the petitioner went to stay with a branch of the community in England and eventually joined the respondent in Germany for a trial period in order to ascertain whether she could fit in with the community. It was agreed that during this period the parties should abstain from sexual intercourse. At the end of the trial period the petitioner was unable to bring herself to join the community and she returned to England. Some months later the Bruderhof community came to England and the respondent again approached the petitioner; she refused to join the community. After some time the respondent once again approached the petitioner who again refused to join the community. In 1941 the letters passed between the parties and the petitioner made it plain that she wanted the respondent to leave the community and live an ordinary married life with her; but the respondent refused to leave the community. The wife filed a petition asking for the dissolution of the marriage on the ground of desertion:—

Held: the respondent's conduct in withdrawing from the matrimonial home to the headquarters of the Tramp Preacher Movement together with the refusal of sexual intercourse, amounted to desertion. The desertion continued and had not been terminated by the respondent's endeavours to set up a home with the petitioner within the Bruderhof community, such conditions for the petitioner being unreasonable in the circumstances.

[**EDITORIAL NOTE.** An offer to resume cohabitation may be coupled with conditions so unreasonable as to fail to terminate existing desertion. Here the wife was expected to accept a way of life within a religious community of which the husband was a member, little different from that which had caused the desertion, except that the husband was no longer required to practice celibacy, and the pre-existing desertion is held to continue notwithstanding the husband's offer to set up a home within the community.

As to Meaning of Desertion, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-658, paras. 964-967; and for Cases, see DIGEST, Vol. 27, pp. 306-322, Nos. 2840-3013.]

Petition for the dissolution of marriage on the ground of desertion. The facts are fully set out in the judgment.

Stephen Murray for the petitioner.

C. A. Marshall-Reynolds for the respondent.

Denning, J.: In this case the parties married on Dec. 5, 1931. The wife now petitions for divorce on the ground that her husband deserted her. The parties were engaged for about eight months before their marriage. At the commencement of the engagement the husband was in work as a commercial artist, but during the engagement he became a member of the Tramp Preachers' movement, and became himself a Tramp Preacher. That movement strongly desires its members to be celibate, although I gather there is not a rigid rule to that effect. For a time the engagement was broken off on account of his association with the movement; but the parties made it up, as it was realised that it would be possible for them to have a married life whilst he was a Tramp Preacher, and they were married. For one year they lived in rooms. During that time the marriage was normal, the husband doing his work as a Tramp Preacher, the wife doing her work, and there was the ordinary sexual life between them. After about a year he decided that he wanted to move to the headquarters of the Tramp Preachers' movement in London. Not only that, but his religious convictions so moved him that he felt he ought to withdraw from sexual intercourse with his wife. He did go to the headquarters and his wife went with him, because she thought that if she went the marriage might be saved, and she feared that if she did not go the marriage would certainly be broken up. When she got there, his religious convictions persuaded him that he had to refuse sexual intercourse, and the conditions of living were not as good as they had been when they were in rooms. As a result the petitioner became so ill that she had to leave the headquarters and go to a friend in Hampshire, to restore her health, and she was there for some time. The husband remained on at the headquarters. As he told me, his religious convictions were such that he could not really ask her to come back there with any hope of happiness, because he still held his ideas of refusing sexual intercourse. After a while the husband ceased to be a Tramp Preacher, and joined a community which apparently had its foundation in Germany, called the Bruderhof, a religious movement with a branch in this country known as the Society of Brothers. The convictions of that community differ from those of the Tramp Preachers. They certainly hold nothing against sexual intercourse; they believe in a natural and healthy way of living, with proper regard to the sanctities of married life; and they desire to live a life of service. As a result of this change of convictions he approached his wife again. He wanted her to become a member of the Bruderhof. She, at this time, was at a college in London, and she did what she could to see if she could fit into this new way of life that he had adopted. Whilst he was in Germany she went down to Ashton Keynes, in Wiltshire, where there was a section of the Bruderhof community. Not only that, but she got a travelling bursary, which enabled her to go out to Germany. She lived with him in the community there, and, as the husband very frankly told me, it was really to see whether she could be brought to join that mode of life, and I am sure both parties were sincere in trying it. She tried it for a month, and by mutual agreement they abstained from sexual intercourse during that time, because it was a trial period. At the end of the month the wife decided that she really could not follow that way of life. It was life as a community. The religious ideas of the community pervaded every aspect of their life, so much so that they believed in sharing all things, working for the community, which owned, in effect, all their property, and living together. So the trial period ended with her deciding that she could not do as he wished, and she came back to this country. Some months later the husband returned. Apparently the authorities in Germany did not allow this community to remain there any longer and eventually some of them came to this country and settled in Shropshire. The husband sought out his wife. He wore the distinctive garb which the members of the brotherhood wear, and he called on her. She refused at that time to discuss joining him in the community. From his garb it was quite plain to her that he still retained his convictions, and his way of life having been tried, and she not seeing her way to join him in it, she refused. After a time, in his devotion to her and his anxiety to win her back, he tried again to see her, and asked her to join him, but she still did not see her way to do so. There was a suggestion at the beginning of 1941 that he might be going with some others of this brotherhood to South America. There were letters passing at that time, and it is quite plain that she wanted her husband, in her own words, to come out into the world again and take part in the struggle, instead of holding himself aloof, whereas he on his side was bound up with the life of the community; he would not forsake his convictions, and would remain with them, and so the matter went on.

This community is worthy of much admiration: but it is a community which lives, so to speak, continuously in retreat from the world; it is a community which lives a very special kind of life, a life of service of each to all, and although, no doubt, it is very satisfying to those who feel called to that kind of life, it is not the kind of life in which everybody can be expected to join. It needs a strong religious conviction on those particular lines, for it involves every aspect of the individual's life. It seems to me that for a husband to expect his wife to go and live in that community unless she feels called to do so, is unreasonable. Even if she is only asked to live near the community and not actually inside it, that is, I think, still unreasonable because the husband himself is part and parcel of the community, where everything is in common; and the wife, if she went there not as a member of the community, would, I am satisfied, be living on her own altogether from all mental and psychological aspects.

How does the matter rest in law? I think that when the husband withdrew to the headquarters of the Tramp Preachers' movement, in circumstances in which he felt that he had to refuse all sexual intercourse, when he withdrew from what was their matrimonial home in rooms, that was a withdrawal from married life in any real sense of the term, and although she followed him to the headquarters in an attempt to keep the marriage together, I think his conduct in withdrawing there and refusing sexual intercourse was desertion on his part. I recognise that it is not every refusal of sexual intercourse which amounts to desertion, but a withdrawal in the circumstances of this case from the existing matrimonial home to the headquarters of this movement, coupled with this refusal of sexual intercourse was, in my view, desertion, and that desertion continued. It had so serious an effect on the wife's health that it was thought that she was about to suffer from tuberculosis, and she had to go away for the sake of her health on account of it: but that was the initial desertion, and in law, that desertion continues, unless the husband can show that he has brought it to an end by reasonable offers on his part to set up home again in a proper married life. That brings me to this matter of the brotherhood. He did want to set up home again there, and she did try it; she went to see what it was like at the place in England, and she tried it for a month in Germany, but she found that she could not bring herself to that way of life. I think that the husband was not entitled to call upon his wife, to go and live with him in the community or immediately adjoining it, when he was still a member of it. It was an unreasonable demand for him to make. At all events, it was not such an offer as to terminate the pre-existing desertion. I find that the withdrawal from the matrimonial life by going to the Tramp Preachers, and the further withdrawal, as I find it, by joining this brotherhood community, being with them and under no circumstances leaving them, was a withdrawal which amounted to desertion. That desertion continued for the three years before the presentation of the petition, and the result is that I pronounce a decree nisi on the ground of the husband's desertion.

Solicitors: *H. Miller* (for the petitioner); *Waterhouse & Co.* (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

SMITH *v.* SMITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Denning, J.), **March 28, 1945.**]

Divorce—Variation of settlement—Freehold house purchased after marriage—Purchase money provided solely by husband—Covenants entered into jointly and severally with vendor restricting use of house—House conveyed to husband and wife "in fee simple as joint tenants"—Whether conveyance a post-nuptial settlement or a gift of half share of house to wife—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 192.

The parties were married on Nov. 6, 1929, and there were three children of the marriage. On Nov. 4, 1933, a house was bought in the joint names of husband and wife, the money for the purchase being provided solely by the petitioner husband. They entered jointly and severally into covenants with the vendor restricting the use of it. The house was expressly conveyed to the husband and wife "in fee simple as joint tenants" and it was expressly stated that they were to stand possessed of it "upon trust to sell the same with power of discretion to postpone any sale" and to stand possessed "of the net proceeds of sale" and "of the net rents and profits until sale in trust for the husband and wife as joint tenants beneficially." On Aug. 16, 1944, a decree absolute was pronounced dissolving the marriage. The respondent being still in possession of the house, the petitioner husband, in order to obtain possession of the house, presented a petition for the variation of the post-nuptial settlement in the sense that the respondent should be A treated as being dead. It was contended for the petitioner that, as the house was for the future benefit of both the spouses, it was a settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. For the respondent it was contended that the transaction constituted a gift to the respondent of a half-share in the house and, therefore, the conveyance could not be considered to be a post-nuptial settlement:—

HELD: (i) generally where a husband made a continuing provision for B the future needs of his wife in her character as wife, which was still continuing when the marriage was dissolved, the provision was a "settlement." The fact that it was made for no consideration other than natural affection and was in that sense a gift did not mean that it was not a "settlement." Therefore, the conveyance of the house was a post-nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192.

C (ii) the conveyance could not be varied by treating the respondent as being dead because that would be to affect the covenants without the vendor's consent. The appropriate method, if the petitioner husband made out a claim on the merits, would be to vary the deed by leaving the legal estate as it was, deleting the existing trust and substituting a trust for the petitioner husband absolutely and to order the respondent D to deliver possession to him.

[**EDITORIAL NOTE.** Any continuing provision made by a husband for the future needs of his wife which is still continuing when the marriage is dissolved is a "settlement" within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and the word is here held to include a freehold house bought by the husband in the joint names of himself and his wife with money provided by the husband. Neither the fact that the gift is assignable, nor that it is made for no consideration other than E natural affection makes it any less a "settlement" within the meaning of the section. The court refuses to vary the conveyance by treating the wife as dead, since this would affect the position of the vendor with whom restrictive covenants had been entered into.

AS TO VARIATION OF SETTLEMENT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-803, paras. 1274-1278; and FOR CASES, see DIGEST, Vol. 27, pp. 517-523, Nos. 5576-5647.]

F Cases referred to:

*(1) *Bosworthick* v. *Bosworthick*, [1927] P. 64; Digest Supp.; 95 L.J.P. 171; 136 L.T. 211.

*(2) *Prinsep* v. *Prinsep*, [1929] P. 225; Digest Supp.; 98 L.J.P. 105; 141 L.T. 220.

*(3) *Hubbard (otherwise Rogers)* v. *Hubbard*, [1901] P. 157; 27 Digest 520, *5623*; 70 L.J.P. 34; 84 L.T. 441.

*(4) *Brown* v. *Brown*, [1937] P. 7; [1936] 2 All E.R. 1616; Digest Supp.; 105 L.J.P. 103; 155 L.T. 418.

G PETITION by Charles Herbert Smith, the husband petitioner for divorce, for variation of a post-nuptial settlement. The facts are fully set out in the judgment.

S. Seuffert for the petitioner.

William Latey for the respondent.

H DENNING, J.: On Nov. 6, 1929, the parties married. On Nov. 4, 1933, a house was bought in their joint names. They lived in it as their home and brought up their three children there. On Oct. 11, 1943, the husband presented a petition for divorce against his wife, and on Feb. 8, 1944, he was granted a *decree nisi*. On Aug. 16, 1944, a decree absolute was pronounced dissolving the marriage. The wife is still in the house. The husband wants possession of it. To that end he says that it is the subject of a "post-nuptial settlement" within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. The wife says it is not.

In point of law the purchase of the house was a joint affair. The conveyance was taken in the joint names of husband and wife. They entered jointly and severally into covenants with the vendor restricting the use of it. The greater part of the purchase price was raised from a building society on a mortgage of the house under which husband and wife were jointly liable for the repayments and for performance of the covenants. In point of fact, however, the moneys for the purchase were provided solely by the husband, and the mortgage was paid off by him by instalments, the final repayment being in Feb., 1940.

The conveyance expressly defined the interests of husband and wife in much the same way as would otherwise be imported by statute from the fact that it was taken in their joint names. The house was expressly conveyed to the husband and wife " in fee simple as joint tenants," and it was expressly stated that they were to stand possessed of it " upon trust to sell the same with power of discretion to postpone any sale " and to stand possessed " of the net proceeds of sale " and " of the net rents and profits until sale in trust for the husband and wife as joint tenants beneficially." The result was that the husband and wife held a joint tenancy of the legal estate in the land (which could not be severed) and an equitable joint tenancy in the income of the land pending sale and of the proceeds eventually arising from the sale (which could be severed by taking appropriate steps). The presumption is that the interest of the wife was intended by the husband as an advancement by him. So long as husband and wife were living together in the house, they, of course, shared the occupation and acquiesced in a postponement of sale, and if they had continued in that way till one died, the survivor would take the whole legal and beneficial interest in it. If they together let or sold the house, either of them could sever the equitable joint tenancy in the income or proceeds whereupon each would be entitled to one-half. No letting or sale could, however, be effected by one without the consent of the other, except by order of the Court of Chancery, which would consider whether in the particular circumstances it was right and proper that such an order should be made. Neither party has yet applied for such an order.

Counsel for the petitioner submitted that the provision of the house was for the future benefit of both the spouses and was a " settlement." He relied on *Bosworthick* v. *Bosworthick* (1), and *Prinsep* v. *Prinsep* (2). Counsel for the respondent submitted that it was a gift to the wife of a half-share in the house and was not a " settlement." He relied on *Hubbard* (*otherwise Rogers*) v. *Hubbard* (3), and *Brown* v. *Brown* (4).

I find it difficult to reconcile the decisions in *Hubbard* v. *Hubbard* (3) and *Brown* v. *Brown* (4), with the principle that runs through the rest of the cases on this subject. That principle, as I understand it, is that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a " settlement " which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both. The provision usually takes the form of periodical payments either with the intervention of trustees as in an ordinary marriage settlement, or without them as in a separation deed or a bond ; but it may take other forms. The transfer of an investment into a wife's name whether it be a house or shares, or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment. The fact that it is made for no consideration other than natural affection and is in that sense a gift does not mean that it is not a " settlement." The bond securing the annuity in *Bosworthick's* case (1) was in that sense a gift. Again, the fact that it is assignable does not mean that it is not a " settlement." A wife is often free to assign her interest under an ordinary marriage settlement or a separation deed, but it is none the less a "settlement." If she should assign her interest, the court might treat the proceeds in her hands as representing the property ; and a co-respondent, or indeed any person, who takes an assignment from her with notice that proceedings are pending as to the application of the property, will find that the arm of the court is long enough to reach the property in his hands.

Neither *Hubbard* v. *Hubbard* (3) nor *Brown* v. *Brown* (4) directly covers this case. This freehold house was a continuing provision for the future needs of both husband and wife in their character as such. Neither could dispose of it without the consent of the other except by taking proceedings in Chancery. Applying the principles I have stated, I think it was a "post-nuptial settlement."

The conveyance cannot be varied in the way asked, namely, by treating the wife as being dead, because that would be to affect the covenants in favour of the vendor without his consent. The appropriate method, if the husband makes out a claim on the merits, would be to vary the deed by leaving the legal estate as it is, deleting the existing trust and substituting a trust for the husband absolutely and to order the wife to deliver possession to him. The wife has, however, not yet been heard on the merits, and the case must go back to the registrar for the purpose.

Case remitted to the registrar.

Solicitors: *MacDonnell & Co.* (for the petitioner); *Gibson & Weldon,* agents for *J. M. Goundry,* Middlesbrough (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re WRIGHT'S SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Romer, J.), **February 21, 1945.**]

Settlement—Marriage settlement—Property settled comprising inter alia shares in a particular company—Direction for accumulation of dividends on shares after settlor's death—Issue of bonus shares—Conversion of total shares into stock—Bonus shares accretion to original shares—Direction to accumulate applicable to bonus shares forming part of whole stock.

By a marriage settlement dated Dec. 8, 1908, 100 ordinary fully paid-up shares of £100 each in a particular company were amongst the property settled by the husband. Cl. 4 of the settlement provided that the trustees should stand possessed of "the husband's fund and the wife's fund during the joint lives of the spouses" upon trust to pay to the husband the income from the husband's fund and, if the wife survived him, so much of the income from the husband's fund as should accrue after his death and during her life upon trust to pay it to her for her separate use. There was also the proviso that if the wife survived her husband and married again when there should be living any child or children of the marriage, then, as from the date of the wife's re-marriage until a period of twenty-one years from the date of the husband's death or during such lesser period as the wife and any child or children of the marriage should be living, the trustees should pay to the wife £150 a year and should accumulate and invest the surplus of such income; at the end of the period of such accumulation, the trustees, if the wife and any child or children of the marriage should then be living, were to distribute the accumulated income equally between the wife and any child or children of the marriage *per capita.* In the event of the husband predeceasing the wife leaving children of the marriage, the trustees, for twenty-one years or such less period as the wife and the children should be living, were to accumulate by way of compound interest any dividends on the shares exceeding seven per cent. on the nominal value of the shares in any one year, and to hold the accumulations upon trust similar in all respects to those concerning the surplus income of the husband's fund. Under sect. 3 of a private Act of 1914, the company in which the shares were held was converted from a company limited by guarantee to a company limited by shares. Sect. 5 of the Act increased the capital of the company to 1,200,000 shares of £1 each, and by sect. 6 every shareholder of shares of £100 each became entitled to 150 shares for every one of the £100 shares held by him. The result was that the trustees acquired 15,000 shares of £1 each in the reconstructed company. Bonus shares were issued in 1918 for 6,950 and in 1927 for 10,975; the result being that the aggregate holding of the settlement trustees was 32,925 shares of £1 each. In 1938 the whole share capital of the company was converted into stock and the settlement trustees became the holders of £32,925 ordinary stock. Dividends in excess of seven per cent. were declared and paid on the ordinary stock for 1942, 1943 and 1944. The husband died on Feb. 1, 1944, leaving children and the wife did not marry again. The question for determination was whether the whole of this stock (comprising the original and the bonus shares) held by the trustees was affected by the proviso directing accumulation by way of compound interest on any dividends exceeding seven per cent. on the nominal value of the shares in any one year :—

Held : (i) the bonus shares were an accretion to the original shares. The effect of the issue of bonus shares was not actually to increase the holding, because the persons to whom bonus shares were issued would hold the same proportion.

Re Spier (1) and *In re Whitfield* (2) *applied.*

(ii) on a proper construction of the settlement the proviso directing accumulation applied to the bonus shares which formed part of the whole stock.

[**EDITORIAL NOTE.** The principle underlying this decision is well expressed in the words of Fry, L.J., in *Re Bouch* ((1885), 29 Ch.D. 635, at p. 653). The decision was reversed in the House of Lords, but Fry, L.J.'s *dictum* was approved by Lord Herschell. He said : " When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital."

As to the Accumulation of Surplus Income, see HALSBURY, Hailsham Edn., Vol. 29, pp. 773-776, paras. 1081, 1082 ; and for Cases, see DIGEST, Vol. 40, pp. 660-662, Nos. 1986-1998.]

Cases referred to :

*(1) *Re Spier, Holt* v. *Spier*, [1924] 1 Ch. 359 ; 40 Digest 661, *1988* ; 93 L.J.Ch. 225 ; 130 L.T. 564.

*(2) *In re Whitfield,* [1920] W.N. 256.

Summons to determine the construction of a proviso contained in cl. 4 of a marriage settlement dated Dec. 8, 1908. The facts are fully set out in the judgment.

C. V. Rawlence for the trustees.

S. Pascoe Hayward for the first defendant (the widow).

Wilfrid Hunt for the second and third defendants (the children).

Romer, J. : This summons raises a short question under a settlement dated Dec. 8, 1908, made upon the occasion of the marriage of Francis Evelyn Fitzherbert Wright and Mary Joyce Bateman.

The particular point in question relates to some bonus shares which were issued in respect of 100 ordinary fully paid-up shares in the Butterley Colliery Co., Ltd., which were amongst the property settled by the husband by his settlement. The settlement recites that the husband is entitled in possession absolutely to the 100 shares to which I have just referred and that upon the treaty for marriage it was agreed, amongst other things, that those shares should be settled. It recites that the husband had duly transferred the said shares of the Butterley Colliery Co., Ltd., to the trustees and that an order had been made by the Chancery Division approving the proposed settlement, the wife then being an infant.

By cl. 3 of the settlement it provided that :

> In further pursuance of the said agreement and in obedience to the said order [amongst other things the trustees of these presents] shall stand possessed of the said shares in the Butterley Colliery Co., Ltd., hereinbefore mentioned to have been transferred to the trustees and of the said sum of £1,000 and all bonuses and additions which the trustees or trustee shall receive by virtue of the said policy and the full benefit thereof and the money and investments for the time being representing the same respectively (all of which original and substituted shares sum of £1,000 bonuses additions money and investments are hereinafter included in the terms " the husband's fund " that term being intended to mean from time to time the constituents for the time being of that fund) and from time to time of the income [upon the trusts, in effect, thereinafter set forth].

By cl. 4 it provided :

> The trustees or trustee shall stand possessed of the husband's fund and the wife's fund during the joint lives of the spouses and during the life of the survivor of them,

> upon the following trusts [upon trust for the husband until marriage and thereafter to pay the income of the husband's fund to him] and if the wife shall survive the husband so much of the income from the husband's fund as shall accrue after his death and during her life in trust to pay the same to the wife for her separate use without power of anticipation during any coverture Provided Always [and then there is a proviso in an event which did not in fact occur, but it is relevant, because the subsequent proviso is made by reference to it] that in the event of the wife surviving the husband and marrying again [which in fact did not happen; she did not marry again] at a time when there shall be living any child or children of the said intended marriage then as from the date of such remarriage of the wife until a period of twenty-one years shall have elapsed from the date of the death of the husband or during such lesser period as the wife and any child or children of the marriage shall be living the trustees or trustee shall pay to the wife the sum of £150 per annum . . . and shall accumulate and invest the surplus of such income and shall at the expiration of the said period of accumulation stand possessed of the fund formed by such accumulation of income upon trust if the wife and any child or children of the said intended marriage shall be then living and pay and distribute the same equally between the wife and the then surviving child or children of the now intended marriage *per capita* and in the event of the death of the last surviving child of the said intended marriage within the said period of twenty-one years from the death of the husband leaving the wife surviving then upon trust for the wife absolutely but without power to alienate or anticipate her expectant interest but in the event of the wife having married again and dying within the said period of twenty-one years from the death of the husband leaving any child or children of the marriage surviving then upon the trusts hereinafter declared concerning the joint fund constituted out of the husband's fund and the wife's fund.

Pausing there, it is to be observed that in the contingency to which this proviso was directed, the whole of the income of the husband's fund, subject to the payment of £150 a year to the wife, was to be accumulated over a period. It continues:

> And provided also that in the event of the death of the husband during the life of the wife and there being any child or children of the now intended marriage living at the death of the husband the trustees or trustee shall during the period of twenty-one years from the death of the husband or for such lesser period as the wife and any child or children of the said intended marriage shall be living accumulate by way of compound interest any dividends in respect of the said shares in the Butterley Colliery Co., Ltd., exceeding seven per cent. on the nominal value of such shares in any one year by investing the same and the resulting income thereof and shall hold the said accumulations and investments and resulting income (subject to the proviso next hereinafter contained) upon trusts similar in all respects to the trusts hereinbefore declared concerning the accumulations and investments of the surplus income of the husband's fund in the event of the wife surviving the husband and marrying again at a time when there shall be a child or children of the marriage surviving after payment to the wife of the said sum of £150 per annum And in the like events the trustees or trustee shall after the expiration of the said period of twenty-one years from the death of the husband if and so long as the wife or any child or children of the said intended marriage shall be living hold the dividends in respect of the said shares in the Butterley Colliery Co., Ltd., exceeding seven per cent. on the nominal value of such shares in any one year upon trust to pay and distribute the same equally between the wife and the then surviving child or children of the now intended marriage.

Then cl. 5 provides what is to happen to the joint fund, namely, the aggregate of the husband's fund and the wife's fund, after the death of the survivor of the spouses; it is to go to the children or remoter issue of the marriage. I do not think there is anything more to which I need refer, except to note that by cl. 14, which is a trust for investment, there is a direction that the trustees shall convert the part undisposed of and retain any of the original investments.

On July 8, 1914, a private Act was passed under which it was provided that the Butterley Colliery Co., Ltd., which was originally a company limited by guarantee, was to become a company limited by shares, and a reorganisation was carried out. Sect. 3 provides that the company shall cease to be a company limited by guarantee and shall be a company limited by shares. Sect. 5 altered the capital of the company, increasing it to £1,200,000, divided into 1,200,000 shares of £1 each. By sect. 6 there is a cancellation of the existing shares and the creation of new shares in lieu thereof. The effect of that was:

> Every holder on the passing of this Act of any of the existing 5,467 shares of £100 each shall be entitled to and shall receive 150 new shares in substitution for every one of the said existing shares of £100 each held by him.

By sect. 8 it was provided:

> Trustees executors administrators and all other holders in any representative or fiduciary capacity of existing shares in the company are hereby expressly authorised to accept and hold the new shares issued in respect of their existing holdings under the provisions of this Act.

By sect. 9 it was provided :

> The new shares shall respectively be held in the same rights on the same trusts and subject to the same powers provisions charges and liabilities as those on or subject to which the existing shares in respect of which the new shares are issued were held immediately before the commencement of this Act and so as to give effect to and not to revoke any deed will or other instrument or testamentary or other disposition disposing of or affecting such existing shares and every such deed will or other instrument or testamentary or other disposition shall take effect with reference to the whole or a proportionate part as the case may be of the existing shares and the new shares issued in respect thereof.

The result of that was that the trustees of the settlement, in lieu of the original 100 fully paid ordinary shares of £100 each acquired 15,000 shares of £1 each in the reconstructed company.

Subsequently there were two issues of bonus shares. In the year 1918 a distribution of bonus shares took place, as a result of which 6,950 of such shares were allotted to the settlement trustees as holders of the 15,000 shares. Again in 1927 there was a further creation of new shares and an issue of bonus shares, and as the result of that 10,975 of such further bonus shares were issued to the settlement trustees. The result was that their aggregate holding, after that transaction, was 32,925 shares of £1 each. In the year 1938 the whole share capital of the company was converted into stock and the settlement trustees became, and are still, the holders of £32,925 ordinary stock in lieu of the 32,925 shares.

The husband died on Feb. 1, 1944. In the result, the widow not having married again, the second proviso in cl. 4 has become operative, and what I have to decide is to what extent it is operative on the stock in the Butterley Colliery Co., Ltd., now held by the trustees. It only remains to add that dividends in excess of 7 per cent. have been declared and paid on the ordinary stock for the years 1942, 1943 and 1944.

Counsel, on behalf of the widow, concedes that the £15,000 stock which now represents in the hands of the trustees the original trust holding of 100 ordinary fully paid up shares of £100 each, is covered by the proviso and that, consequently, the accumulation at compound interest of any dividends over 7 per cent is to be observed and carried out in relation to those shares ; but, he says, the proviso which caused that accumulation and directed it has no effect whatsoever upon the two issues of bonus shares or the two blocks of shares now represented by stock which the trustees received as a result of the company issuing those bonus shares.

He says the first proviso, the one that did not operate because the wife, although she had survived her husband, had not married again, directs that the whole of the income, subject to £150 a year of the husband's fund, is to be accumulated. He says that when he comes to the contingency which has in fact occurred, the settlor is at pains to pick out of the husband's fund one particular asset and one asset alone as the subject matter of accumulation. That subject matter, he says, is the said shares in the Butterley Colliery Co., and the said shares, he says, in the Butterley Colliery Co. are the said original 100 shares and nothing else. He said that supposing that those shares had been sold under cl. 14 and further investments had been bought, those would not be within the proviso. Then he said that were it not for the express provisions in the private Act, the 15,000 shares which represent in effect the original shares, probably would not have been within the proviso either ; but having regard to the express provisions of the Act they are undoubtedly caught. At all events, he says, unless you can point either to the original Butterley shares themselves or to investments which directly represent those shares and nothing else, then the proviso for accumulation has no operation.

Counsel, on behalf of the children of the marriage, says that what has happened is this. The issue of bonus shares is to be regarded for all purposes as an accretion to the original Butterley shares, and, as such accretion, they are to be subject to all incidents affecting the original Butterley shares. Supposing, says counsel, some appointment under the settlement had diverted the shares after the death of the income beneficiaries to A., and had diverted the policy moneys and the rest of the husband's fund to B., then undoubtedly the person to whom the shares were appointed would get the bonus shares as well, and they would not go to anybody else; therefore, not only in regard to destination but in regard to incidents as well, the bonus shares in effect are merged in the original shares and subject to all the incidents to which the original shares themselves were subject. Counsel drew my attention to a case where that view appears to have been taken, at all events by WARRINGTON, L.J. It is the case of *Re Spier* (1). That case arose out of a bequest of 300 ordinary shares on trust to pay the income to A. for life and afterwards to somebody else. In respect of those shares bonuses were issued, and P. O. LAWRENCE, J., held that the tenant for life was entitled, under the particular language of the bequest, to the bonus shares themselves; but the Court of Appeal held that that was not so, that the tenant for life did not become entitled to those as dividends or bonuses, but that they were to be treated as capital. WARRINGTON, L.J., concluded his judgment by stating, at p. 370:

> And I think that is quite clear, or at any rate it is made more clear by the reference to the income of any new investments being applied in the same manner as the income of the shares to the tenant for life. Accordingly I think the ordinary rule applies and the additional shares must be capitalised and regarded as an accretion to the 300 original shares.

It seems to me, if I may respectfully say so, that that view is right, and that the only logical effect of what has happened is that the bonus shares are to be regarded as an accretion and as an accretion for all relevant purposes to the original shares. It seems to me also to be consistent with what one may reasonably regard as the intention of the testator, that the excess over 7 per cent. receivable by virtue of his holding in this particular company should be capitalised for the benefit of those interested in or entitled to the *corpus*.

As SARGANT, J. (as he then was), points out in *In re Whitfield* (2), the effect of the issue of bonus shares is not actually to increase the holding, because the persons to whom the bonus shares are issued will hold the same proportion and, therefore, it will not be the fact that there will be a greater accumulation of dividends by reason of the issue of bonus shares, even if I hold that the proviso directing accumulation does apply to the bonus shares. The net result probably will be that there will be less accumulation than there would have been if no bonus shares had been issued at all.

It seems to me that, on the construction of this document (it is ultimately a question of construction), but fortified by the view which WARRINGTON, L.J., expressed as to the effect of the issue of bonus shares in respect of a number of shares which are settled, and also having regard to the considerations arising out of the observations of SARGANT, J., in *In re Whitfield* (2), I shall be giving effect, and the best effect, to the intentions of the parties to this settlement, as expressed by the language which they have used, if I hold, as I do hold, that the proviso for accumulation applies to the bonus shares now represented by some of the stock which the trustees have received.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of husband's fund.

Solicitors: *Taylor, Jelf & Co.*, agents for *Randolph Eddowes & Co.*, Derby (for the trustees and the second and third defendants); *Thicknesse & Hull* (for the first defendant).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

WILFRED EUSEBIUS LEWIN *v.* AMERICAN & COLONIAL DISTRIBUTORS, LTD.

[Chancery Division (Vaisey, J.), **January 18, 1945.**]

Landlord and Tenant—Lease of restaurant premises—Premises intended for use as a licensed victualling house—Company third party in lease and described as "the surety"—Covenant by lessee not to let person named be concerned directly or indirectly in business of company or in business carried on upon demised premises—Lease assigned to company with consent of lessor—Reversion of lease assigned to plaintiff—Breach of the covenant relating to named person—Action by assignee of reversion of lease against assignee of lessee—Whether covenant running with land.

By a lease, dated Nov. 30, 1942, the predecessor in title of the plaintiff demised to a lessee certain restaurant premises, which were intended to be used as a licensed victualling house, for a term of 7 years and at a rent of £2,000 per annum. There were three parties to this lease, the defendant company being defined therein as "the surety." The lessee, for himself and his assigns, covenanted, *inter alia*, that a certain S. should not directly or indirectly have any interest in this lease or in any company or firm interested in this lease, and in particular that the said S.: (*a*) should not be either nominally or beneficially entitled to or interested in any shareholding or loan capital of the defendant company; (*b*) should not be a director or in any way concerned in the conduct of the business of the defendant company; (*c*) should not be in any way concerned in the conduct of business carried on upon the demised premises; (*d*) should not become an assignee or sub-lessee of the demised premises or any part thereof. By consent obtained from the lessor on Jan. 30, 1943, the lease was assigned by the original lessee to the defendant company. On Sept. 25, 1943, the plaintiff was assigned the reversion of the lease. It was found that S. was the owner of large stocks of wines and spirits kept and sold on the restaurant premises and that he was practically the sole shareholder in the defendant company to whom he had lent money for the purpose of opening and managing the restaurant. The plaintiff brought an action for a declaration that the lease had been forfeited by the breach of covenant relating to S., for possession of the restaurant premises and for damages:—

Held: as the covenant relating to S. was a restriction governing the use of demised premises, the covenant was one which ran with the land and touched and concerned the premises demised. The plaintiff, as assignee of the reversion on the lease, was, therefore, entitled to the declaration claimed, to an order for possession and to an appropriate sum of mesne profits as damages.

Tatem v. *Chaplin* (6), *Fleetwood* v. *Hull* (7), *Clegg* v. *Hands* (9), *White* v. *Southend Hotel Co.* (10), and *Barnes* v. *City of London Real Property Co.* (11) *applied.*

[**EDITORIAL NOTE.** A covenant against a named person being concerned in the business carried on upon the demised premises is here held to be a covenant which touches and concerns the demised premises within the line of authorities commencing with *Tatem* v. *Chaplin* (6). A second point of interest is discussed by Vaisey, J. The assignee company had been a party to the original lease, in which it was defined as "surety." In Foa's Landlord and Tenant it is noted that the rules relating to covenants running with the land "would seem to entail the somewhat curious result that the interest taken by the assignee . . . is less precarious than that of the lessee." Vaisey, J., suggests that had his decision been otherwise, the assignee here might well have lost his advantageous position and been held liable on the covenant as being a party, although *alio intuitu.*

As to Covenants Running with the Land, see HALSBURY, Hailsham Edn., Vol. 20, pp. 356-359, paras. 431-433; and for Cases, see DIGEST, Vol. 31, pp. 141-147, Nos. 2769-2824.]

Cases referred to:

*(1) *Stevens* v. *Copp* (1868), L.R. 4 Exch. 20; 25 Digest 359, *95*; 38 L.J.Ex. 31; 19 L.T. 454.

*(2) *Horsey Estate, Ltd.* v. *Steiger,* [1899] 2 Q.B. 79; 31 Digest 372, *5191*; 68 L.J.Q.B. 743; 80 L.T. 857.

(3) *Congleton Corpn.* v. *Pattison* (1808), 10 East 130; 31 Digest 144, *2794*;

(4) *Doe d. Lloyd* v. *Ingleby* (1846), 15 M. & W. 465; 31 Digest 462, *6091*.
(5) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; 31 Digest 324, *4659*; 9 B. & S. 740; 37 L.J.Q.B. 231; 19 L.T. 238.
*(6) *Tatem* v. *Chaplin* (1793), 2 Hy.Bl. 133; 31 Digest 153, *2878*.
*(7) *Fleetwood* v. *Hull* (1889), 23 Q.B.D. 35; 31 Digest 104, *2416*; 58 L.J.Q.B. 341; 60 L.T. 790.
*(8) *Thomas* v. *Hayward* (1869), L.R. 4 Exch. 311; 31 Digest 156, *2897*; 38 L.J.Ex. 175; 20 L.T. 814.
*(9) *Clegg* v. *Hands* (1890), 44 Ch.D. 503; 31 Digest 109, *2448*; 59 L.J.Ch. 477; 62 L.T. 502.
*(10) *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767; 31 Digest 111, *2460*; 66 L.J.Ch. 387; 76 L.T. 273.
*(11) *Barnes* v. *City of London Real Property Co.*, [1918] 2 Ch. 18; 31 Digest 98, *2371*; 87 L.J.Ch. 601; 119 L.T. 293.
(12) *Dewar* v. *Goodman*, [1909] A.C. 72; 31 Digest 145, *2806*; 78 L.J.K.B. 209; 100 L.T. 2.
(13) *Re Hunter's Lease, Giles* v. *Hutchings*, [1942] Ch. 124; [1942] 1 All E.R. 27; 111 L.J.Ch. 102; 166 L.T. 75.

ACTION by the plaintiff claiming (i) a declaration that a lease of restaurant premises has been forfeited; (ii) an order for possession of the demised premises; and (iii) damages. The facts are fully set out in the judgment.

C. E. Harman, K.C., and *W. F. Waite* for the plaintiff.

J. Neville Gray, K.C., and *Geoffrey Lawrence* for the defendant company.

VAISEY, J.: This is an action for a declaration that a lease has been forfeited, for possession of the demised premises and for damages in the form of mesne profits.

The plaintiff, Wilfred Eusebius Lewin, is the assignee of the reversion, and the defendant company, American & Colonial Distributors, Ltd., are the assignees of the term.

The lease is dated Nov. 30, 1942. The parties to it are, first, Barclays' Nominees (Branches), Ltd., defined as "'the lessor', which expression where the context so admits shall include the reversioner for the time being immediately expectant on the term," secondly, one Lucien Rene Samett, defined as "'the lessee', which expression where the context so admits shall include his successors in title," and, thirdly, the defendant company, defined as "the surety."

Cl. 1 of the lease contains a demise by the lessor to the lessee of the property therein described, being the restaurant premises in the Strand, known as Romano's and also some other premises, together with certain fixtures and fittings for a term of seven years from the date of the lease, subject as therein mentioned at a rent of £2,000 per annum, payable in advance as therein set forth.

By cl. 2 the lessee for himself and his assigns entered into a number of covenants with the lessor, which are set out in paras. (1) to (13) inclusive. Some of these are in common form; to pay the rent, to defray the outgoings, to keep the property in repair, not to assign or underlet without the lessor's written consent and so forth.

In paras. (5) to (8) of the clause there are indications that the carrying on by the lessee of a licensed victualling house on the premises was in the contemplation of the parties, and further provisions are made in this direction by paras. (9), (10) and (11), which run as follows:

> (9) To apply at all proper times to the licensing authority and to use his best endeavours to obtain a renewal of the licences and certificates necessary for using and keeping open the demised premises as a licensed victualling house duly licensed for the sale and consumption therein of beer, wines and excisable liquors by retail.
>
> (10) So long as the requisite licences can be obtained to use the demised premises or permit the same to be used as a licensed victualling house only and to keep the same or cause the same to be kept open as such during all lawful hours and to conduct the business thereof or cause the same to be conducted in a lawful and orderly manner so as to maintain and extend such business and not to cause or permit any nuisance or annoyance to the residents of adjoining or neighbouring property and so to manage and control the same or cause the same to be managed and controlled that nothing shall be permitted or omitted contrary to any statutory provision or regulation for the time being in force relating to licensed premises or whereby any licence in respect of the demised premises may be liable to forfeiture or suspension and not to carry on or permit to be carried on any other business on the demised premises except that of a laundry respecting the washing and treatment of linen and the like used upon the said premises only.

> (11) On the termination of the term if so required by the lessor to assign transfer and deliver to the lessor or its nominee the then existing licences and certificates and to sign make and do all necessary notices, applications and acts for that purpose or for obtaining renewals thereof on being paid the fair proportion for the unexpired term thereof of the sum paid for the same subject to the right (hereby conferred) of the lessor to deduct from the amount payable by it all money owing to it by the lessee on any account.

Paras. (1) to (12) inclusive are introduced by a verb in the infinitive, the lessee in each paragraph covenanting for himself and his assigns either to do or not to do some specified act or thing. In the final paragraph, para. (13), the form is changed, for it runs thus :

> (13) That S. R. Sequerra, of 45, Porchester Gate, London, W.2. shall not directly or indirectly have any interest in this lease or in any company or firm interested in this lease and in particular but without prejudice to the generality of this clause that the said S. R. Sequerra (*a*) shall not be either nominally or beneficially entitled to or interested in any shareholding or loan capital of American & Colonial Distributors, Ltd. [that is to say, the present defendants, defined, as I have already mentioned, in the deed as " the surety "] (*b*) that the said S. R. Sequerra shall not be a director or in any way concerned in the conduct of the business of American & Colonial Distributors, Ltd. ; (*c*) that the said S. R. Sequerra shall not be in any way concerned in the conduct of business carried on upon the demised premises ; (*d*) that the said S. R. Sequerra shall not become an assignee or sub-lessee of the demised premises or any part thereof.

It is mainly upon para. (13) that the questions which have been argued in this matter turn.

Cl. 3 of the lease is divided into two sub-clauses. By the first, it is provided :

> In consideration of this demise being made at its request the surety to the intent that it shall not be released either wholly or partially from liability under this covenant by reason of any neglect or forbearance by the lessor to require or enforce payment of the said rents or any part thereof by the lessee or the performance by the lessee of any of the lessee's covenants or by the time given . . . hereby covenants with the lessor that the lessee shall pay the rent on the days and in manner aforesaid and perform all the lessee's covenants and that the surety will on demand pay and make good to the lessor all losses, damages, costs and expenses sustained or incurred by the lessor by reason or in consequence of any default by the lessee in the payment of the rent or any part thereof or in performing the lessee's covenants or any of them.

By the second sub-clause it is provided that, if the lessee should become bankrupt during the term and the trustee in bankruptcy should disclaim the lease, the surety (that is, the defendant company) covenanted with the lessor that it would accept a lease of the premises similar to the lease in which this provision appears.

Cl. 4 contains the lessor's covenants and I need not, I think, say anything about them.

We come now to cl. 5, which contains a number of provisions, of which I think that the only relevant one is the first. It is in these words :

> If the rents hereby reserved or any part thereof shall be unpaid for twenty-one days after becoming payable (whether legally demanded or not) or if any covenant on the lessee's part herein contained shall not be performed or observed or if the lessee or other the person in whom for the time being the term hereby created shall be vested shall become bankrupt or enter into any composition with his creditors or suffer any distress . . . or being a company shall go into liquidation [then in any of such cases] it shall be lawful for the lessor at any time thereafter upon the demised premises or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the right of action of the lessor in respect of any breach of the lessee's covenants therein contained.

The counterpart of the lease, which has been produced to me, is executed by Samett, the lessee, and also by the defendant company, whose seal is affixed thereto. On Jan. 30, 1943, that is, just two months after the date of the lease, a consent was given by the lessor, enabling the lessee to assign the lease to the defendant company and such assignment was made upon a date of which I am not informed. Later in the year, that is, on Sept. 25, 1943, there was an assignment of the reversion by the lessor party to the deed, that is, by Barclays Nominees (Branches), Ltd., to the plaintiff, Lewin.

Bearing in mind the covenant relating to Sequerra, which I have read, the admitted facts are as follows : (*a*) Sequerra is the owner of large stocks of wines and spirits which are kept upon the demised premises and sold in so much of the restaurant, Romano's Restaurant, as is open to the public; (*b*) Sequerra has been constantly at the premises, giving orders to employees of the defendants; (*c*) by a certain agreement Sequerra, on behalf of the defendant company, agreed to employ a certain manager at a certain salary and in that document he was described as the owner of the restaurant; (*d*) Sequerra holds shares in the defendant company and it appears to be the fact that he is practically its sole shareholder; and (*e*) Sequerra has loaned large sums of money to the defendant company to enable the defendant company to open and manage the restaurant.

All those allegations are admitted and at first sight one would have thought that there was no question but that the proviso for re-entry applied. There clearly have been breaches of those covenants by the original lessee; and the defence to the action and all the issues which have been raised in argument before me are of a highly technical character.

The law appears to stand thus: Notwithstanding the apparently unqualified form of a proviso for re-entry, of the character of the one found in the present lease, it is not possible for the assignee of a lessor to take advantage of a breach of covenant for the purposes of such a proviso unless the covenant is one which, in the technical phrase, runs with the land.

That rule is very clearly seen in the case of *Stevens* v. *Copp* (1), where the head-note is this:

> A lease contained a proviso for re-entry in case the lessee, his executors, administrators, or assigns, or any tenant, undertenant, or occupier of the premises demised, should, at any time during the term thereby granted, be lawfully convicted of any offence against any of the present or future game laws. The occupier of the premises having been convicted of killing game without a game certificate, the assignee of the reversion brought ejectment: Held, that he could not maintain the action. *Per* MARTIN, CHANNELL and CLEASBY, BB., that the assignee of the reversion could not avail himself of the breach of the condition, inasmuch as the condition did not touch or concern any land demised, and therefore did not run with the land.

The same matter was dealt with by LORD RUSSELL OF KILLOWEN, in the case of *Horsey Estate, Ltd.* v. *Steiger* (2), at p. 88, and the following pages. That was a case, not of a covenant, but of a condition of the lessee's bankruptcy, but I think that in order to make the matter clear I should read a short passage from the Lord Chief Justice's judgment, beginning at p. 88:

> The third point, which presents the greatest difficulty, has, therefore, to be considered—namely, is this condition of re-entry in the event of the company entering into liquidation one which, in the language of the common law, "runs with the land"? It is to be noted that this question was not raised in the court below and the judgment of the learned judge is silent upon it. It was put in argument that the question here turned upon a condition and not upon a covenant, and it was suggested that the cases dealing with covenants were, therefore, not authorities on the present question. I cannot assent to this view. Whether a particular covenant or condition does or does not run with the land is determined by the common law, and it is enough to say that the authorities uniformly treat them as governed by the same principles: *Stevens* v. *Copp* (1). Further, the statute, 32 Hen. 8, c. 34, s. 1, which gives assignees of the reversion the same benefit and remedies as lessors or grantors in respect of covenants and conditions, couples them together, and s. 2 of that Act, which gives lessees the same remedies against assignees of the reversion which they had against the lessor or grantor, in like manner couples conditions and covenants together. Is, then, the condition in question one the burden of which runs with the land so that its obligation binds the assignee of the lease? The answer to this question depends, in this case, upon whether it is a condition touching the thing demised or is merely collateral. I say "in this case" because there are undoubtedly collateral covenants or conditions, which on equitable principles, but only in a restrictive sense, bind the assignee. But this principle is confined to covenants and conditions of a negative character and depends upon notice. But apart from cases of this class, the true principle is that no covenant or condition which affects merely the person, and which does not affect the nature, quality, or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land: see *Mayor of Congleton* v. *Pattison* (3). Does, then, the condition or proviso in question "run with the land"? On the whole, and after much hesitation, I have arrived at the conclusion that it does. It must be taken as fully established that a covenant against assignment and also a proviso for re-entry in the case of bankruptcy run with the land [and he refers to a number of cases]. I think that a proviso for re-entry in case of liquidation by a company or an individual falls within the principle of these cases, and indeed that the proviso as to liquidation is cognate

> both to a covenant against assignment and to a proviso relating to bankruptcy. It partakes of the character of each of them. The proviso against bankruptcy was introduced into leases in consequence of the ordinary covenant against assignment being held not to apply to the involuntary assignment which is the consequence of bankruptcy: see *Doe* v. *Ingleby* (4); and like the covenant against assignment, it touches the question who shall have and occupy the premises demised, and, therefore, touches and concerns the thing demised: see *Williams* v. *Earle* (5), *per* Blackburn, J. I find myself unable to draw any distinction in principle between these cases and the case of a proviso for re-entry in case the assign of the lessee should enter into liquidation. I think the result, that covenants against assignment and provisoes for re-entry in the event of bankruptcy or liquidation stand on the same footing, is made clearer by considering what are the consequences following from a company entering into liquidation.

I need not read the rest of that judgment.

Those two cases and one which I will just cite are mentioned briefly both in Woodfall's Law of Landlord and Tenant, 24th Edn., where the law is stated in these words, at p. 559:

> A condition for re-entry in case the lessee or his assigns become bankrupt runs with the land, but a condition for re-entry in case the lessee or his assigns be convicted of any offence against the game laws does not; it has been said that the running of conditions with the land is governed by exactly the same rules as the running of covenants with the land.

And in Foa's Relationship of Landlord and Tenant, 6th Edn., at p. 469, the same two cases (*Horsey Estates* v. *Steiger* (2), *Stevens* v. *Copp* (1)) are cited with this note: that they "would seem to entail the somewhat curious result that the interest taken by the assignee . . . is less precarious than that of the lessee; for the latter of course . . . may be made liable to forfeiture on breach of covenant of *any* kind." Therefore the condition of re-entry which we have in this lease appears, according to the law, as I understand it, to run with the land in so far as the covenants are of the character which run with the land.

I now approach the question of whether in this case the covenant, a breach of which has been not only alleged but admitted, is a covenant of that description or not. I have already read para. (13) of cl. 2 of the lease, and I think that both counsel for the plaintiff and counsel for the defendant are agreed in submitting that the object and purpose of it is not a matter of speculation, but that I must read it as part of the document as a whole, knowing nothing more than what appears in the document itself. It seems to me that the numerous references to using the demised premises as a licensed victualling house and not for any other purpose and the various provisions as to licences and so forth, which appear in the various parts of the lease, make it perfectly plain that this was not merely a lease of a messuage—not so much of land and so much of bricks and mortar, but that it was a lease of business premises, and business premises of that very special kind which possesses, attaching to it, a sort of goodwill which it is the duty of the lessee, if he complies with the terms of the lease, to maintain to its full value for the benefit of the lessor when the lease comes to an end. Licences, for instance, have to be maintained, so that at the termination of the lease the landlord is to come into the benefit of them. Quite clearly, if the licences were forfeited, the premises would thereby become of less value.

Therefore, I read para. (13), expressed, as it is, in this curious impersonal manner, not as obliging the landlord to do anything, but positively enacting certain restrictions in relation to Sequerra. I must read that in connection with the rest of the document and, so far as I can, with an intelligent mind. Sequerra is, according to this covenant, not to have any interest in the lease. The lessee covenants that he shall not have any interest in the lease either directly or indirectly and shall not have any interest in any company or firm interested in the lease. Those are rather vague expressions.

A lease may be regarded from various points of view. It may be regarded as a piece of paper, as a lease and counterpart, or a piece of parchment, or it may be regarded merely as the label or compendious evidence of title for the property which it includes. I should be inclined to read the expression "have any interest in" the lease as really meaning have any interest in the demised premises, because I cannot see very much sense, if any, (and I cannot attribute nonsense to the parties), in treating the lease as being merely a piece of paper or parchment. I think that the same construction must be applied when we have references to "company or firm interested in" the lease. I see very little difference between that expression, read, as I think, sensibly, and "interested in the demised premises." The matter does not, however, stop there, because the covenant goes on to particularise, and one of the particulars, and the one which seems to me to be the relevant one here, is the restriction which says "that the said S. R. Sequerra shall not be in any way concerned with the conduct of the business carried on upon the demised premises." What business ? A Obviously, the business of a licensed victualler, which is the only business which is permitted and which is not only the only business which is permitted but a business which it is the positive obligation of the lessee to carry on and maintain in the proper manner.

It seems to me, therefore, that this covenant is not very different from saying that the business shall be carried on upon the demised premises in a proper manner, but subject to this : that those who are to be concerned in its being B carried on are not to include Sequerra himself. Quite obviously, if so read, this is an obligation not requiring something to be done upon the demised premises but prohibiting the doing of something upon the demised premises. It directly relates to the demised premises and to the use of the demised premises and to the manner in which the lessee is to enjoy the demised premises. It has nothing to do with anything which takes place outside the four walls of C Romano's Restaurant, although it was argued (and I do not wish to ignore the argument) that it might be possible for Sequerra to do something in the way of conducting the business, without going upon the property at all. That seems to me to be approaching rather perilously near to a quibble, because, although it might be a possible thing, it is a very unlikely thing that a man should conduct a business or be concerned in the conduct of a business elsewhere than at the premises upon which that business is carried on. I so read D that covenant. It seems to me to be a covenant which, first of all, relates to something which is not to be done on the demised premises ; that is to say, prohibiting the doing of something upon the demised premises. It has nothing to do with any other land or premises and is a restriction governing the preceding provisions of the lease relating to the user of the property, the maintenance of the licences and the other matters in regard to which the lessee has bound himself.

E If that be the meaning of this covenant, I look at the authorities to solve the question as to whether it is a covenant which touches or concerns the demised premises. I refer, first, to a very old case, which has been cited with approval in the later ones, of *Tatem* v. *Chaplin* (6). That was a case decided in 1793, and the headnote is this :

> A covenant in a lease that the lessee, his executors and administrators, shall constantly F reside upon the demised premises during the demise, is binding on the assignee of the lessee, though he be not named.

I take it from that that it would clearly follow that a covenant by the lessee that he should not reside upon the demised premises would equally touch and concern the demised premises and would run with them in the same way that the positive covenant to reside on them would run.

The next case in the same line of authorities is the case of *Fleetwood* v. *Hull* (7). G There the covenant was by the lessee of a public house to conduct and manage the business of an inn in such proper and orderly manner as to afford no ground or pretext whatever whereby the licences might be suspended or forfeited. The judge, after reviewing earlier authorities, and saying that that covenant which I have just read was concerned with the mode in which the premises are to be dealt with and used by the occupier, cited the earlier cases, including *Tatem* v. *Chaplin* (6), and the case of *Thomas* v. *Hayward* (8), which I shall H mention presently, where, as the judge said, at p. 37 :

> . . . the lessor of a beerhouse had covenanted with the lessee not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises, and it was held that this covenant did not run with the land. But that was upon the ground that the covenant was not either to do or refrain from doing anything on the demised premises. It did not touch the thing itself ; it only restrained the lessor from setting up a beerhouse somewhere else.

I take that statement in the judgment to imply that, in the judge's opinion, if the covenant had been to do or to refrain from doing something on the demised premises, it would have run with the land.

The next case is the very well known case of *Clegg* v. *Hands* (9). There the covenant was a covenant by the lessee with the lessors that he would not during the term, directly or indirectly, buy, sell or dispose of upon the premises any ales or stout other than such as had been *bona fide* purchased from the lessors. Among other things, it was held in that case, which, I think, is the first tied house case, that the covenant was not a personal covenant and capable of assignment, but a covenant relating to the way in which the business of a particular house was to be carried on, and accordingly, a covenant running with the land and enforceable by the owner of the reversion on the lease. At p. 518 of the report Cotton, L.J., said this :

> Then it is said that this covenant does not run with the land. I think it does run with the land. That is my opinion ; but there are other points on which this case may be decided independently of that question. It is a contract relating to the way in which the business at a particular house is to be carried on—therefore it is a contract relating to the public-house, just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on relates to the land. It affects the value of the reversion, it affects the house, and in my opinion it is a contract running with the land. If that is so, that will enable the judgment to be supported [the action was one in which an injunction was sought] and will enable the present owner of the reversion in this case to sue.

Then there is the case of *White* v. *Southend Hotel Co.* (10), where there was a covenant to buy wines from a particular wholesaler, and it was held that the assign of the lessee was still bound by the covenant and entitled to the benefit of a certain proviso. Lindley, L.J., in giving judgment in the case, using words of general import which I think it right for me to quote, at p. 771, said :

> Questions of this kind are always somewhat troublesome and difficult ; but, having regard to the authorities to which our attention has been called, and expecially to such cases as *Tatem* v. *Chaplin* (6), *Clegg* v. *Hands* (9) and *Fleetwood* v. *Hull* (7) [those being the three authorities which I have already mentioned] . . . it appears to me that it is impossible to say that the tenants' " assign " is not bound by this covenant. It is a covenant restraining, in fact, the lessee and his assign (although not named) from using this property in a particular way. In the old language which we are accustomed to with reference to matters of this kind, that is a covenant "touching the land." I think that is plain, not only from what was said by this court in *Clegg* v. *Hands* (9), where we had a somewhat different problem to solve, but also from the decision of Charles, J., in *Fleetwood* v. *Hull* (7), which contains a very full and careful investigation of what is meant by the expression " touching the land." It appears to me, on those authorities, that this covenant touched the land, and that consequently the defendants are bound by it.

A similar view was taken by the other Lords Justices and that case seems to me to support the view which I have formed in this case.

Lastly, on this line of cases, we have the case of *Barnes* v. *City of London Real Property Co.* (11) before Sargant, J., where the covenant in question was a covenant to maintain and pay a housekeeper to assist the tenants of a large block of flats. Sargant, J., held that the obligation as to the housekeeper was one with reference to the subject matter of the lease and would bind the reversioners.

Of the cases which were cited on the other side I may mention, first of all, the *Mayor of Congleton* v. *Pattison* (3), where there was a covenant not to hire persons to work in a certain mill from certain other parishes. That seems to me to be a very different case. So also was the case of *Dewar* v. *Goodman* (12). The last of the cases on the other side is the case of *Re Hunter's Lease* (13).

I come to the conclusion that this covenant precluding Sequerra from concerning himself in this business of management is a covenant which runs with the land and touches and concerns the thing demised, exactly in the same way as the covenants which were referred to in the five cases which I have cited, beginning with the case of *Tatem* v. *Chaplin* (6) and ending with the case of *Barnes* v. *The City of London Real Property Co.* (11). Indeed, I am unable to distinguish between them. I have disregarded, as I think that I was bound to disregard, the utterly reckless manner in which this covenant has been ignored by the defendant company, which admits in the most perfectly candid manner that it has disregarded it entirely.

That leads me to my final point, as to which I need not perhaps express a concluded opinion, but, having regard to the amount of time taken in discussing it, I think that I ought not altogether to pass over it. It is this: The assignees of the lessee were *alio intuitu* parties to the deed itself. They did not, it is true, enter into a direct obligation in regard to the thirteen paragraphs of the covenant by which the lessee was bound, but they did, as I have already mentioned, by cl. 3 of the lease admit that the demise had been made at the request of the defendant company and covenanted with the lessor, that is, with Barclays Nominees (Branches), Ltd., that the lessee would perform the covenants. If the defendant company is bound by that covenant, I have felt a great deal of doubt as to whether it is not also bound by cl. 5 of the lease, and I think that a good deal might be said for the proposition that the defendant company has in cl. 5 (1) of the lease bound itself to submit to re-entry on the breach of any covenant, whether running with the land or not, in the event, which has happened, of the defendant company itself becoming the lessee by assignment.

If I am right on the first point, that the covenant runs with the land, the second point, I take it, is one which I need not decide, and I do not propose, therefore, to dwell upon it at any length, but I wish to make it clear, that, even if the covenant were not one which ran with the land and, therefore, a covenant, the breach of which could not be taken advantage of by an ordinary assignee of the lease, I am not at all convinced that the defendant company, which was actually a party to the lease, stands quite in the same advantageous position. The note in the text-book to which I have referred, which points out that this doctrine entails the somewhat curious result that an assignee's interest is less precarious than that of the original lessee, rather suggests to me that that advantage is not one which could be claimed by an assignee who happened, although, as I have said, *alio intuitu*, to be actually a party to the document: but, as I have said, that point it is unnecessary for me to decide, having regard to the view which I have taken of the main point, and it is upon that main point that I decide that the plaintiff's case is here well founded.

I shall, therefore, make a declaration in the terms of the prayer to the statement of claim, and I shall make an order for possession; I shall award the appropriate sum of mesne profits by way of damages and the plaintiff must have the costs of the action.

Judgment for the plaintiff with costs. Declaration accordingly.

Solicitors: *Preston, Lane-Claypon & O'Kelly* agents for *Herbert & Gowers & Co. Oxford,* (for the plaintiff); *Oscar Mason & Co.* (for the defendant company).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

ictum of MACKINNON, L.J., at p.
00, *dissented from.* SMITH *v.* MATHER.
1948] 1 All E.R. 704.

Followed. PHILLIPS *v.* WELTON.
[1948] 2 All E.R. 845.

SUMMERS *v.* DONOHUE.

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), **April 13, 1945.**]

Landlord and Tenant—Rent restriction—Statutory tenant—Death of widow of tenant—No further statutory protection—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (1) (*g*).

The respondent was the freehold owner of certain premises within the Rent Restriction Acts. In 1920 the appellant's father was the tenant of the premises, when the rent was increased to the amount permitted by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In 1927 the appellant's father died and his widow, the appellant's mother, continued in occupation under sect. 12 (1) (*g*) of the 1920 Act. In 1944 the appellant's mother died and the appellant, who was her only relative living with her in the house, continued in occupation. The respondent brought ejectment proceedings against the appellant. It was contended on behalf of the respondent (i) that although there was no strict proof of a notice to quit having been served on the appellant's father in 1920, nevertheless, by reason of the rent having been increased in that year and by reason of sect. 3 (2) of the 1920 Act, it ought to be inferred that a notice to quit was duly served in 1920 prior to the raising of the rent, and that, therefore, the appellant's father was, at the time of his death, a statutory tenant and that the appellant's mother continued in occupation as a statutory tenant under sect. 12 (1) (*g*) of the 1920 Act, and (ii) that the appellant was not a "tenant" within the meaning of sect. 12 (1) (*g*) of the 1920 Act:—

Held: (i) in the circumstances it was correct to infer that a notice to quit had been duly served on the appellant's father in accordance with the requirements of sect. 3 (2) of the 1920 Act.

(ii) the appellant was not a "tenant" within the meaning of sect. 12 (1) (*g*) of the 1920 Act.

Pain v. *Cobb* (1) *approved.*

[**EDITORIAL NOTE.** It is here held, following *Pain* v. *Cobb* (1), on different grounds, that the protection to the widow of a statutory tenant given by the Rent Restriction Act, 1920, s. 12 (1) (*g*), does not extend to any relation living with her at her death. The word "tenant" in the extended definition in cl. (*g*) refers only to the contractual tenant or a deceased statutory tenant.

As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, para. 400; and for Cases, see DIGEST, Vol. 31, pp. 562, 563, Nos. 7097-7107.]

Case referred to:

**Pain* v. *Cobb* (1931), 146 L.T. 13; Digest Supp.

Appeal by the tenant from a decision of His Honour Judge Hancock, dated Feb. 6, 1945, on a question of the construction of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sect. 12 (1) (*g*). The facts are fully set out in the judgment of MacKinnon, L.J.

Sydney Isaacs for the appellant.

Robert Fortune for the respondent.

MacKinnon, L.J.: This case illustrates yet another of the many difficult problems which arise under the Rent Restrictions Acts. The plaintiff is the freeholder of a little house at Kingston-on-Thames. She brought an action against the defendant to recover possession of that property. The plaintiff's title was not strictly proved. She said in evidence that her mother bought the freehold property in 1916 and that she, the plaintiff, inherited it from her in 1936. If the defendant had insisted, perhaps more formal proof of that would have been necessary, but apparently it was not contested and it was taken below, and I think we are entitled to take it, that the plaintiff is in fact the freehold owner of these premises.

The story of what has happened to this little house since 1916 is that in 1916 the father of the defendant had become the tenant at a rent of 9*s.*—or 9*s.* 6*d.* per week. In 1920 his rent was increased to 12*s.* 6*d.* a week. In 1927 the father died. Thereupon his widow continued in possession of the house and it is not disputed that she continued in possession by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*), which provides that the expression "tenant" shall include the widow of a tenant residing with him at the time of his death. In 1944 the widow, the defendant's mother, died. The defendant was her only relative living with her in the house. She remained there in possession.

The plaintiff brought her action against the defendant saying she had no contractual tenancy with her, the plaintiff, and therefore she was a trespasser, and she asked for possession. The answer of the defendant was: "By virtue of sect. 3 of the Act of 1933 [which now takes the place of sect. 5 of the Act of 1920] I am a tenant within the meaning of those Acts of these premises and you are not entitled to recover possession under sect. 3 of the Act of 1933 without the necessary provision of alternative accommodation."

The question really is, can the defendant allege that she was a tenant within the meaning of the Act so as to have the protection of sect. 3 of the Act of 1933? If her mother was a contractual tenant with the plaintiff then clearly the defendant might claim the benefit of the Act pursuant to the definition of "tenant" in sect. 12 (1) (*g*) of the Act of 1920, as being, from the death of the contractual tenant, a member of the tenant's family residing with her at the time of her death. It is, therefore, necessary for the plaintiff to show that the mother, who died in 1944, was not a contractual tenant but was only a statutory tenant. That she sought to show by alleging that in 1920 notice to quit had been given to the father and that he remained on in possession not as a contractual tenant but as one whose contractual tenancy had been determined by the notice to quit and, therefore, as only a statutory tenant. It is not surprising, owing to the lapse of time and the fact that this was a small property occupied by perhaps humble people, that strict proof of the giving of that notice was not forthcoming. But evidence was given that it was believed that such a notice had been given, and plaintiff's counsel or solicitor relied upon the fact that in 1920 there was an increase of rent assented to or submitted to by the father which was exactly the amount of the increase of rent, or very nearly exactly A the amount, which would be permitted by the Act of 1920.

The judge upon those facts came to the conclusion that he ought to infer that the formal necessities for the increase of rent had been complied with at that change of the rate of rent in 1920, which formal necessities would include the giving of a notice to quit. At one period during the argument we were inclined to think that that inference was not one which could be legitimately drawn by the judge because, as one of us suggested during the argument, it is quite likely B that the then freeholder went round to the father, Donohue, and said: "Look here, I am told I am entitled to raise your rent. I want to put it up to 12*s.* 6*d.*" and that Donohue said: "Oh, very well, is that all right?" The freeholder said: "Yes, my solicitor tells me so," and Donohue said: "All right, I will agree to pay it," and, therefore, there was no notice to quit but the change in the rent was made by agreement.

C Counsel for the plaintiff has drawn our attention to sect. 3 (2) of the Act of 1920, which provides that no such increase of rent shall be recoverable until one week:

> . . . after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act . . .

and that in the absence of such notice any agreement to increase the rent shall D be invalid and illegal. That, I think, adds a very material consideration to those which are to be taken into account in determining whether the county court judge was justified and was right in his assumption that there was in fact, though strict proof of it is lacking, a notice to quit served on Donohue in 1920 so that in effect he became thereafter a statutory tenant. Having regard to that provision as to the illegality of any increase of rent without serving such a notice, I think the county court judge was not only justified but was right in drawing that E inference. The result of that is that when the father died in 1927 he was a statutory tenant. The mother's right during her occupation from 1927 to 1944 was not by virtue of any contractual tenancy or the inheritance from her husband of any contractual tenancy but was a statutory tenancy pursuant to the definition in sect. 12 (1) (*g*) of the 1920 Act as being a widow of a tenant residing with him at the time of his death. Then on her death in 1944 if the present defendant F is to say: "I am a tenant and, therefore, I am protected by sect. 3 of the Act of 1933," she must also rely upon that definition of "tenant" in the section I have just referred to as constituting her a statutory tenant within the meaning of these Acts.

The material words of the definition are:

> The expression "tenant" includes the widow of a tenant dying intestate [which words are now deleted by a subsequent Act] who was residing with him at the time of his G death, or, where a tenant dying intestate leaves no widow . . . such member of the tenant's family so residing as aforesaid . . .

The argument for the defendant is that she comes within the provision as being a member of the tenant's family upon the death intestate of a tenant and that "a tenant" on the third occasion on which those words occur in this definition means the enlarged notion of a tenant which is itself defined by the whole clause. I think that contention is erroneous. This part of the subsection H is setting out and defining the expression "tenant" which is in inverted commas. That expression in inverted commas is defined as including somebody, somebody who is referred to twice over with the preposition "or" between the two occasions on which he or she is mentioned. The expression "tenant" includes the widow of a tenant or, where that same person, a tenant, leaves no widow, some other member of his or her family. I do not think it is possible or right to extend that definition so that, as it were, on the third occasion where the word "tenant" occurs "tenant" has to be put into inverted commas and included in the person whose personality is being defined in the following words. Where the words

" a tenant " occur twice over in the definition part of the section I think it refers to the same person and only to one person ; that is to say, " tenant " in that latter part means the contractual tenant or the statutory tenant who has died, and it is not right to continue that in a succession of descendants so that under the second part of the definitive portion of the section " a tenant " can include one who has become an artificial tenant of the original tenant defined under the earlier definitive passage.

A In the result I do not think that the defendant in this case comes within the definition of " tenant " in that subsection. This was, in my opinion, rightly held in the case which has been cited to us, *Pain* v. *Cobb* (1). The county court judge upon this part of the argument rightly held that he was bound by the decision in *Pain* v. *Cobb* (1), though he had a doubt whether he would have come to the same conclusion himself. I think if the matter had been fully argued out before him as it has been here he would have come to the conclusion that *Pain* v. *Cobb* (1) was rightly decided and that his decision upon B that part of the case was, therefore, correct. In the result I think his appeal fails and must be dismissed with costs.

LAWRENCE, L.J. : I agree and I only wish to add this. I think the presence of the words " dying intestate " which were included in the original enactment in sect. 12 (1) (*g*) still further imports the view that the word " tenant " in the two places to which my Lord has referred mean the same person.

MORTON, L.J. : I agree. C

Appeal dismissed with costs.

Solicitors : *Good, Good & Co.* (for the appellant) ; *Badham, Comins & Sloman* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WYATT *v.* JOHN KNIGHT, LTD. D

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), **April 12, 1945.**]

Workmen's Compensation—Average weekly earnings—Basis of calculation—Change from full time to half-time during period of twelve months prior to accident—Rate of pay per hour unchanged—No change of grade of employment—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (3), 10 (iii). E

The appellant, a bag washer employed by the respondents, met with an accident in Jan., 1943, and became permanently disabled. During the eleven months prior to the accident, she was at one period a full-time worker doing 40 hours a week and later a half-time worker doing 25 hours a week ; the rate of pay per hour was the same in both periods. In calculating the amount of compensation payable the county court judge took the view that there had been a change of grade in the employment of the F appellant and that, therefore, he ought, in estimating the pre-accident earnings, to take only the average of those earnings from the time when she became a half-time worker :—

HELD : (i) the county court judge was wrong in law in coming to the conclusion that the appellant entered upon a new grade of employment when she became a half-time worker.

G (ii) the appellant was, therefore, entitled to compensation based on her earnings during the whole eleven months before the accident.

[**EDITORIAL NOTE.** This case considers the meaning of " change of grade " for the purpose of calculating compensation under the Workmen's Compensation Act. It was said by COZENS-HARDY, M.R., in *Perry* v. *Wright* (1), that grade refers to the " particular rank in the industrial hierarchy occupied by the workman " and it is held here that a H mere change in the number of hours worked is not a change of grade. In other words, full-time and half-time workers doing the same work are not in different grades for this purpose.

AS TO GRADE OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 938-940, para. 1284 ; and FOR CASES, see DIGEST, Vol. 34, pp. 428, 429, Nos. 3487-3493. See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., pp. 345-348.]

Case referred to :

*(1) *Perry* v. *Wright, Cain* v. *Leyland & Co.* (1900), *Ltd., Bailey* v. *Kenworthy, Ltd., Gough* v. *Crawshay Brothers, Cyfartha, Ltd.*, [1908] 1 K.B. 441 ; 34 Digest 409, *3329* ; 77 L.J.K.B. 236 ; 98 L.T. 327.

APPEAL by the workman from an award of His Honour JUDGE TUDOR REES made at Bow County Court and dated Mar. 7, 1945. The facts are fully set out in the judgment of MACKINNON, L.J.

F. W. Beney, K.C., and *H. Lester* for the appellant.

John Thompson for the respondents.

MACKINNON, L.J.: In this case the appellant is a workwoman who appeals against the amount of an award in her favour fixed by the county court judge in an arbitration before him.

In Jan., 1943, she met with an unfortunate accident and broke her wrist, as a result of which she became permanently disabled. The arbitration, therefore, arose in order to fix the amount of her compensation for disablement. The task of the judge in fixing that is regulated by sect. 9 of the 1925 Act, the material part of which is subsect. (3):

> The rules for calculating the weekly payment in the case of partial incapacity shall be: (i) If the maximum weekly payment would, had the incapacity been total incapacity, have amounted to twenty-five shillings a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident [which is, as appears from subsect. 2 (i) of the same section, " during the previous twelve months " before the accident] and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

The judge found, and there is no dispute about it, that the latter factor, the average weekly amount she is able to earn after the accident, is 10*s*. The question arises as to his findings on the first factor, what was the average weekly earnings of the workman before the accident. That is subject to a qualification under the 1925 Act, s. 10 (iii):

> Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident . . .

The facts were that for 11 months, with an interval for ill-health or accident, the appellant had been working at certain work as a bag washer for the respondents at a time rate of 1s. 4d. an hour. *Prima facie*, therefore, the task to ascertain this first factor, the average weekly earnings during the past twelve months, would be to see how long she had worked during that period, to multiply it by 1*s*. 4*d*., and so arrive at the average weekly earnings during those eleven months. But the respondents contend that that simple calculation ought not to be the basis of estimating the factor because she had not been employed during those eleven months in the same grade. She had in fact during those eleven months worked for the first period in one grade and for the second period in a second grade. There was no difference in the class of work she was doing, there was no difference in the amount she was paid for that per hour during that period. The difference that did occur was that at a certain date instead of working all day, by reason of some domestic necessities at home, she had intimated her desire not to work a full day's work but to work only half a day in the morning instead of both in the morning and in the afternoon. On an average in the earlier part she had worked 40 hours and earned 1*s*. 4*d*. an hour during that time, and in the later part she only worked 25 hours or something like that.

The contention for the respondents is that she had passed from the grade of a full-time worker to the grade of a half-time worker and that, in the circumstances, the result was that she had not been employed by these employers in the same grade and that, therefore, it was not right to take her average weekly earnings during the whole eleven or twelve months but only the average weekly earnings during the second period when she had worked for a less time as being the average weekly earnings in the grade in which she was when she met with the accident.

Now what is the result of this provision about grade, as illustrated by various cases which have been referred to, is not very clear. This much, I think, is clear; it is for the county court judge to find the facts and, of course, his finding of fact is not open to review by us. But upon the facts as found by him it is a question of law upon the construction of this section of the Act whether upon these facts there has been a change of grade. The county court judge came to the conclusion upon what was proved before him that there had been a change of grade and that, therefore, he ought not in estimating the factor of pre-accident earnings to take the average earnings through the whole eleven months but only the average of those earnings from the time when she ceased to do full-time and entered, as he held, upon a new grade as a half-time worker. It is a very nice question upon which different minds might well differ, but I think the onus was upon the employers to establish that there had been this change of grade, and upon the evidence as recorded by the county court judge I think he was wrong in law in coming to the conclusion that when she ceased to do the same amount of work as she had done in the earlier period she then entered into a different grade of employment.

It has been strenuously and most ably argued by counsel for the respondent that there were two well recognised categories, to use a neutral phrase, one of a full-time worker and the other of a half-time worker. I do not think the evidence establishes that. It does establish that some of these workers worked longer hours than others, but they were paid at the same rate. If one of them worked 20 hours, or even 10 hours, I do not think they would be in any other position than the present appellant, who merely says that she worked 25 hours, though I do not know that it is clear that every week she did or was obliged to do 25 hours. The fact was that she was allowed to work only in the morning instead of in the morning and in the afternoon. I am not satisfied upon the evidence, in fact I disagree with the county court judge in his conclusion as a matter of law, that upon the facts which were proved before him it was satisfactorily proved that there was a change of grade when she ceased to do a full day's work and only did a smaller amount of time.

In the result, I think that the county court judge was wrong in applying the limitation of the average of the eleven months average earnings imposed by sect. 10. He ought to have taken as the first factor in his calculation the average weekly amount which she did earn during the eleven months before the accident. If that factor is taken as the first factor in the calculation, there is no question but that the award in her favour ought to have been considerably increased above the amount which the county court judge did give her. I think, to that extent, this appeal succeeds and should be allowed with costs. The exact amount I have no doubt can be agreed ; I do not pretend to bear in mind what it is, but I dare say there will be no difficulty about it.

Lawrence, L.J. : I am of the same opinion. I think that there was no satisfactory evidence that there was a category of part-time workers which had the necessary identity to constitute a grade. I also think that there was no satisfactory evidence that any such category had sufficient permanence to constitute it a grade. I think, upon the evidence, it appears that the workers could either work over the whole week if they wanted to or could, with the permission of the employers, work for any shorter period. Therefore, I agree with the judgment proposed.

Morton, L.J. : The crucial point of this appeal is, was there in Sept., 1942, a change in the grade in which the appellant was employed within the meaning of sect. 10 of the 1925 Act ? Immediately before the change upon which reliance is placed the appellant was a machine bag washer, paid at the rate of 1*s*. 4*d*. an hour. The only change which took place was that at her own request she worked fewer hours. She was still a machine bag washer and she was still paid 1*s*. 4*d*. an hour for that work. It might happen that the day after the accident or the week or the month after the accident she might have gone back to working more hours per week. To my mind the change in the number of hours so worked does not constitute a change in grade within the meaning of the Act. As was said by Cozens-Hardy, M.R., in the case of *Perry* v. *Wright* (1), at p. 451 :

> . . . the word " grade " . . . refers to the particular rank in the industrial hierarchy occupied by the workman, such as shepherd, carter, or common labourer on a farm, or mason or bricklayer or bricklayer's labourer in the building trade, and not to his greater or less excellence in that rank.

I do not think that the change in the number of hours which this workman actually worked can amount to a change in grade within the meaning of the Act. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *W. H. Thompson* (for the appellant) ; *P. A. Gascoin* (for the respondents). [*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

DOWD *v.* W. H. BOASE & CO., LTD.
McFARLANE *v.* COGGINS & GRIFFITHS (LIVERPOOL), LTD.

[COURT OF APPEAL (Scott, du Parcq and Morton, L.JJ.), **February 9, 1945.**]

Master and Servant—Loan of servant—Hire of vehicle and driver—Accident due to negligence of driver—Whether hirer or regular employer responsible for negligence of driver.

(i) Dowd's Case. The plaintiff was employed by Rea, a firm of stevedores, in unloading meat from a ship and loading it into vans. Rea required more bogies and drivers than they themselves had available at the time and, following a common practice at the dock, Boase, another firm of stevedores, arranged to supply Rea with bogies and drivers as required. There was no written agreement. Owing to the negligent driving of one of the drivers supplied by Boase, the plaintiff was injured in the course of his employment.

(ii) Macfarlane's Case. The plaintiff was employed by a company in checking goods which were being loaded into a ship by Coggins, a firm of stevedores. Coggins had applied for and obtained the loan of a certain number of mobile cranes and drivers from the Mersey Docks and Harbour Board, subject to the board's regulations. Reg. 6 contained the clause: "The drivers so provided shall be the servants of the applicants."

In each of the two cases the question for the decision of the court was whether, in applying the maxim *respondeat superior*, the regular employers of the workman or the hirers were liable for the damage resulting from the negligence of the workman:—

HELD: in each of the two cases, the regular employers failed to establish that the hirers had such control of the acts of the workman at the time of the accident as to become liable as employers for his negligence. Although the driver was acting under the directions of the hirers in that they could tell him where to go and what to carry, he was not under their directions in regard to the manner of driving; in doing the negligent act he was exercising his own discretion as a driver—a discretion vested in him by his regular employers when he was sent out with the vehicle.

Nicholas v. *Sparks & Sons* (2) *followed.*

[**EDITORIAL NOTE.** When an accident occurs by reason of the negligent driving of a vehicle hired out with its driver to another person, difficult questions may arise whether the owner or the hirer is responsible. The present cases are decided by applying the test laid down by the Court of Appeal in *Nicholas* v. *Sparks* (2), which was as follows: "One test in cases of a vehicle lent with its services to a hirer, is this question, in the doing of the negligent act was the workman exercising the discretion given him by his general employer, or was he obeying or discharging a specific order of the party for whom, upon his employer's direction, he was using the vehicle or other instrument?" It is held that in the actual driving of a vehicle of which the driver has been placed in charge by his regular employers he uses his own skill and he is to that extent not carrying out the orders of the hirer by whom he is for the time being employed. The regulations of the employers in one of these cases provided that where a crane was provided for an applicant with the services of a driver, the driver should be the servant of the applicant. It is held that as this could not effect a transfer of the service of the driver without his consent, it amounted to no more than an agreement between the employer and an applicant for certain purposes, and had no effect upon the liability to a third party injured by the driver's negligence.

AS TO LIABILITY FOR SERVANTS OF INDEPENDENT CONTRACTORS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 241-243, paras. 421, 422; and FOR CASES, see DIGEST, Vol. 34, pp. 22-28, Nos. 23-61.]

Cases referred to:

*(1) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 34 Digest 23, *29*; 9 L.J.Ex. 308.

*(2) *Nicholas* v. *Sparks & Sons* (1943), 61 T.L.R. 311n.

*(3) *M'Cartan* v. *Belfast Harbour Comrs.*, [1911] 2 I.R. 143; Digest Supp.

(4) *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] A.C. 509; [1942] 1 All E.R. 491; 167 L.T. 404.

(5) *Rourke* v. *White Moss Colliery Co.* (1877), 2 C.P.D. 205; 34 Digest 25, *46*; 46 L.J.Q.B. 283; 36 L.T. 49.

*(6) *Donovan* v. *Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 34 Digest 26, *49*; 63 L.J.Q.B. 25; 68 L.T. 512.

(7) *Poulson* v. *Jarvis* (*John*) *& Sons, Ltd.* (1919), 89 L.J.K.B. 305; 34 Digest 24, *39*; 122 L.T. 471.

(i) Dowd's Case.

Appeal by the workman from a decision of Stable, J., given at the Liverpool Summer Assizes on June 13, 1944.

(ii) McFarlane's Case.

Appeal by the defendants, the Mersey Docks and Harbour Board, from a decision of Croom-Johnson, J., given at the Liverpool Summer Assizes, on June 29, 1944.

The two cases raised substantially the same issues. The facts of both cases are set out in the judgment of the court delivered by Morton, L.J.

(i) Dowd's Case.

E. G. Hemmerde, K.C., and *Rose Heilbron* for the appellant.

Neville Laski, K.C., and *S. Scholefield Allen* for the respondents.

(ii) McFarlane's Case.

F. A. Sellers, K.C., and *G. Glynn Blackledge* for the appellants, the Mersey Docks and Harbour Board.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the respondents, Coggins & Griffiths (Liverpool), Ltd.

Rose Heilbron held a watching brief on behalf of McFarlane.

Morton, L.J. [delivering the judgment of the court]: These two cases were both decided at the Liverpool Summer Assizes in 1944. Stable, J., gave judgment in Dowd's case on June 13, and Croom-Johnson, J., (without having heard of the decision of Stable, J.,) gave judgment in Mcfarlane's case on June 29. In each case the question was whether the regular employers of a workman, or the persons who were temporarily making use of his services (hereinafter referred to as the hirers) were liable for damage to the plaintiff resulting from the negligence of that workman. In each case it was manifest that the maxim *respondeat superior* applied, and that one of the two defendants was liable for the workman's tort. The facts in the two cases were not, of course, identical, but they were similar in some respects. In Dowd's case Stable, J., held that the hirers were the employers of the negligent workman at the time of the accident. In McFarlane's case Croom-Johnson, J., held that the regular employers of the negligent workman were still his employers at the time of the accident. The result of the decision of Stable, J., was that the plaintiff Dowd failed in his action, as Dowd was himself employed by the hirers Rea, Ltd., and thus, being in common employment with the negligent workman, he could not recover damages against Rea, Ltd. From that decision Dowd appeals and contends that the regular employers of the negligent workman, the respondents Boase & Co., Ltd., were still the workman's employers at the time of the accident. In McFarlane's case no question of common employment arises, and the contest is between the regular employers of the negligent workman, the Mersey Docks and Harbour Board, as appellants, and the hirers, the respondents Coggins & Griffiths. As the two cases raised substantially the same issues and the decisions appeared to be in conflict, the court agreed to hear argument in both cases before deciding either. The facts in each case are very fully and clearly stated in the judgment of the judge who tried it, and we shall only repeat those facts so far as is necessary in order to render this judgment intelligible.

We turn first to Dowd's case. In that case Rea, Ltd. (hereafter called Rea) had a contract to unload some frozen meat from a ship in the Gladstone Dock at Liverpool and load it into vans. For the purpose of carrying out this work they required more bogies and drivers then they had available at the moment, and Boase & Co., Ltd., a firm in the same line of business (hereafter called Boase) arranged to supply to Rea such bogies and drivers as they required. To quote Stable, J.:

> A practice had grown up, no doubt with the idea of getting on with the work of loading and unloading at the docks with the maximum of despatch. Under this practice, where a company which owned bogies or any particular plant had no particular work for that plant on a particular day, and other concerns had work which required the plant, the company with the surplus plant (in this case I confine it to bogies) was in the habit of hiring bogies which they did not want to the company that required them. There was no written agreement, and there is no documentary evidence of the arrangement between the two companies, with the exception of an account, which simply shows that Rea were debtors to Boase for a sum of money. But the account is headed "to hire of trucks" and the trucks were charged out against Rea at so much per hour.

In addition, if the men driving the bogies worked overtime there is an additional charge against Rea, the extra cost of the drivers' overtime, and in addition to that too, although I do not think it matters, there is an item called "tonnage bonus," for which is added an additional 10 per cent.

On July 20, 1943, one Davies, who had been for 16 years in the regular employ of Boase as a bogie driver, was driving a bogie belonging to Boase and was assisting Rea's men in loading meat into vans. The method of working was as A follows. Rea had fitted a platform or rig on the top of the bogie driven by Davies, in order to raise its height. The frozen meat carcases were swung from the ship on to the floor of the platform. The bogie was then driven to the van into which the carcases were being loaded. The bogie was backed up against the back of the van, the platform of the bogie being flush with the floor of the van. The men who were shifting the carcases then moved them from the bogie on to the van. The accident by which the plaintiff sustained damage B came about in this way. A bogie-load was in course of being loaded into the van, and the two men who were loading, one of whom was the plaintiff Dowd, were handling the last carcase. Unfortunately, Davies started moving his bogie away from the van, in the mistaken belief that the loading had been completed, at a moment when Dowd was standing with one leg on the floor of the van and one leg on the platform of the bogie. The result was that Dowd fell to the ground and sustained certain injuries. STABLE, J., was satisfied that C Dowd's injuries were due to the negligence of Davies, the driver of the bogie.

In McFarlane's case, the accident to the plaintiff McFarlane happened on Aug. 22, 1943. He was a registered checker employed by a company called James Dowie & Co., and was engaged in checking goods at the North Sandon Dock, Liverpool; these goods were being loaded on a ship called the Port Chalmers. Whilst so engaged, McFarlane was run down by a mobile crane, D driven by one Newall, and suffered injuries. It is not in dispute that Newall was negligent. The loading was being carried out by a firm of stevedores called Coggins & Griffiths (Liverpool), Ltd., and Newall with the mobile crane was assisting in this work, but his regular employers were the Mersey Docks and Harbour Board, and the crane was the property of the board. The board have a large number of mobile cranes and they let them out on hire to persons who are going to undertake the loading or unloading of vessels in their docks, E upon certain terms and conditions which are called regulations. In this case the stevedores, whom we shall call Coggins, had applied in writing for the use of certain cranes, including this particular crane, for the loading of the Port Chalmers at the North Sandon Dock, prescribing the date and time when the cranes would be required. The application was dated Aug. 4, and the mobile crane in question was still being used for this work on Aug. 22.

There is no doubt that in each case the hirers, Rea in the first case and Coggins F in the second, had a considerable measure of control over the negligent workman. He was assisting in the work which they had contracted to do. They could tell him where to go, within the area in which the work was being carried out, what to transport on his bogie or crane, and where to deliver the goods which he was carrying. Moreover, in McFarlane's case there were certain provisions in the board's regulations and certain answers to interrogatories on which reliance G was placed; we shall return to these matters later. On the other hand, in each case it is clear that the workman, so far as the actual driving of the vehicle was concerned, had the entire control of it. He was the only man who had any right to drive it and, as STABLE, J., put it:

> . . . the control of the vehicle, in the sense of the manipulation of the controls, is a matter which must be left to the driver. It is quite impossible for the principal to direct to what extent the brake is to be applied and how far the steering gear and H so on and so forth is to be operated. The manipulation of the controls is a matter for the driver himself.

It is clearly established that if the regular employers of a workman wish to contend that they were not his "employers" at the time when his negligence in performing his duties caused an accident, the burden is upon them to prove this. *Prima facie*, the persons who have engaged a man to serve them, who pay his wages and who have power to dismiss him if he misbehaves, are his employers during his hours of work, and it is by no means easy for them to prove that at the relevant time some other person had such complete control over the workman as to become his superior for the purposes of the maxim *respondeat superior.* This is illustrated by a long line of cases cited to us, of which the earliest was *Quarman* v. *Burnett* (1) (the well known case in which two ladies hired a carriage and a man to drive it) and the latest was a very recent decision of this court, *Nicholas* v. *Sparks & Sons* (2). Included in this line of cases are two decisions of the House of Lords, *M'Cartan* v. *Belfast Harbour Comrs.* (3), and *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board* (4). There are, however, certain reported cases in which the regular employers were held to have discharged that burden of proof. See *Rourke* v. *White Moss Colliery Co.* (5), and *Donovan* v. *Laing, Wharton and Down Construction Syndicate* (6), where the Court of Appeal followed the decision in *Rourke's* case (5). Lord Sterndale, M.R., said in *Poulson* v. *John Jarvis & Sons, Ltd.* (7), at p. 308, referring to *M'Cartan's* case (3) and *Donovan's* case (6):

> It is very difficult to reconcile these cases . . .

We share his difficulty; but *Donovan's* case (6) was referred to with approval in the *Century Insurance* case (4) and it must be accepted that, on the special facts of *Donovan's* case (6), the decision was correct. We think the basis of the decision is to be found in the words of Lord Esher, at page 632, when he said:

> The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co. [the hirers].

We do not intend to review the cases in detail, or to restate the principles applicable. This task has recently been performed by this court in *Nicholas'* case (2). We would only observe that the burden of proof lying upon the regular employers is particularly difficult to discharge in cases where the workman who caused the accident was driving a vehicle belonging to them, of which he was in sole charge, and which he alone was allowed to drive on the day of the accident. In such a case the vehicle has been placed under the control of the driver by his regular employers, who rely upon him to use his own skill and exercise his own discretion in driving it. This being so, if he causes an accident by negligent driving, it is not easy to establish that someone else was his *superior* at the time of the accident.

Nicholas' case (2) and the two cases now before us all fall within this category. The answer to the question " Who was the *superior* at the time of the accident " ? must depend in each case upon the facts of that case, and no case can be said to govern another unless the facts are similar in all respects. We shall not embark upon an exhaustive examination of the facts in these three cases. This has been done very skilfully by the counsel appearing before us, and various facts have been relied on as distinguishing Dowd's case and McFarlane's case respectively from *Nicholas'* case (2). In our view, however, in each of the cases before us, the regular employers have failed to establish that the hirers had such control of the acts of the workman, at the time of the accident, as to become liable as employers for his negligence. In *Nicholas'* case (2), Scott, L.J., delivered the judgment of the court (Scott, Luxmoore and Goddard, L.JJ.), and said:

> One test in cases of a vehicle lent with its services to a hirer, is this question, " In the doing of the negligent act was the workman exercising the discretion given him by his general employer, or was he obeying or discharging a specific order of the party for whom upon his employer's direction, he was using the vehicle or other instrument ? "

We are content to apply this test, so recently laid down in this court, and applying it we feel no doubt that in each of the cases before us the driver, in the doing of the negligent act, was exercising his own discretion as driver—a discretion which had been vested in him by his regular employers when he was sent out with the vehicle—and he made a mistake with which the hirers had nothing to do.

The result is that the appeal in Dowd's case must be allowed. We doubt if Stable, J., would have decided as he did if he had had before him reports of *M'Cartan's* case (3) and *Nicholas'* case (2).

It follows from what we have said that the appeal in McFarlane's case will be dismissed, but before we part from that case we ought to say a few words about the Mersey Docks and Harbour Board's Regulations, and the answers of the defendants to interrogatories. Reg. 6, which was much relied upon before us, is as follows:

> Applicants for the use of cranes must provide all necessary slings, chains, and labour for preparing the article to be lifted, and for unshackling the same. They must also take all risks in connection with the matter. The board do not provide any labour in connection with the cranes except the services of the crane drivers for power cranes. The drivers so provided shall be the servants of the applicants.

It is plain that reg. 6 cannot have the effect of transferring the crane driver from the service of the board to the service of the applicant. That could not be done without the consent of the crane driver. This being so, the last sentence of reg. 6 could amount to no more than an agreement between the board and the applicant that the crane driver shall be regarded, as between these parties, as the servant of the applicant for certain purposes. It is not necessary to decide what these purposes are; the regulation may be intended to place the liability for any tort of the crane driver, as between these parties, upon the applicant, but however this may be, no such bargain can affect the right of the plaintiff to sue the party who was in fact the employer of the crane driver at the relevant time. Turning to the answers to interrogatories, interrogatory 3, delivered on behalf of the plaintiff, was as follows:

> Under whose immediate directions was the driver of the crane working at the time of the accident on Aug. 22, 1943?

To that the defendants Coggins answered:

> The driver of the said crane was working under the immediate directions of these defendants' servants at the time of the alleged accident.

The defendant board answered:

> The defendants Coggins & Griffiths (Liverpool), Ltd.

It was argued that the answer of Coggins, the hirers, to this interrogatory concluded the matter against them, but CROOM-JOHNSON, J., did not take this view, nor do we. It is true that the crane driver was acting under the immediate directions of the hirers in the sense that they could tell him where to go and what to carry on his crane, but, as has already been pointed out, he was not under their directions in regard to the manner in which he should drive the crane, and it was the manner in which he drove the crane which caused the accident to the plaintiff. As a representative of the hirers said in his evidence:

> We naturally hang the slings on and sling the stuff, but of course we leave it to the crane driver to take it in his way. We do not interfere with the driver of the crane.

At the request of counsel, we promised to defer dealing with the questions of costs or with the precise form of order in each case. We shall now hear counsel in regard to these matters, but as a matter of first impression we think that in Dowd's case judgment should be entered for the plaintiff against Boase for the sum of £548 6*s.* 4*d* (the sum at which STABLE, J., assessed the damages in the event of the plaintiff being held entitled to damages), with costs here and in the court below, and that in McFarlane's case the appeal should be dismissed with costs.

Appeal in Dowd's case allowed. Leave to appeal to the House of Lords refused.

Appeal in McFarlane's case dismissed. Leave to appeal to the House of Lords granted.

Solicitors: (i) Dowd's Case: *Sidney Pearlman*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *Barlow, Lyde & Gilbert*, agents for *A. W. Mawer & Co.*, Liverpool (for the respondents). (ii) McFarlane's Case: *Gregory, Rowcliffe & Co.*, agents for *R. H. Bransbury*, Liverpool (for the appellants, the Mersey Docks and Harbour Board); *P. F. Walker*, agent for *Weightman, Pedder & Co.*, Liverpool (for the respondents, Coggins and Griffiths, (Liverpool), Ltd.); *Silverman & Livermore*, Liverpool (for McFarlane).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re GRIFFITHS, HAWORTH *v.* WELTON.

[Court of Appeal (Scott and Morton, L.JJ., and Cohen, J.), **March 7, 9, 1945.**]

Wills—Construction—Annuity—Annuity to daughter payable during widow's lifetime and subject to the income of the residuary trust fund being first applied to payment of widow's annuity—Widow's annuity charged on capital if income of residuary trust fund insufficient to pay it—Whether daughter's annuity charged on capital or continuing charge.

By his will, dated Nov. 23, 1925, the testator directed his trustees (*inter alia*) to pay a certain annuity to his widow during her lifetime and, subject to this annuity and during the widow's lifetime, to pay an annuity of £104 a year to his daughter D.; he further directed that D.'s. annuity should " only be payable subject to the income of [the] residuary trust fund being first applied to the payment of " the widow's annuity. " Subject to the payment of such annuities " the residuary trust fund was settled upon certain trusts. The testator further declared by his will that " in case the income from my residuary trust fund shall be at any time insufficient to pay my wife the said annuity the same shall be paid out of the capital of the residuary trust fund." The residuary estate had proved insufficient from the outset for payment in full of the widow's annuity, and each year during her life the trustees had to have recourse to capital to make up that annuity. Nothing had been paid to D. in respect of her annuity. The widow died on July 24, 1943. It was contended by D. that her annuity was charged upon the capital of the residuary trust fund, or, alternatively, that it was a continuing charge on the income of the residuary trust fund for an indefinite period :—

Held : upon the true construction of the will, the daughter's annuity was only intended to be paid if and so far as the income of the residuary trust fund during the widow's lifetime was sufficient for this purpose after paying the widow's annuity in full. There was, therefore, no intention on the testator's part to give the daughter either a charge on capital or a continuing charge on the income.

[**EDITORIAL NOTE.** A provision in a will that trustees " shall, subject to the payment of such annuities, stand possessed of the residuary trust fund and income thereof " has often been construed as giving the annuitant a charge on capital. Here, however, the widow's annuity was expressly charged on capital in the event of an insufficiency of the residuary trust fund and it is held that the daughter's subsequent annuity is not charged either on capital or income, reading the will as a whole. The paramount consideration throughout the will is the provision for the widow and a charge on capital given to the daughter would weaken the widow's security. The question of whether a charge upon income for an indefinite period was void under the perpetuity rule was argued, but no opinion is expressed by the court as a decision on the point is unnecessary.

As to Annuities Charged on Corpus or a Continuing Charge on Income, see HALSBURY, Hailsham Edn., Vol. 28, pp. 203, 204, para. 370; and for Cases, see DIGEST, Vol. 39, pp. 145-148, Nos. 398-422.]

Case referred to :

(1) *Re Howarth, Howarth* v. *Makinson*, [1909] 2 Ch. 19; 39 Digest 146, *407*; 78 L.J.Ch. 687; 100 L.T. 865.

Appeal by a daughter of the testator from a decision of the Vice-Chancellor, given in the Chancery Court of the County Palatine of Lancaster, on Oct. 16, 1944. The facts and the relevant clauses of the will are set out in the judgment of Morton, L.J.

A. C. Nesbitt for the appellant.

R. F. Roxburgh, K.C., and *G. Maddocks* for the respondents other than the trustees.

A. L. Ungoed-Thomas for the trustees.

Scott, L.J. : We have had an opportunity of discussing this matter and I will ask Morton, L.J., to deliver the leading judgment.

Morton, L.J. : The testator, William Henry Griffiths, made his will on Nov. 23, 1925. On May 26, 1937, he made a codicil to his will, which is immaterial for the present purpose. By his will he appointed his wife and two other persons to be executors and trustees, and he gave pecuniary and specific legacies, including a legacy in the following terms :

> I also give to my daughters Amy Welton and Dora Griffiths the sum of £1,000 each (free of legacy duty) if they shall or either of them shall survive my said wife such sum of £1,000 each not to be paid or vest in my said daughters respectively until after the death of my said wife. And I declare that my trustees need not set aside any fund to provide for those legacies but they shall be paid out of my residuary trust fund on the death of my said wife.

I have only read that clause for the purpose of indicating the testator's primary desire to make provision for his wife ; he has taken care that the capital shall not be depleted by the payment of these legacies until after the death of his wife.

There follows a bequest of certain preference shares, and then comes a devise and bequest of the testator's real and personal estate upon the usual trust for sale and conversion and for the payment of funeral and testamentary expenses and debts and the usual trusts for investment. Then the testator proceeds :

> My trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same (hereinafter called the residuary trust fund) Upon trust to pay out of the income thereof such a sum as will yield to my said wife after deducting income tax therefrom an annuity of £520 to my said wife during her widowhood to commence from my death and be payable by equal weekly payments of £10 per week and in the event of her marrying again then during the remainder of her life a reduced annuity of £104 for her separate use without power of anticipation and payable by equal weekly payments of £2 per week and subject to the said annuity to my wife also during the lifetime of my said wife to pay to my said daughter Dora if she shall be a spinster at the date of my death an annuity of £104 per annum by equal quarterly payments until she shall marry and which annuity shall be in addition to her share of the residuary trust fund but such annuity shall only be payable subject to the income of my residuary trust fund being first applied to the payment of the above annuity to my said wife And shall subject to the payment of such annuities stand possessed of the residuary trust fund and the income thereof in trust for all my children who being sons attain the age of 21 years or being daughters attain that age or marry under that age in equal shares and if there shall only be one such child the whole to be in trust for that one child.

There then follows a substitution clause, which is of no importance for the present purpose, and a declaration that the share in the residuary trust fund given to any daughter shall be settled upon trusts, which I need not read. There is an ultimate trust in favour of the testator's brothers and sisters living at his decease in equal shares. There then follows a clause to which I attach a great deal of importance :

> And I declare that in case the income from my residuary trust fund shall be at any time insufficient to pay my wife the said annuity as herein provided the same shall be paid out of the capital of the said residuary trust fund.

The rest of the will is not material.

The testator died on Aug. 29, 1938. He was survived by his widow, Elizabeth Ann, who never remarried, and the two daughters mentioned in the will. The defendant, Amy Welton, is the wife of Matthew William Stanley Welton, and has issue two children and no more, namely, the infant defendants. The defendant, Dora Griffiths, is still a spinster. The testator's residuary estate proved insufficient from the outset for payment in full of the annuity of £520 free of tax given to his wife and accordingly in every year during her life the trustees had to have recourse to capital to make up that annuity. The widow died on July 24, 1943. Nothing has been paid to the daughter Dora in respect of her annuity of £104 a year. The Vice-Chancellor of the Palatine court has held that upon the true construction of the testator's will, Dora's annuity was only payable out of income, if any, of the residuary trust fund accruing during the life of the widow subject to and after payment of the widow's annuity. From that order the daughter Dora appeals and counsel on her behalf has submitted that Dora's annuity is charged upon the capital of the residuary trust fund, or, alternatively, that the testator has used words which create a continuing charge on the income of the residuary trust fund for an indefinite period. The latter argument does not seem to have been raised before the Vice-Chancellor and is not mentioned in his judgment, but we have carefully considered it. In regard to that argument, counsel for the respondents raised two interesting questions, *videlicet*, (*a*) whether a charge upon the income of property for an indefinite period, there being no express charge upon corpus, is void as infringing the rule against perpetuities ; (*b*) whether such a charge can only be saved from infringing the rule by treating it as equivalent in law to a charge upon corpus. For the moment, I shall assume, in favour of the appellant, without so deciding, that a charge upon income for an indefinite period is valid and that there is a real distinction between such a charge and a charge upon corpus.

Is Dora's annuity charged upon corpus or upon income for an indefinite period, as counsel on her behalf contends ? Turning back to the will, I observe, first, that the widow's annuity is directed to be paid out of the income of the residuary trust fund. Secondly, that the daughter's annuity is introduced by the words " subject to the said annuity to my wife," and also " during the lifetime of my said wife to pay." The widow's annuity ranks first, and the testator contemplates that the only payments to be made to Dora will be made during the lifetime of his widow. Further, although it is not expressed that Dora's annuity, like the widow's annuity, is to be paid out of income, I think that the context makes it clear that this is the testator's intention. Of course, the fact that an annuity is, in the first instance, directed to be paid out of income is by no means conclusive of the question whether the annuitant has or has not got a charge on capital. The words " and which annuity shall be in addition to her share of the residuary trust fund," are, I think, of little importance. No doubt the testator hoped that Dora would take something during her mother's lifetime, and, if she did, that was to be in addition to her share of the residuary trust fund. Next come words which seem to me very significant :

> . . . but such annuity shall only be payable subject to the income of my residuary trust fund being first applied to the payment of the above annuity to my said wife . . .

This passage clearly indicates again that the income of the residuary trust fund is to be first applied in payment of the annuity to the widow, and it indicates also to my mind that the daughter's annuity is also payable out of income and that it may not be payable in certain events. It is difficult to reconcile this passage with the view that the daughter's annuity is to be secured by a charge on capital, or even by a continuing charge on income.

Next comes a passage on which counsel for the appellant rightly laid stress :

> . . . and shall, subject to the payment of such annuities, stand possessed of the residuary trust fund and the income thereof.

Those words, or similar words, have been often held to indicate that the annuity is a charge on capital : (see, *e.g.*, *Re Howarth* (1)) ; but they must always be read in the light of the other provisions contained in the will, and I now come to a provision which, in my view, sheds a strong light upon all that has gone before :

> And I declare that in case the income from my residuary trust fund shall be at any time insufficient to pay my wife's said annuity as hereinafter provided, the same shall be paid out of the capital of the said residuary trust fund.

To my mind, this provision removes any doubts as to the meaning of the earlier provisions, and the intention of the testator. It shows quite clearly that the testator thinks he has not so far charged his wife's annuity on capital, and if he has not so far charged his wife's annuity on capital, he clearly has not so charged the secondary annuity to his daughter. Thinking this, the testator expressly charges the wife's annuity on capital, but says nothing about the daughter's annuity. One can see a very good reason for the omission of any charge on capital in favour of the daughter. The testator's first wish is that his widow shall have her £10 a week free of tax and if the daughter also had a charge on capital the security for the payment of the widow's annuity might be gravely impaired. Turning back to the words " subject to the payment of such annuities," and reading those words in the light of the provisions which precede and follow them, I think that they do not confer any charge on capital though they would confer such a charge in a suitable context. The words " such annuities" refer, in my view, to the annuities which, under the earlier clause, are payable (and only payable) out of income accruing due in the widow's lifetime if and so far as it is sufficient for the purpose. Subsequently, the widow is given a charge on capital, but the daughter is not, by the provision to which I have referred, beginning :

> And I declare that in case the income from my residuary trust fund . . .

Reading the will as a whole, I feel no doubt that the Vice-Chancellor is right, and that the daughter's annuity was only intended to be paid if and so far as the income of the residuary trust fund during the life of the widow was sufficient for this purpose, after paying the widow's annuity in full. If this is the true construction of the will, there is no intention on the part of the testator to give the daughter either a charge on capital or a charge on income which continues after the widow's death, and both of the arguments of counsel for the appellant must fail, even if I make, in favour of the appellant, the assumptions which I have already mentioned. It thus becomes unnecessary to consider the two interesting questions raised by the argument of counsel for the respondents other than the trustees, and I resist the temptation to make certain observations upon them which would necessarily be *obiter dicta.*

In my judgment, this appeal should be dismissed and, *prima facie*, the unsuccessful appellant should pay the costs, but I am open to conviction on this point.

SCOTT, L.J. : I agree.

COHEN, J. : I also agree.

Appeal dismissed. Appellant to pay the respondents' costs excepting the costs of the respondent trustees, which should be paid as between solicitor and client out of the testator's estate.

Solicitors : *Leach, Sims & Co.*, agents for *O. Collier Littler & Kilbeg*, Manchester (for the appellant) ; *Bower, Cotton & Bower*, agents for *Simpson, Wright & Haworth*, Manchester (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re ALCOCK, BONSER *v.* SEVILLE AND OTHERS.

[CHANCERY DIVISION (Evershed, J), **April 11, 1945.**]

Wills—Construction—Residuary gift—Direction to divide equally between nephew and children of cousin absolutely—Whether division referred to distribution per capita or per stirpes—Meaning of word "between."

By the terms of her will a testatrix left her residuary estate "upon trust to be divided equally between my nephew Reginald Seville and the three children of my cousin who resides at 12, Milner Road, Kingston-on-Thames, absolutely." It was proved that the cousin referred to had four children and it was agreed that for all purposes the will should be treated as referring to four, and not three, children. The question for the determination of the court was whether the direction in the will to divide equally referred to a division *per capita*, and whether, therefore, it had the effect of giving the nephew, R.S., one-half or one-fifth of the proceeds of the conversion of the residue :—

HELD : *prima facie* a direction to divide between A., and the children of B. imported a division *per capita* among the whole class consisting of A. plus all the children of B. Having regard to the special circumstances of this case and the use of the word "absolutely," there was nothing to displace the application of the rule, which meant that the residuary estate was divisible among the five participants in equal shares.

Re Harper, Plowman v. *Harper* (3) *and Re Cossentine, Philp* v. *Wesleyan Methodist Local Preachers' Mutual Aid Assocn. Trustees* (4) *followed.*

[**EDITORIAL NOTE.** The word "between" was, etymologically, a reference to two, but, as MAUGHAM, J., points out in *Re Cossentine* (4) it has long been extended to more than two and it is now equivalent to "among", especially where equality of division is intended. The court holds that there is nothing in the facts of this case to displace this rule, regard being had to the fact that the persons between whom the division is to be made are in the same generation.

AS TO DISTRIBUTION PER CAPITA AND PER STIRPES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 356-359, paras. 402-405 ; and FOR CASES, see DIGEST, Vol. 44, pp. 991-1003, Nos. 8490-8605.]

Cases referred to :

*(1) *Re Walbran, Milner* v. *Walbran*, [1906] 1 Ch. 64 ; 44 Digest 997, *8552* ; 93 L.T. 745.

*(2) *Re Prosser, Prosser* v. *Griffith* (1929), 167 L.T.Jo. 307 ; Digest Supp. ; 67 L.Jo. 346 ; [1929] W.N. 85.

*(3) *Re Harper, Plowman* v. *Harper,* [1914] 1 Ch. 70 ; 44 Digest 991, *8495* ; 83 L.J.Ch. 157 ; 109 L.T. 925.
*(4) *Re Cossentine, Philp* v. *Wesleyan Methodist Local Preachers' Mutual Aid Assocn. Trustees,* [1933] Ch. 119 ; Digest Supp. ; 102 L.J.Ch. 78 ; 148 L.T. 261.

Adjourned Summons by the plaintiff to determine whether the direction in a will by a testatrix leaving the proceeds of her residuary estate to her nephew and to the children of her cousin referred to a distribution of the proceeds *per capita* or *per stirpes.* The facts are fully set out in the judgment.

J. Pennycuick for the plaintiff.

Harold Christie, K.C., and *A. P. Vanneck* for the first defendant, the nephew.

Wilfrid Hunt for the four remaining defendants, children of the cousin.

Evershed, J. : In this summons a question has arisen as to the effect of a residuary gift in the will of a Miss Alcock, the material terms of that gift being as follows :

> I give devise and bequeath the remainder of my estate whatsoever and wherever unto my executor to sell, call in and convert into money and from out of the net proceeds calling in and conversion and out of my ready money to pay my debts, funeral and testamentary expenses and to stand possessed of the residue upon trust to be divided equally between my nephew Reginald Seville and the three children of my cousin who resides at 12 Milner Road, Kingston-on-Thames, absolutely.

That will was made on Oct. 23, 1942, at a time when the testatrix was very ill in hospital and it is in evidence that the will was somewhat hastily prepared because of the physical condition of the testatrix by a firm of solicitors who were not her usual solicitors. The testatrix did not in fact survive long the making of the will. She died on Nov. 10, 1942. I do not know that the circumstance that the will was prepared by someone unacquainted with the testatrix and in the circumstances that I have mentioned would be material, or even admissible, save upon a preliminary matter which can be shortly disposed of.

The latter part of the residuary gift which I have read is : " The three children of my cousin who resides at 12, Milner Road, Kingston-on-Thames." It is proved in evidence beyond all doubt that the cousin residing at 12, Milner Road was, and is, Mrs. Minnie Harrison. It is also proved that the number of children Mrs. Minnie Harrison had and has is four and not three. The *falsa demonstratio* as regards the number of children and the peculiar way of referring to Mrs. Harrison is no doubt accounted for by the circumstances of the testatrix's illness which I have mentioned. However that may be, it is, in my judgment, clear, and it has not been indeed argued to the contrary, that this reference to three children must be taken as a mistake and that for all purposes now before the court one must read " four " for " three," there being no ground which would justify the court in selecting from the four which in fact existed three, or for rejecting altogether this obvious intention of Miss Alcock to benefit the children of a person who also was a close friend.

In these circumstances I approach the question, which does seem to me to be a difficult one, namely, whether the whole phrase which I have read has the effect of giving to Reginald Arthur Kenneth Seville one-half or one-fifth of the proceeds of this conversion. The brevity of the will, as pointed out in a somewhat similar case by Lord Maugham, in no way diminishes the difficulty of the problem, the solution of which must depend upon the proper meaning of the words used in the will. That very obvious remark has to be made, though I think it does not altogether remove, and may not substantially clarify, a certain lack of uniformity in the decisions which have been cited in this case. On the one hand, the cases of *Re Walbran* (1), decided by Joyce, J., and *Re Prosser* (2), decided by Clauson, J., as he then was, are examples of a conclusion on the lines for which counsel for the first defendant contends in this case. On the other side of the line Sargant, L.J., and Lord Maugham, when judges of first instance, in the cases of *In Re Harper* (3) and *In Re Cossentine* (4) respectively reached conclusions on the particular wills which they had to construe which illustrate the conclusion which counsel for the four remaining defendants contends should be the conclusion in this case. I, therefore, approach the matter with all the more diffidence because of that lack of uniformity, as I think there is lack of uniformity in those decisions.

I will state my own conclusion at once, which is that as I read this document and construe the terms that this lady has used, I think she intended Reginald Arthur Kenneth Seville and the children of Mrs. Minnie Harrison to share as between all of them equally in this residue, that is to say, that each should take one-fifth. I am not unassisted, I think, in reaching that conclusion by the circumstances that Reginald Arthur Kenneth Seville was a nephew and the children of Mrs. Harrison were first cousins once removed. They belong to the same generation. The evidence shows that Miss Alcock was friendly both A with her nephew and with Mrs. Harrison's family. I think that the construction which I have given to the words used is in accordance with what one would not unnaturally suppose to be the intention of a testatrix in such circumstances who is benefiting people of the same generation. I realise fully that the matter I have referred to is somewhat slight, but then, when construing a brief document and when examples are to be found on both sides of the line which divides the contending arguments, it is perhaps all the more natural to clutch somewhat B at slender indications.

I must in the circumstances say something about the decided cases which I have mentioned, because, as I read them, I think much of the lack of uniformity may have sprung from the significance originally given to the word "between"—when I say "originally" I mean in the earliest of the cases. In *In Re Walbran* (1) JOYCE, J., founded himself to a substantial extent upon his view that etymologically the word "between" indicated a C division into two. That strict view of the use of the word "between" was not accepted by SARGANT, J., who said that whatever the etymology might be, in popular usage the word "between" no longer indicated a division into two as opposed to a division into any other number of parts. In the case of *Re Prosser* (2) LORD CLAUSON followed *Re Walbran* (1), because the language of the two wills was almost identical. In the short report in the Weekly Notes D there is no further assistance to be derived in analysing the grounds on which the conclusion was reached.

Finally in the case of *In Re Cossentine* (4), attention was for the first time directed closely to the proper inference to be drawn from the use of the word "between" and after an examination of the article in the OXFORD DICTIONARY, MAUGHAM, J., pointed out that to-day in reference to a division, and particularly to an equal division into many parts, the word "between" was not only the E natural but an equally proper word to use rather than such a word as "among." I say equally proper: it might be put higher and be said to be more proper where emphasis is to be attached to equality of distribution. However that may be, I think that discussion really disposes of the argument which has lain at the root of the case put forward in favour of a division into moieties, an argument which prevailed in the case of *Re Walbran* (1). It seems to me that to-day it is not true to say in a context such as this that any inference in F favour of a division into two can be drawn from the use of the word "between." Speaking for myself I respectfully adopt and follow the opinion of MAUGHAM, J., when he says in *Re Cossentine* (4), at p. 124:

> An ordinary man directing a sum to be divided between the children of his sister and, say, his nephew Jack, would, in my opinion, be intending a division *per capita*.

G That analysis is supported by the fact that in each of the three text books commonly cited in matters of this kind, HAWKINS' CONCISE TREATISE ON CONSTRUCTION OF WILLS, 3rd Edn., JARMAN'S WILLS, 7th Edn., THEOBALD'S LAW OF WILLS. 9th Edn., it is stated that *prima facie* a direction to divide between A. and the children of B imports a division *per capita* among the whole class consisting of A. plus all the children of B. Plainly such a rule must give way in any particular case to the proper inferences to be drawn from a particular H instrument. It might well be a most important matter that if you take the case of A. and the children of B., B. is in a different relationship to the testator from A., for example, if A. is a stranger and B. is a brother or sister or if the result is that A. and the children of B. bring different generations into direct connection. Then you may well say that the intention of the will is not a division *per capita*, but a division in effect *per stirpes*. But the *prima facie* rule which is stated in these text books does not seem to me to be displaced in this case, regard being had to the circumstance that Reginald Seville and the children of Mrs. Harrison are in the same generation.

I was troubled by the mistake as to the number of children because it might be said that the number of children would be much more relevant in the testatrix's mind if she was considering a division *per capita* than if she was considering a division *per stirpes*. That I think is a fair argument, but I do not think it is strong enough having regard to the special circumstances of this case and the obvious peculiarity of the description. I do not think that is enough to outweigh the inference to be drawn in accordance with what I believe is the *prima facie* rule. Moreover, as counsel for the four remaining defendants has observed, if the argument of counsel for the first defendant succeeded the result is the creation apparently of a joint tenancy, a thing which one would not regard as a probable intention when there is a direction to divide absolutely—and that word "absolutely" is used—the proceeds of a conversion. The point is one which in the case of *Re Harper* (3), SARGANT, J., felt was significant and that point is again referred to by MAUGHAM, J. The point is present also in this case.

The conclusion, therefore, which I reach is that in this case the proceeds of sale should be divided into fifths.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of residue.

Solicitors: *Taylor, Jelf & Co.*, agents for *C. A. Bonser*, Mansfield (for the plaintiff); *Rider, Heaton, Meredith & Mills*, agents for *Bevan, Hancock & Co.*, Bristol (for the first defendant); *Pritchard, Englefield & Co.* (for the four remaining defendants.)

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re BAILEY, BARCLAYS BANK, LTD. *v.* JAMES.

[CHANCERY DIVISION (Romer, J.), **February 6, 1945.**]

Wills—Construction—"Residuary legatee"—Real estate not specifically disposed of—Comparative value of real and personal estate—Context—General words passing undisposed of real estate.

By her will, dated Oct. 2, 1943, a testatrix left the house in which she lived to a named person and gave a number of pecuniary legacies to other named persons. The will concluded as follows: "I leave Marjorie James, daughter of Clifford James as my residuary legatee . . ." The testatrix died on Jan. 26, 1944; her personal estate amounted to about £300, but her real estate, consisting of a number of freehold houses, was worth about £3,500. The question for the determination of the court was whether the appointment of M.J. as residuary legatee carried with it a gift to her of all the undisposed of realty:—

HELD: the rule was that the words "residuary legatee" by themselves *prima facie* did not apply to real estate, though their application might be extended so as to do so when the context required it. Here the comparative value of the real and personal estate made it plain that the testatrix intended M.J. to be her residuary beneficiary and there was sufficient context in the will to extend the technical meaning of the words "residuary legatee" so that all the real estate not specifically disposed of passed to M.J.

Hughes v. *Pritchard* (4) *followed.*

Re Gibbs, Martin v. *Harding* (1) *distinguished.*

[**EDITORIAL NOTE.** The *prima facie* rule that "residuary legatee" refers to personal estate only is here held to be inapplicable on the special facts of the case. The most material consideration is the comparative value of the real and personal estate, which, coupled with the context in the will, is held sufficient to displace the well-settled rule.

AS TO EFFECT OF APPOINTMENT OF RESIDUARY LEGATEE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 263-265, para. 313; and FOR CASES, see DIGEST, Vol. 44, pp. 749-751, Nos. 6082-6093.]

Cases referred to:

*(1) *Re Gibbs, Martin* v. *Harding*, [1907] 1 Ch. 465; 44 Digest 751, *6092*; 76 L.J.Ch. 238; 96 L.T. 423.

*(2) *Perrin* v. *Morgan*, [1943] A.C. 399; [1943] 1 All E.R. 187; 112 L.J.Ch. 81; 168 L.T. 177.

(3) *Re Methuen & Blore's Contract* (1881), 16 Ch.D. 696; 44 Digest 750, *6090*; 50 L.J.Ch. 464; 44 L.T. 332.

*(4) *Hughes* v. *Pritchard* (1877), 6 Ch.D. 24; 44 Digest 750, *6089*; 46 L.J.Ch. 840; 37 L.T. 259.

ADJOURNED SUMMONS by the plaintiffs to determine whether the appointment of a residuary legatee carried with it a gift of all the undisposed of real estate which were of much greater value than the personal estate. The facts are fully set out in the judgment.

A. H. Droop for the plaintiffs.

A *C. V. Rawlence* for the residuary legatee.

F. C. Watmough for the next-of-kin.

ROMER, J.: This summons raises a short but by no means easy point on the will of Mrs. Florence Stafford Bailey, which is dated Oct. 2, 1943, and is in her own handwriting. The testatrix died on Jan. 26, 1944. She made this will while in a hospital at Southend-on-Sea. The question is whether the B appointment of Marjorie James as residuary legatee carries with it all the undisposed of realty. The personal estate of the testatrix was worth about £279, but her real estate, which consisted of four small freehold houses in London, and three freehold houses at Southend, was worth about £3,500. The general rule in such a case is in no doubt and was stated by JOYCE, J., in *Re Gibbs* (1), at p. 468, as follows:

> It is well settled that the words "residuary legatee" by themselves *prima facie* C do not apply to real estate, though their application may be extended so as to do so when the context requires it, and when a testator directs his real estate to be sold and disposes of part of the proceeds, it may be taken, I think, that the appointment of a residuary legatee will pass the rest.

That rule, as expressed in 1907, is still the rule. But I was referred to *Perrin* v. *Morgan* (2) where the House of Lords dealt with the meaning of the word "money" in a will: VISCOUNT SIMON, L.C., said, at p. 406:

D

> I agree, of course, that, if a word has only one natural meaning, it is right to attribute that meaning to the word when used in a will, unless the context or other circumstances which may be properly considered show that an unusual meaning is intended, but the word "money" has not got one natural or usual meaning. It has several meanings, each of which in appropriate circumstances may be regarded as natural.

Here the words "residuary legatee" have only one natural meaning, and E thereby differ from the word "money," and *prima facie* refer only to personalty. So that the only question is whether there is sufficient context in this will to extend the natural meaning of the phrase. I have a certain amount of guidance from the decisions in *Re Methuen & Blore's Contract* (3) and in *Re Gibbs* (1). There is a specific gift of part of the real estate —48, Argyll Road, Westcliff. It seems to me to be quite plain that the mind of the testatrix was directed to both her real and her personal estate, and when it appears that her personal estate F was worth less than £300, while her real estate was worth about £3,500, it seems clear to me that she intended Marjorie James to be her residuary beneficiary. In *Hughes* v. *Pritchard* (4), at p. 24, the will began: ". . . I do make and ordain this my last will and testatment as follows," and then after disposing of two freehold farms and some pecuniary legacies and one specific legacy, the testator ended, "and I make A., C. and D. my residuary legatees." JESSEL, M.R., held that the real estate not specifically devised passed to A., C. and D. JAMES, G L.J., at p. 26, asked:

> Is there any case in which such words as "I make A.B. my residuary legatee" have been held not to pass real estate if there have been previous gifts of real estate in the will?

At all events I have come to the conclusion, on the special facts of this case and having regard to the comparative values of the real and personal estate, H coupled with the fact that there is sufficient context in this will to extend the technical meaning of the words "residuary legatee," that all the real estate not specifically disposed of passes under the will to Marjorie James as "residuary legatee."

Declaration accordingly.

Solicitors: *Hatchett Jones & Co.* (for the plaintiffs); *Williams & James* (for the residuary legatee); *T. E. Crocker & Son* (for the next-of-kin).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re HEY'S SETTLEMENT TRUSTS AND WILL TRUSTS, HEY *v.* NICKELL-LEAN AND OTHERS.

[Chancery Division (Cohen, J.), **March 21, 28, 1945.**]

Settlements—Construction—Beneficial trusts—Implication of cross-remainders.

Perpetuities—Settlement—Income of trust fund to be paid to settlor's children from death of settlor's widow to death of last surviving child with provisions for substitution and cross-remainders—Provisions for substitution and cross-remainders to be read as separate directions—Settlor's children born before date of settlement—No breach of rule against perpetuities.

Wills—Construction—Resulting trust to testator's estate of income of settled fund —Whether capital or income of estate.

By a settlement dated Oct. 1, 1931, the testator provided, *inter alia*, that, from the death of his wife until the death of his last surviving child, the whole income of the settled fund should be paid in equal shares to his children during their respective lives, and if any child should die leaving issue, the issue should take the share which such child would otherwise have taken. By his will, dated Feb. 1, 1938, the testator directed his trustees to pay the income of his residuary trust fund to his widow during her lifetime and after her death to hold the capital and income on trust for his children. The trustees were empowered to postpone, at their absolute discretion, the sale of any part of the estate, and the testator directed that, pending such sale, " the income of property actually producing income " should be applied as income, and the rules in *Howe* v. *Dartmouth* (9) and *Allhusen* v. *Whittell* (10) were negatived. The testator died on Sept. 24, 1942, leaving a widow and 4 children. Each of the 4 children was born before the date of the settlement. During the widow's lifetime, after the payment of certain annuities provided for in the settlement, there was a surplus of the income of the settled fund which was payable by way of resulting trust to the testator's estate. The questions for the decision of the court were (i) whether, on the true construction of the settlement, in the event of a child dying without issue, the share of income of such child accrued to the surviving children ; (ii) whether the rule against perpetuities would affect the dispositions of the settlement as construed ; (iii) whether, on the true construction of the testator's will, the income of the settled fund which resulted to the testator's estate by way of resulting trust was applicable as income or to be invested as corpus :—

Held : (i) upon the true construction of the settlement, in the event of a child dying without issue, cross-remainders were implied. (*Re Tate* (2) *followed*). Such child's share and accruing share would be divisible among the surviving children and the issue of any child then dead.

(ii) the provisions, express or implied, for substitution and cross-remainders should be read as separate directions as to the share of each child and were valid as regards the share of any child born at the date of the settlement. (*Re Russell* (8) *followed.*) Since all the children were born at the date of the settlement the rule against perpetuities did not apply to the dispositions of the settlement as construed.

(iii) upon the true construction of the testator's will, the word " property " in the expression " income of property actually producing income " meant " property forming part of my estate " ; the income of the settled fund resulting by way of resulting trust to the testator's estate was capital of the estate and not income. (*Re Whitehead* (15) *followed.*) The clause excluding the operation of the rule in *Howe* v. *Dartmouth* (9) only operated if the executors, in proper exercise of the power conferred on them by the will, determined to postpone sale of the asset. (*Rowlls* v. *Bebb* (19) *followed.*) Therefore, if the testator's executors determined to exercise the power to postpone the sale of the right to receive the resulting income, the same should, as and when received, be treated as corpus and invested accordingly, the tenant for life receiving the income of such investments ; but any income received before the executors so determined should be apportioned between capital and income in accordance with the principle in *Re Chesterfield's Trusts* (14).

[**EDITORIAL NOTE.** The first point arising out of the settlement herein considered is decided upon application of *Re Tate* (2), cross-remainders in favour of the surviving children being implied in case of the death of a child without issue. The court holds that these provisions may be read as separate directions as to the share of each child and they are therefore not contrary to the perpetuity rule as regards any child born at the date of the donation, which all the children were. On the construction of the will it is held that the provision for treating income of " property actually producing income " as income refers to property forming part of the estate. Surplus income of the settled fund resulting to the testator's estate is not income of such property and is to be treated as *corpus*, the *Howe* v. *Dartmouth* (9) rule being excluded by virtue of the express terms of the will if the executors exercised their power of postponing the sale of the right to receive this resulting income.

As to Rule Against Perpetuities in Regard to Gifts to Members of a Class, see HALSBURY, Hailsham Edn., Vol. 25, pp. 134-141, paras. 229-236 ; and for Cases, see DIGEST, Vol. 37, pp. 101, 102, Nos. 359-373.

As to Apportionment between Income and Corpus, see HALSBURY, Hailsham Edn., Vol. 14, pp. 368-371, paras. 689-694 ; and for Cases, see DIGEST, Vol. 23, pp. 464-467, Nos. 5358-5374.]

Cases referred to :

*(1) *Re Hobson, Barwick* v. *Holt*, [1912] 1 Ch. 626 ; 44 Digest 1205, *10426* ; 106 L.T. 507.

*(2) *Re Tate, Williamson* v. *Gilpin*, [1914] 2 Ch. 182 ; 44 Digest 1215, *10505* ; 83 L.J.Ch. 593 ; 109 L.T. 621.

(3) *Armstrong* v. *Eldridge* (1791), 3 Bro.C.C. 215 ; 44 Digest 1212, *10481*.

(4) *Pearce* v. *Edmeades* (1838), 3 Y. & C.Ex. 246 ; 44 Digest 1213, *10487* ; 8 L.J.Ex. Eq. 61.

(5) *Re Richerson, Scales* v. *Heyhoe* (No. 2), [1893] 3 Ch. 146 ; 44 Digest 1215, *10501* ; 62 L.J.Ch. 708.

*(6) *Re Game, Game* v. *Tennent*, [1907] 1 Ch. 276 ; 37 Digest 121, *531* ; 76 L.J.Ch. 168 ; 96 L.T. 145.

*(7) *Re Legh's Settlement Trusts, Public Trustee* v. *Legh*, [1938] Ch. 39 ; [1937] 3 All E.R. 823 ; Digest Supp. ; 107 L.J.Ch. 6 ; 157 L.T. 270.

*(8) *Re Russell, Dorrell* v. *Dorrell*, [1895] 2 Ch. 698 ; 37 Digest 102, *370* ; 64 L.J.Ch. 891 ; 73 L.T. 195.

*(9) *Howe* v. *Dartmouth (Earl), Howe* v. *Aylesbury (Countess)* (1802), 7 Ves. 137 ; 23 Digest 467, *5373*.

*(10) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295 ; 23 Digest 464, *5358* ; 36 L.J.Ch. 929 ; 16 L.T. 695.

*(11) *Re Fisher, Harris and Fisher* v. *Fisher*, [1943] Ch. 377 ; [1943] 2 All E.R. 615 ; 113 L.J.Ch. 17 ; 169 L.T. 289.

*(12) *Re Payne, Westminster Bank, Ltd.* v. *Payne*, [1943] 2 All E.R. 675 ; 113 L.J.Ch. 46 ; 169 L.T. 365.

*(13) *Crawley* v. *Crawley* (1835), 7 Sim. 427 ; 37 Digest 145, *710* ; 4 L.J.Ch. 265.

*(14) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch.D. 643 ; 39 Digest 173, *632* ; 52 L.J.Ch. 958 ; 49 L.T. 261.

*(15) *Re Whitehead, Peacock* v. *Lucas*, [1894] 1 Ch. 678 ; Digest Supp. ; 63 L.J.Ch. 229 ; 70 L.T. 122.

*(16) *Neville* v. *Fortescue* (1848), 16 Sim. 333 ; 44 Digest 206, *347*.

*(17) *Re Sherry, Sherry* v. *Sherry*, [1913] 2 Ch. 508 ; 44 Digest 209, *371* ; 83 L.J.Ch. 126 ; 109 L.T. 474.

*(18) *Re O'Hagan, O'Hagan* v. *Lloyds Bank, Ltd.*, [1932] W.N. 188 ; Digest Supp.

*(19) *Rowlls* v. *Bebb, Re Rowlls, Walters* v. *Treasury Solicitor*, [1900] 2 Ch. 107 ; Digest Supp. ; 69 L.J.Ch. 562 ; 82 L.T. 633.

Adjourned Summons to determine certain questions of construction arising under a settlement made by the testator on Oct. 1, 1931, and under his will dated Feb. 1, 1938. The testator died on Sept. 24, 1942, leaving him surviving a widow and 4 children. Each of the said children was born before the date of the settlement. During the widow's lifetime, after the payment of certain annuities provided for in the settlement, there would be a surplus of the income of the settled fund. Apart from the questions dealt with in the report, it was held that this surplus income resulted by way of resulting trust to the testator's estate. The relevant clauses of the will and settlement are set out in the judgment.

E. M. Winterbotham for the plaintiff, the widow.

S. Pascoe Hayward for the third defendant, W. L. Hey, an executor of the will.

Wilfrid Hunt for the second defendant, J. W. Ing, a trustee of the settlement.

A. H. Droop for the testator's infant grandchildren.

C. L. Fawell for the testator's children and son-in-law.

Cohen, J.: I have now to consider the meaning and effect of those provisions of the donation in trust dated Oct. 1, 1931, which are to operate after the death of the survivor of the donor and his wife, in the light of my decision that the expression "children" in such provisions includes children born after the date of the donation. The questions involved are future questions, but the executors of the donor desire to settle now the duty payable on any interest which the donor takes by way of resulting trust and cannot do so unless these questions are decided. I think, therefore, that I should deal with them now. The relevant provisions are as follows:

> . . . and after the death of the survivor of the donor and his said wife (*d*) Upon trust to pay the whole of the income of the trust fund to the children of the donor . . . in equal shares during their respective lives (*e*) Provided nevertheless that in case any child of the donor shall die at any time leaving issue such issue shall stand in the place of such deceased child and take *per stirpes* and equally between them if more than one the share of the income of the trust fund . . . which such deceased child would have taken if he or she had lived (*f*) After the death of the survivor of the donor and his said wife and of the last surviving child of the donor whichever event shall last happen upon trust as to the capital income and accumulations of the trust fund for the respective issues of the children of the donor living at the happening of such last event absolutely in equal shares *per stirpes* and such issue *inter se* shall be entitled to their respective share equally between them if more than one.

The first point to be observed is that on the strict grammatical construction of these provisions they do not dispose of the share of income of a child dying before the period of distribution leaving no issue. Counsel for the testator's children argued that it was possible without any implication to construe cl. 1 (*d*) as amounting to a direction to divide the income among the children of the donor for the time being living, subject, of course, to the substitutionary gift in favour of the issue of a child dying leaving issue him surviving. I cannot so read it. In my opinion, the expression "the children of the donor" in cl. 1 (*d*) means the children living at the death of the donor and his wife. That being so, the share of income of a child dying without issue before the period of distribution is undisposed of unless (i) I can read the gift as creating a *quasi* joint tenancy in the income, the joint tenants being the surviving children and the issue of any child dying leaving issue or (ii) I can imply cross-remainders in favour of the surviving children.

The basis on which it has been held that there is no intestacy or resulting trust in this class of case was considered by Parker, J., in *Re Hobson* (1). In that case:

> Testator gave the income of his estate, real and personal, to trustees upon trust to pay and divide the same equally between and amongst S., the daughter of C., and 13 other named persons during their respective lives, and, if any of them should die leaving children them surviving, directed the share of income payable to the parent to be divided equally amongst his, her, or their children, and from and after the death of the survivor of the said 13 other named persons (the name of S. being omitted) upon trust to sell the whole of his trust estates and divide the proceeds equally amongst such of the children of the said C. and 13 other named persons (the name of S. being again omitted) as might be living at the death of the last survivor of them, or, if any of them were dead leaving children them surviving, then amongst their children, such children to take their parent's share equally between them. Two of the 13 named persons died in the testator's lifetime without leaving children: Held, that there was an intestacy as to these two shares of income down to the period of distribution.

At p. 631, Parker, J., said:

> It appears that two of the named persons died in the testator's lifetime without leaving children, and I am asked to imply a gift of their shares of income down to the time of the ultimate division of the capital of the estate in order to avoid an intestacy. In my opinion it is quite clear on the authorities that where there is a gift equally between A., B., and C. during their respective lives and after the death of the survivor of them the whole property is given over, the court has implied an intention on the part of the testator that the survivors or survivor of A., B., and C. shall after the death of one or more of them be entitled to the whole income down to the period of distribution, and that conclusion appears to have been arrived at in one of two ways. In the first place and in the earlier cases the judges have said that a gift in equal shares during their respective lives only *prima facie* creates a tenancy in common, and that, if the court can gather an intention on the face of the will that the tenancy was intended to be not a tenancy in common but a joint tenancy, it will treat the words "in equal shares" or other similar words as not destructive of what would otherwise be a joint

tenancy ; and that interpretation is one which would in the ordinary course lead to the desired effect. On the death of A., for instance, B. and C. would continue to be joint tenants of the whole, and on the death of B., C. again would become tenant of the whole. That is one way of meeting the difficulty and of avoiding an intestacy ; but in other cases the rule has been rested on different grounds in this way. It has been said that where there is a gift to A., B., and C. equally during their respective lives, and after the death of the survivor over, an intention is manifested that A., B., and C., or such of them as shall be living for the time being, shall enjoy the property A down to the period of distribution, and that the best way of effecting that intention is to imply a gift over on the death of any of them of his or her share as well original as accruing to the survivors or survivor ; and some of the cases have, I think, been decided on what I may describe as a mixture of those two theories.

It will be observed that in that case, as here, there was a substitutionary gift in favour of issue though the gift in that case was not of the share of income which the parent would have taken if living but only of the share of the income B payable to the parent dying, with the result that the issue could not benefit by any subsequent accruer. Dealing with the joint tenancy argument, PARKER, J., said, at p. 632 :

> In the first place it appears to me that I cannot give effect to any intention which I can fairly presume on the part of the testator by construing this gift as creating a joint tenancy. The effect of so doing would be this. If I were to hold that the 14 named persons were entitled as joint tenants and not as tenants in common, then, C on the death of one of them leaving issue, by the very words of the will the joint tenancy would be severed so far as his or her share was concerned, and the joint tenancy which originally existed between all of them would continue to exist only between the other original takers, and so on as any one or more died leaving issue. The result would be that on the deaths of those who died without issue the persons to take would be the persons still alive and the stocks of those who had died would be excluded.

These observations, with which I respectfully agree, are in point in the present D case, and I cannot see my way to implying a joint tenancy or *quasi* joint tenancy. PARKER, J., also refused to imply a gift to survivors, saying, at p. 632 :

> In the next place, let me look at it from the other point of view and see if I can arrive at a satisfactory result by the implication of a gift to the survivors. In this case it appears to me that, in order to carry out any intention which I can fairly presume on the part of the testator, I should have to imply not an ordinary gift over on the death of any one of the first takers to the others, but I should have to say further that, E contingently on any one of them dying without issue, his or her share was to go, not to the survivors in the ordinary sense of the word, but to the survivors in a modified sense of the word, construing it as including survivorship by stocks. In that case, on the death of one of the first takers without leaving issue after the death of another leaving issue, the issue of the one who had previously died leaving issue would be entitled to a share as representing his parent, his parent being considered to have survived by reason of the survivorship of the stock. I am by no means clear, however, F that the word " survivor " could be properly construed in that way, though no doubt an express limitation might be so framed as to produce that effect. But in any case the gift which I am asked to imply appears to me to be different from any other gift by implication which I can find in the books. Moreover, so far as I am aware, the cases in which gifts of this nature have been implied have been confined to cases in which the gift over is on the death of the survivor of all the first takers, while in the present case the gift over is not on the death of the survivor of all the first takers, but on the death of the survivor of 13 out of the 14 first takers. In the next place, I can G find no case in which the implication has arisen where provision is made for the persons entitled under the ultimate gift over, or some of them, during the lives of some of the first takers where others have died.

On the other hand, in *Re Tate* (2), SARGANT, J., implied cross-remainders notwithstanding a substitutionary gift in favour of issue. In that case :

> Testator specifically devised certain real estate in trust to pay the income arising H therefrom amongst his children in equal shares during their lives, or to their issue in case any of them should die before the others of them, and from and after the decease of all his children then in trust to sell the same and to divide the proceeds between his grandchildren in equal shares *per stirpes* and not *per capita* ; and devised his residuary real and personal estate in trust to sell the same and hold the proceeds in trust for his wife and three children. The testator died in 1910, leaving three children him surviving—(1) Elijah, his heir-at-law, who was still living ; (2) Emile, who died in 1910, leaving one child ; and (3) Frances, who died in 1911 without issue : Held, that on the true construction of the will during the remainder of Elijah's life Elijah and the child of Emile were entitled in equal shares to Frances' one-third share of income.

Re Hobson (1) was not cited in *Re Tate* (2), and at first sight it is difficult to reconcile *Re Tate* (2) with some of the reasons given by Parker, J., in *Re Hobson* (1). But before I deal with that, I should first refer shortly to the reasons Sargant, J., gave for his judgment. At p. 185, he said :

> The real question is whether on the language of the will there is a sufficient indication of an intention on the part of the testator to create what I may call cross-remainders between the three children, including the issue of any deceased child. If the words had been such as they are, only omitting the substitution of the issue of a deceased child for his or her parent, there is, in my opinion, ample authority to show that cross-remainders for life would have been implied between the children. I need only refer to *Armstrong* v. *Eldridge* (3), *Pearce* v. *Edmeades* (4) and *Re Richerson* (No. 2) (5) where Chitty, J.'s decision in chambers was afterwards confirmed by him in court. That being so, is there any difference in the present case because of the words substituting issue for a deceased parent ? In my opinion there is no difference. I think that the testator is intending that the property shall be kept together as a whole until the death of the survivor of his children and that the income shall go amongst the children who survive either by themselves or by their respective issue, the issue being substituted for his or her parent. It is clear that they are so substituted for the parents in respect of original shares, and if so I see no reason why they are not equally so substituted in respect of an accruing share given over by way of cross-remainder. Otherwise there would be an hiatus, which seems to me contrary to the general intention of the testator which he has sufficiently indicated that the children or issue of the children shall together take all the income of the estate, and that on the death of the survivor of the children the whole property shall go amongst their children.

Turning to the question of reconciling *Re Tate* (2) and *Re Hobson* (1), it is to be observed that in *Re Hobson* (1) the ultimate distribution was to take place not on the death of the last survivor of the life tenants but on the death of the last survivor of thirteen out of the fourteen life tenants and that, as I have already pointed out, the substitutionary gift could, having regard to the words of the will, only operate on the share of income which the deceased parent was actually receiving at the time of his death. These two differences are sufficient to make the actual decision in *Re Hobson* (1) consistent with that in *Re Tate* (2). I respectfully agree with the reasoning in *Re Tate* (2), which is in my opinion applicable to the provisions of the donation before me.

I have next to consider the application of the rule against perpetuities to the dispositions in the donation as I have construed them. Counsel for the executors of the donor relied on a passage in the judgment of Warrington, J., in *Game* v. *Tennent* (6), at p. 280 :

> We all know that if a fund is given on trust for a class, some of the members of which may by possibility attain vested interests in it after the period limited by the rule against perpetuities, the gift is void not only as regards them, but also as regards all the members of the class. The principle is that you cannot ascertain the share of any member of the class without taking into account the members born after the expiration of the legal period ; the rights of all the members of the class would be affected by the consideration whether or not some of them were born within the legal period.

Counsel for the executors of the donor did not suggest that the original gift of a life interest in subcl. (*d*) was bad since the persons entitled to participate would be ascertained on the death of the wife, who was a life in being at the date of the donation. But he argued that, on the construction I have placed on the gifts, it should be read as a gift to the children and the survivors or survivor of them with a substitutionary gift in favour of the issue of any child dying leaving issue. But the gift to the survivors was contingent and since it might not vest within the prescribed period, the so-called cross-remainders were void. He relied on *Re Legh's Settlement Trusts* (7), in which the head-note reads :

> When in exercise of a special power of appointment a testator makes an appointment of a share of personalty to two objects of the power for their joint lives and after the death of either of them to the survivor for life and they were not lives in being at the date of the creation of the power of appointment, the reversionary life interest of the survivor is a contingent interest and therefore void as contravening the rule against perpetuities.

He called my attention to the observations of Sir Wilfrid Greene, M.R., at p. 44 ([1937] 3 All E.R., at p. 825), where he said, referring to the rule :

> The rule is strict and highly technical in its operation and the temptation to construe words in such a way as to exclude its application is one which must be firmly resisted.

Counsel for the remaining defendants, on the other hand, contended that the provisions, express or implied, for substitution and cross-remainder must be read as separate directions as to the share of each child. So read, they said that the authorities clearly established that those provisions would be valid as regards the share of any child born at the date of the donation, and, therefore, since all the children were in fact born at that date, there was no resulting trust. I think it will be sufficient if I refer to *Re Russell* (8). In that case :

> A testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain 21 or marry under that age ; with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, the plaintiff, who attained 21, and she was born in the lifetime of the testator : Held (affirming the decision of CHITTY, J.), that the proviso for resettlement of the shares must be construed as applicable to each share separately ; and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund.

RIGBY, J., in delivering the judgment of the court, said at p. 702 :

> It is suggested that the proviso for the settlement of the shares which I have read is void for remoteness, inasmuch as there might have been a daughter of Mary Dorrell born after the testator's death who would live to take a vested interest, and whose children would not necessarily attain 21 within the period allowed by law for the postponement of the vesting of a benefit. No doubt, in the case of such a daughter, the settlement over directed by the proviso would have been void ; but it would be perfectly good as to the interest taken by the plaintiff, who was alive at the testator's death, unless the possible operation of the proviso with reference to the share of a daughter not in existence at the testator's death makes the whole proviso void. Looking at the state of things at his death, it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the shares of such other daughters would be perfectly separate and distinct, and completely ascertained and separated within the limits of vesting allowed by the law. The proviso in no way mixes them up, but operates separately upon each share. The settlement of the plaintiff's share directed by it is perfectly legal, and would have been so even though there were other shares to which the proviso could not legally apply.

The question which of these alternative views should prevail depends upon the exact effect of the implication which, on the authority of *Re Tate* (2) I have thought it right to make. Counsel for the executors of the donor urged me to bear in mind the observations of SIR WILFRID GREENE, M.R., in *Re Legh's Settlement Trusts* (7), at p. 44, to which I have already referred, but I am not dealing with an express provision of a written document. I have, in effect, to rewrite the deed of donation, to give effect to the implication of so-called cross-remainders which, on the authority of *Re Tate* (2), I have thought it right to make. On the whole, it seems that the implication of a separate direction as regards the share of each child fits in best with the scheme of the donation. The substitutionary gift operates separately on the share of each child dying leaving issue, and I think that the clause should be read as a gift of the income to the children as tenants in common in equal shares for their respective lives with remainder as to the share of each child.

I turn now to subcl. (*f*), which deals with the ultimate distribution. It was admitted that this gift was void since it is clear that some of the beneficiaries might not obtain a vested interest within the period permitted by the rule against perpetuities. I should like the assistance of counsel in framing the order which on this basis I should make, but as at present advised it seems to me I should declare :

> That as from the death of the plaintiff each of the children if then living is entitled to a one-fourth share in the income of the said fund for life. That as from the death of any child, whether before or after the death of the plaintiff, his issue (if any) will be entitled to the share which his parent if living would have taken, but if he dies without issue his share will thenceforth be divisible among the surviving children and the issue of any child then dead, such issue taking equally between them if more than one the share which such child would have taken if she had lived. That after the death of the last survivor of the plaintiff and the said four children the capital, income and any accumulations of the fund are held upon trust for the executors of the will of the donor.

Declaration accordingly.

The last question on this summons is as to the income of the fund subject to the donation of trust (which I shall hereinafter refer to as " the settled fund "), which results, by way of resulting trust, to the estate of the testator and is whether :

> . . . as between the persons entitled to (i) the income and (ii) the corpus of his estate the same is and will be (*a*) applicable as income or (*b*) ought to be invested as part of such corpus or (*c*) ought to be apportioned between income and corpus in some and what manner.

I must first state the relevant provisions of the testator's will. By cl. 1 he appoints his widow, the plaintiff, his son-in-law, the first defendant, and his nephew, the third defendant, to be the executors and trustees of his will. Then, after bequeathing a number of pecuniary legacies, by cl. 6, he devised and bequeathed all the residue of his real and personal estate unto his trustees upon trust for sale and conversion ; and by cl. 7 he directed as follows :

> Out of the clear moneys to arise from such sale calling in and conversion as aforesaid my trustees shall pay or provide for my debts funeral and testamentary expenses and the said legacies and any duties payable on any legacies bequeathed free of duty and subject thereto my trustees shall invest in manner hereinafter authorised the residue of the said clear monies and shall stand possessed of such investments and of all parts of my estate for the time being unsold (hereinafter called " my residuary trust fund ") upon the following trusts : (*a*) Upon trust to pay the income thereof to my said wife during her life and after her death (*b*) Upon trust as to both capital and income for all and every my children or my child (if only one) living at my death who being sons or a son have attained or shall attain the age of 21 years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares as tenants in common.

Then followed a substitutionary gift in the event of the death of a child in the testator's lifetime leaving issue, and provisions settling a daughter's share upon trust as therein mentioned for the daughter and any husband who might survive her and her issue. Cl. 8 is an investment clause. Cll. 9 and 10 are in the following terms :

> 9. I direct that my trustees shall be entitled (without prejudice to the trust for sale hereinbefore contained) to retain unconverted for so long a period as they in their absolute discretion shall think fit and without being responsible for loss all or any shares securities and other interests to which I shall be entitled at my death notwithstanding that the retention of the same may be found to have been hazardous or reckless or otherwise improper. 10. I declare that my trustees may postpone the sale calling in and conversion of any part of my real or personal estate for such period as they may in their absolute discretion deem fit without being liable to account notwithstanding that it may be of a wasting speculative or reversionary nature and notwithstanding that such postponement may be found to have been hazardous or reckless or otherwise improper and that pending such sale calling in and conversion the income including the net rents and profits of real estate and chattels real after payment of rates taxes rent costs of insurance repairs and other outgoings properly attributable in the opinion of my trustees to income of property actually producing income shall be applied as from my death as income and on the other hand on such sale calling in and conversion or on the falling in of any reversionary property no part of the proceeds of such sale calling in or conversion of such property shall be paid or applied as past income and I negative the rules known as the rules in *Howe* v. *Earl of Dartmouth* (9) and *Allhusen* v. *Whittell* (10) in all their branches.

Counsel for the testator's widow admits that, if he is to succeed, he must satisfy me that the income of the settled fund, which is payable to the testator's executors as a result of my previous decision, is income of property forming part of the testator's estate. When asked : " What property ? " he said that the property is an estate *pur autre vie* and that the payments which the testator's executors would from time to time receive out of the income of the settled fund would be income arising from that property. This argument is, at first sight, attractive, but if the matter were free from authority I should have said it was specious, for it seems to me that, although it is true the payments are income of a fund, they are income of the settled fund and not of any property forming part of the estate, and that, on the contrary, in the aggregate they constitute an asset of the testator's estate. This last view was supported by counsel for the persons interested in capital. They relied on a passage from the judgment of Bennett, J., in *Re Fisher* (11), at p. 382 ([1943] 2 All E.R., at p. 618), which was approved and applied by Uthwatt, J., in *Re Payne* (12), at p. 677. The passage in question reads as follows :

It is not possible to point to any property of which the intestate was possessed when he died and to predicate of the annual sums that they are income arising from that property since the intestate's death. There was not, and is not, any tree belonging to the intestate of which the annual payments are the fruits.

The facts in these cases cited were very different from those in the case before me, though it is to be observed that in *Re Fisher* (11) the annual payments in question which were payable under a contract of insurance on the life of the intestate were described as "income of £52 per annum." Counsel for the testator's children said, and I think counsel for the widow agreed, that the payments I am dealing with are analogous to terminable annuities, and on this basis counsel for the testator's children submitted that the case was governed by the decision in *Crawley* v. *Crawley* (13). It will be sufficient if I refer to the first two paragraphs of the head-note in that case :

> Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and the interest of the investments will belong to the tenant for life of the residue. Where sums are set apart to answer contingent legacies, the interest of them, until the contingency happens, is part of the income of the residue.

Counsel for the widow pointed out that this case was shortly reported, no reasons being given for the decision, and that it was difficult to see why the rule in *Howe* v. *Lord Dartmouth* (9) or that branch of that rule which is known as the rule in *Chesterfield's Trusts* (14) did not apply. I agree that that rule does not deal with the question of what is capital or income, but solely with the question of adjusting the rights as between the tenant for life and remainderman in assets forming part of the testator's estate. The first paragraph was referred to favourably and applied by UTHWATT, J., in *Re Payne* (12), though it appears not to have been followed in two cases to which I shall refer hereafter. The second paragraph, which must, like the first, be based on the principle that the annual payments constitute the asset forming part of the testator's estate and not the fruit of an asset forming part of the estate, was followed and applied by STIRLING, J., in *Re Whitehead* (15). At p. 684, STIRLING, J., distinguished *Allhusen* v. *Whittell* (10), saying :

> That judgment was entirely directed to a case where the legacies were contingent, and the reasoning was based upon the fact of the contingency ; and the Vice-Chancellor seems to express the opinion that, if the legacies had been vested, the principle which he treats as established by authority would not have applied. It seems to me that the reasoning of the Vice-Chancellor as regards contingent legacies, and the period at which the tenant for life would become entitled to the income arising from a fund set apart to answer contingent legacies, does not apply in the present case, in which the legacies are vested ; and I must treat the case as if the second testatrix, Mrs. Whitehead, had been entitled simply to a terminable annuity of a like amount as the income of the fund set apart for the legacies respectively. If that is so, then . . . the principle of *Crawley* v. *Crawley* (13) applies ; and it seems to me that the fund must be dealt with in the same way as the fund in that case—namely, that the income which accrues on the fund until the legatees attain 25 must be treated as capital and invested —and the tenant for life under Mrs. Whitehead's will can only receive the income arising from the investment, while the capital belongs to the remaindermen.

The contrast between the income of the fund set apart to ensure the vested legacies which were not presently payable, and the surplus dividends on the consols is interesting. The consols formed part of the testator's estate ; the fund from which the income arose did not.

Had the matter rested there, I should have had no hesitation in holding that any annual payments of income of the settled fund received by the executors were capital and not income ; but I must now refer to three cases on which counsel for the widow relied. The first is *Neville* v. *Fortescue* (16). The head-note is :

> Testator having devised his real estates in strict settlement, bequeathed his personal estate, in trust, as far as the nature of it would admit, for the persons, who for the time being might have the ownership and be in the possession of his real estates under the limitations of his will ; and then directed that those persons, *under letters of attorney and powers from the trustees* (*which he empowered and required them to grant*) *should receive the yearly dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property*, under the same restrictions and limitations and to the same extent on which they held his real

estates. Held, that the testator's personal estate was to be enjoyed *in specie*, notwithstanding it consisted, in part, of long annuities and bank stock.

That case does not assist counsel for the widow, since the words in italics in the head-note put it beyond doubt that the testator intended the dividends and the interest in the long annuities to be paid to the tenant for life.

Re Sherry (17) however presents more difficulty. In that case the will of the testator contained a similar provision to that in cl. 10 of the will before me. It appears from the head-note :

> The testator's estate included an estate *pur autre vie* in certain funds which produced about £244 a year and two policies of assurance for £1,000 and £750 respectively, the annual premiums on which amounted to about £60.

The questions which were argued do not touch the point I have to decide, but question 1 did raise it. It was in these terms as set out on p. 510 :

> . . . whether under the provisions of the will and codicils the testator's widow was entitled during her widowhood to the whole of the instalment as it accrued due arising in respect of the Harwood property or whether any and if so what part of such instalment ought to be treated as capital of the testator's estate.

Counsel for the grandchildren, whose interest it was to argue on behalf of capital, appears, by implication, to have let the case for capital go by default, for, dealing with the question of the policies, he said, at p. 510 :

> As regards the policies it is submitted that the premiums ought to be paid out of income. Where the property is, as here, part of residue the tenant for life takes the whole of it for better or worse. If the tenant for life in the present case takes the income of the life interest it is only fair that she should pay the premiums on the policies out of it.

Accordingly, Warrington, J., answered question 1 by declaring that the widow was entitled to the whole income derived from the life interest. That case is undoubtedly a decision in favour of counsel for the widow, though, as the point was not argued, and neither *Crawley* v. *Crawley* (13) nor *Re Whitehead* (15) were cited, I cannot regard it as by any means conclusive.

The next case is the strongest in favour of counsel for the widow. It is *Re O'Hagan* (18) :

> By a post-nuptial settlement made in 1894 by Henry Osborne O'Hagan, funds were settled upon trust out of the income thereof to make certain payments to his wife until her death or remarriage. Then there was a trust out of the surplus income to pay to each of their three children £200 a year from the attainment by such child of the age of 21 years until the death or remarriage of the wife. Then there was a trust to accumulate the surplus income, after satisfying those previous trusts, until the death or remarriage of the wife, and to add those accumulations to capital. Subject to the foregoing trusts, the capital and income were to be held in trust for their three children. After satisfying those trusts, surplus income amounting to about £930 a year was accumulated, and at the death of the settlor on May 3, 1930, the accumulated income amounted to about £15,000. The surplus income accruing since his death amounted to about £1,600 a year.

Clauson, J., held that accumulations after the death of the settlor were invalid under Thellusson's Act, and that there was a resulting trust of them to the testator's estate. The question then arose as to how these accumulations should be dealt with having regard to the terms of the testator's will. The will contained the usual trusts for sale with power to postpone, and the residuary estate was settled upon trusts for his three children and adopted child in equal shares, each beneficiary taking a life interest with remainder to his or her children. By cl. 20 of the will in that case it was declared :

> . . . that the net rents, profits and income arising from his estate until sale and conversion, in whatever condition or state of investment, and whether consisting of investments of an authorised character or not, including leasehold or other property of a terminable or wearing out nature, should for all the purposes of his will, and as between all persons interested thereunder, be applied as if the same were income arising from the proceeds of such sale and conversion or the investments of such proceeds, no part thereof being liable to be retained as capital.

Although counsel for the widow, who was supporting in that case the opposite view to that which he advocated before me, called attention to *Crawley* v. *Crawley* (13) and *Re Whitehead* (15), Clauson, J., said :

> It was well settled that a terminable annuity ought to be treated as property which, though terminable, was to be treated as part of the testator's estate producing income, and it was difficult to differentiate the interest in question from a terminable annuity.

The periodical payments of the income, pending a postponement of sale and conversion, would, by virtue of the provisions in cl. 20 of the will, be applicable as " income arising from the proceeds of sale . . . or the investments of such proceeds," and be payable to the tenant for life.

I find it difficult to reconcile that case, or *Re Sherry* (17) with *Crawley* v. *Crawley* (13) and *Re Whitehead* (15). In *Re Payne* (12) UTHWATT, J., doubted whether *Re O'Hagan* (18) was rightly decided, but suggested a possible explana-
A tion of the two first-mentioned cases. At p. 677 he said :

> It may very well be that it is possible to arrive at the conclusion that, upon the true construction of a common form trust for sale and a common form power to postpone conversion the phrase " income of my estate " in those clauses means " income which happens to be part of my estate " and not " income derived from my estate " ; and upon that footing I have no quarrel with the decision in *Re Sherry* (17) or *Re O'Hagan* (18).

He distinguished there the facts of his case from that case, and decided that the
B payments in question in that case were capital.

If I were to accept that explanation as the true solution of the difficulty I have mentioned, I should have to follow *Re O'Hagan* (18) for, although there is some difference in language between cl. 20 of the will under consideration in that case and cl. 10 of the will before me, there is, I think, no substantial difference between the two. Indeed, I think it is easier in this case to construe the words
C in the sense which UTHWATT, J., suggested than it was in *Re O'Hagan* (18). But I have come to the conclusion that *Re O'Hagan* (18) is irreconcilable with *Crawley* v. *Crawley* (13) and *Re Whitehead* (15). The income which resulted to the testator's estate in *Re O'Hagan* (18) was, as in the case before me, analogous to a terminable annuity. Therefore, on the authority of *Crawley* v. *Crawley* (13) instalments thereof should be treated as capital. The fund from which the income arose, like the fund representing the vested legacies in *Re Whitehead* (15),
D never formed part of the testator's residuary estate ; the income arising from that fund was, therefore, not income derived from the testator's estate. It is true that in cl. 10 of the will I am considering the expression is " income . . . of property actually producing income," and there is no express reference to the testator's estate, but in its context " property " must, I think, mean " property forming part of my estate." I, therefore, find myself forced to decide whether to follow *Crawley* v. *Crawley* (13) and *Re Whitehead* (15), or *Re O'Hagan* (18).
E I prefer the reasoning in *Re Whitehead* (15) to the negative reasoning in *Re O'Hagan* (18), and must, therefore, hold that the income of the settled fund resulting by way of resulting trust to the testator's estate is capital of the estate and not income. The rule in *Howe* v. *Lord Dartmouth* (9) and, therefore, the rule in *Chesterfield's Trusts* (14), which is a branch of the former rule, are excluded by the express terms of cl. 10 of the testator's will, and if the testator's executors
F determine to exercise their power to postpone the sale of the right to receive this resulting income, it must be dealt with as and when received in accordance with *Crawley* v. *Crawley* (13). But it is established by authority that where there is in a will power to postpone the sale of assets, followed by a clause excluding the operation of the rule in *Howe* v. *Lord Dartmouth* (9), such clause only operates if the executors, in proper exercise of the power, determine to postpone sale of the asset : (see *Rowlls* v. *Bebb* (19).) See also *Re Fisher* (11)
G at p. 385, where BENNETT, J., reached a similar conclusion on the construction or effect of the Administration of Estates Act, 1925, s. 33.

I, therefore, propose to declare that if the testator's executors determine to exercise the power conferred on them by his will to postpone the sale of the right to receive the resulting income, the same should, as and when received, be treated as corpus and invested accordingly, the tenant for life receiving the income of such investments, but that any such income received or to be received
H before the testator's executors so determine should be apportioned between capital and income in accordance with the principle of *Re Chesterfield's Trusts* (14).

Declaration accordingly. Costs to be taxed as between solicitor and client and paid as to one half out of the settled fund and as to the other half out of the testator's estate.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Greaves & Greaves*, Bradford (for all parties).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* GRETTON AND SHRIMPTON.

[House of Lords (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Simonds), **March 12, 13, 14, April 19, 1945.**]

Estate and other Death Duties—Cesser of annuity—Annuity bequeathed by will—Substitution of smaller annuity secured by deed of compromise—Whether "granted for full consideration in money's worth"—Finance Act, 1894 (c. 30), *ss.* 2, 3 (1).

By a will, dated Aug. 26, 1882, a testator, who died on Nov. 15, 1882, gave an annuity of £6,000 free of legacy duty, income tax and all other duties. The will contained a clause empowering the trustees of the will to purchase an annuity in the name of the annuitant, but not the usual appropriation clause. Apart from another small annuity the residue was given to two sisters of the testator. The next-of-kin of the testator were a brother and three sisters. By a deed of compromise, dated Feb. 14, 1883, the brother and the two sisters entitled to the residue agreed with the annuitant to withdraw their threatened opposition to the grant of probate of the will in consideration of the annuitant accepting an annuity of £5,000 free of duty and tax payable out of the testator's estate and agreed on the appropriation of securities to satisfy the annuity. Upon such appropriation the remainder of the estate was to be released and upon the death of the annuitant the appropriated securities were to fall into residue. The annuitant on her part waived for a period of 5 years her right to have an annuity purchased in her name. Neither the parties to the deed nor the residuary legatees or any of them at any time entered into any personal covenant to pay the annuity. At some date within the prescribed period of 5 years the brother of the testator and the surviving residuary legatee, in exercise of the power given to them by the deed of compromise, transferred into the names of two trustees a sum of Government stock of which the dividends at the time of the transfer amounted to the yearly sum of £5,300; on June 8, 1888, the trustees executed a declaration of trust, whereby they declared that they stood possessed of the said sum of Government stock to pay the annuity of £5,000, the income tax and all duties whatsoever which should become payable in respect thereof, and, subject to payment of the annuity, income tax and duties, would hold the stock and the dividends thereof as part of the residuary estate of the testator. Resisting a claim by the Crown that estate duty was payable in respect of the annuity fund on the death of the annuitant on Dec. 23, 1936, the respondents, the present trustees of the declaration of trust, contended that the annuity of £5,000 was not derived under the will of the testator, but was a new annuity which became payable solely by virtue of the deeds of Feb. 14, 1883, and June 8, 1888:—

Held: the annuity was derived under the testator's will and, if and so far as it was payable under the provisions of some other deed, it was so payable only because the annuitant had agreed to surrender part of that which the testator had given to her. The trust fund which became part of the residuary estate of the testator on the death of the annuitant under the deed of compromise was property which passed on her death, and came, therefore, within the ambit of the Finance Act, 1894, s. 2 (1) (*b*), so that estate duty was payable.

Order of the Court of Appeal ([1944] 1 All E.R. 624) *reversed and order of* Macnaghten, J. ([1943] 2 All E.R. 759) *restored.*

[**EDITORIAL NOTE.** In this case an annuitant, faced with opposition to the will from which her annuity was derived, entered into a deed of compromise by which she accepted a reduction of her annuity and gave up for a fixed period her option to demand the capital value. The House of Lords restore the judgment of Macnaghten, J., holding that, looking at the substance of the matter, the testator was still the grantor of the annuity, and estate duty was therefore payable on the trust fund passing to the residuary estate of the testator on the death of the annuitant.

As to Exemption from Estate Duty where Money Consideration is given, see HALSBURY, Hailsham Edn., Vol. 13, p. 251, para. 244; and for Cases, see DIGEST, Vol. 21, pp. 17-19, Nos. 97-107.]

Cases referred to :

*(1) *Re Gretton's Indenture, Re Ratcliff & Brinkman's Trusts, Hood* v. *Byron (Lady)*, [1923] 1 Ch. 77 ; 28 Digest 76, *411* ; 92 L.J.Ch. 49 ; 127 L.T. 817.

(2) *A.-G.* v. *Smith-Marriott*, [1899] 2 Q.B. 595 ; 21 Digest 18, *101* ; 69 L.J.Q.B. 59 ; 81 L.T. 359.

(3) *Lord Advocate* v. *Lyell (Lord)*, [1918] S.C. 125 ; 21 Digest 18, *106i*.

Appeal by the Crown from an order of the Court of Appeal (Scott and du Parcq, L.JJ., Goddard, L.J., dissenting) dated May 3, 1944, and reported [1944] 1 All E.R. 624, reversing an order of Macnaghten, J., dated Nov. 1, 1943, and reported [1943] 2 All E.R. 759. The facts are fully set out in the opinion of Lord Simonds.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellant (Crown).

J. Millard Tucker, K.C., and *John Scrimgeour* for the respondents.

Viscount Simon, L.C. (read by Lord Russell of Killowen) : My Lords, I have had the advantage of reading in print the opinions about to be pronounced by Lord Russell of Killowen and Lord Simonds. I entirely agree with the result at which they have arrived and with the arguments which establish that result. Goddard, L.J., in his dissenting judgment in the Court of Appeal, put the true conclusion in a couple of sentences when he said ([1944] 1 All E.R. at p. 627) :

> The annuity to which the lady was entitled was, I think, the annuity granted by the will, payable out of the testator's estate, but limited by the terms of the deed. No new annuity was granted or purchased by her ; the annuity was created by the bounty of the testator, though the annuitant agreed to accept a reduced amount and gave up the option, which she might otherwise have exercised, to demand its capital value.

I move that the appeal be allowed with costs here and below.

Lord Russell of Killowen : My Lords, I do not state the facts which have given rise to this appeal. Lord Simonds will do so, and I will refrain from unnecessary duplication.

The question for our decision is whether the annuity which ceased on the death of Lady Houston was (i) the annuity bequeathed to her by the will of Frederick Gretton, but reduced in amount from £6,000 per annum to £5,000 per annum, or (ii) a different annuity which was substituted for the testamentary annuity and which was created by the deed of Feb. 14, 1883.

It was conceded, and rightly so, that, if the former is the true view, the appeal must succeed. The question, therefore, resolves itself into a determination of the true construction of the deed, and in particular of cl. 1 therein. The only subject matter of the deed is the annuity which is referred to in that clause ; throughout the remainder of the document no reference is to be found to any annuity which is the subject matter of the deed except in one or other of the following terms, *viz.*, "the said annuity of £5,000," "the said annuity," the annuity hereby covenanted to "be accepted by her" or "the last mentioned annuity." In every case the annuity in question can only be the annuity referred to in cl. 1. I turn, therefore, at once to that clause. It runs thus :

> Now these Presents witness that so far as the covenants hereinafter contained are to be performed by them respectively each of them the said Frances Gretton Clara Gretton and Fanny Lucy Radmall hereby covenants with the others or other of them in manner following that is to say :
>
> (1) In lieu and satisfaction of the annuity of £6,000 by the said recited will given to her the said Fanny Lucy Radmall will accept an annuity of £5,000 clear of legacy duty income tax and all other duties whatsoever which said annuity shall be received by her out of the estate of the said Frederick Gretton as mentioned in the said will or out of the shares of the said estate as hereinafter mentioned but nothing herein contained shall be taken to impose any personal liability on the said Frances Gretton and Clara Gretton or either of them to pay the said annuity or any part thereof. The said annuity shall accrue as from Nov. 15, 1882, and be payable quarterly. The first payment to be made as on Feb. 15, 1883. And the said Fanny Lucy Radmall will for the period of 5 years from the day of the date hereof waive and release the right by such will given to her of calling upon the trustees thereof to purchase the annuity thereby provided for her or any part thereof.

That is the clause which, it is alleged, creates or brings into existence an annuity which is to be substituted for the testamentary annuity. Certain features however must be noted about the clause. It is not in any way a covenant or grant by the Gretton sisters. They promise nothing ; they grant nothing ; they create nothing. On the other hand, it clearly operates as a covenant by Lady Houston to accept " an annuity of £5,000 clear of legacy duty income tax and all other duties whatsoever," in lieu and satisfaction of the annuity of £6,000 which was given to her by the will, " free of legacy duty income tax and all other duties." This is the annuity referred to in the subsequent witnessing parts of the deed as " the annuity hereby covenanted to be accepted by her."

In my opinion the clause cannot be interpreted as one which purports to bring into existence an annuity. There is no trace of a grant by anyone ; nor is it usual for a grantee to covenant to accept a grant. On the other hand a person who is agreeing to reduce the amount payable under an existing annuity would naturally and properly covenant to accept the smaller sum in lieu and satisfaction of the full amount. That is what Lady Houston, in my opinion, covenanted to do.

A further indication (and I think a conclusive one) that this is the true view is to be found in the last sentence of cl. 1. The contention of the respondents is that Lady Houston by the deed gave up all claim to the testamentary annuity, accepting in exchange a new and different annuity which sprang into existence under and on the execution of the deed. If this were so, the cesser of the testamentary annuity or the surrender of all claim to it must, one would imagine, involve the cesser or the surrender of all provisions in the will which are purely ancillary to the annuity thereby granted. But this last sentence of cl. 1, is only consistent with the view that a provision in the will, which is purely ancillary to the annuity thereby granted, still remains in full force. If, however, the testamentary annuity survives, but in a reduced amount, the ancillary provisions would survive with it. On this hypothesis the last sentence of cl. 1 becomes consistent and intelligible, for it gives the Gretton family an opportunity of (i) providing security for that annuity, (ii) of freeing the remainder of the estate, and (iii) of avoiding the risk of the annuitant ever claiming payment of a capital sum.

The view which I have formed of the meaning and effect of cl. 1, agrees with that expressed by ROMER, J., in *Re Gretton's Indenture, Hood* v. *Byron* (*Lady*) (1), when (in relation to a different question) he said, at p. 87, that if the parties had confined themselves to cl. 1, Lady Byron would (I now quote his words) :

> . . . have taken the annuity of £5,000 under the will, and the will alone, the effect of the deed being merely an agreement on her part to give up a portion of the £6,000 annuity bequeathed to her by the will.

It was suggested before us that the construction of the deed was in some way controlled or affected by the deed poll executed on June 8, 1888 ; but I find it impossible to appreciate how the construction of a document can in any way be affected by a document which is executed five years later and to which none of the parties to the earlier document are parties. I see no trace of this argument in the judgments of the majority of the Court of Appeal ; their views as to the construction of the deed of 1883 were, I think, based on the wording of that document alone. SCOTT, L.J., based his view, as I read his judgment, principally upon the fact that cl. 1 specifically provided for the annuity accruing from the date of the death and being payable quarterly. He might have added that it also provided for the first payment being made on Feb. 15, 1883, the date fixed by the will. He says that the provision to which he refers would be " unintelligible " if Lady Houston's right under the will were to persist. He also, perhaps, relied on the words " in lieu and satisfaction of." With all respect to the Lord Justice, the most that can be said of the provision to which he referred is that it was unnecessary. But it may well have been put in out of abundant caution to ensure that the dates applicable under the will would apply to the annuity in its reduced form. As to the words " in lieu and satisfaction of," these appear to me to be consistent with either view. The considerations which influenced the Lord Justice weigh, in my opinion, but lightly in the scale as compared with the considerations which I have indicated. DU PARCQ, L.J., while accepting, I think, my construction of cl. 1, takes the view that the later auses provide for another annuity (different from the annuity referred to in 1) being granted. This grant, according to him, is to be found in cll. (2) and

(4) which enable the Grettons to purchase or transfer stock into the names of trustees to provide for the annuity and so free the remainder of the testator's estate. The Lord Justice treats these provisions as a grant, I presume by the Grettons, of a different annuity from the annuity referred to in cl. 1; but he must, I think, have overlooked the fact that the annuity the payment of which is to be provided by the funds put into the names of trustees is described both in cl. (2) and cl. (4) as "the said annuity of £5,000," words which can only mean A the annuity referred to in cl. (1). In truth all that the Grettons did by putting funds into the names of trustees, was to provide security for the reduced testamentary annuity, in order to enable the remainder of the testator's estate to be freed therefrom.

In my opinion MACNAGHTEN, J., and GODDARD, L.J., came to the right conclusion, *viz.*, that the annuity which ceased on the death of Lady Houston was the annuity bequeathed to her by the will, but reduced by the deed to the B annual sum of £5,000.

I would allow the appeal and restore the order of MACNAGHTEN, J., with costs throughout.

LORD MACMILLAN: My Lords, I agree that this appeal should be allowed for the reasons so convincingly stated in the opinions of LORD RUSSELL OF KILLOWEN and LORD SIMONDS which I have had the privilege of reading in C advance.

I desire only to emphasise by way of supplement one point which has especially impressed me. Estate duty is claimed by the Crown in respect of the benefit accruing by the cesser of Lady Houston's annuity in consequence of her death. To whom does this benefit accrue? Under the declaration of trust of June 8, 1888, the fund thereby placed in trust is to be held for payment of Lady Houston's annuity and subject thereto is to be held "as part of the residuary estate of D the estate of the said Frederick Gretton." It is thus the residuary estate of the testator who bequeathed the annuity of £6,000 to Lady Houston which now benefits by the cesser of the restricted annuity of £5,000. There could be no clearer indication that the modified annuity was recognised throughout as derived from the bounty of the testator and as a burden upon his estate of which it has now been relieved by the death of Lady Houston.

E LORD PORTER (read by LORD SIMONDS): My Lords, this case raises a short question under the Finance Act, 1894, ss. 2, 3, and were it not that your Lordships are differing from the Court of Appeal I should be content to say that I concur in the views of the other members of the House who have sat to hear the appeal. As it is, I think I can express my opinion shortly. The facts will be fully dealt with by LORD SIMONDS, whose speech I have had the privilege of F reading, and need not be repeated.

It is, as I understand, common ground that estate duty would be payable under sect. 2 of the Act in respect of the annuity now in question unless the liability to do so is escaped by reason of the provisions of sect. 3 (1), the vital words of which are as follows:

> Estate duty shall not be payable . . . in respect of the determination of any annuity for lives, where such . . . annuity [was] granted, for full consideration in money G or money's worth paid to the . . . grantor for his own use or benefit . . .

Plainly no consideration in money or money's worth was paid to the testator from whom the annuity was a gift, but it is said that in the circumstances which ensued he was not the grantor but the grantors were John Gretton and either the two Misses Gretton or Miss Frances Gretton alone, and that they received full consideration. This contention is based upon the arrangements made in H the two deeds, the one of Feb. 14, 1883, and the other of June 8, 1888.

It was, I think, conceded that cl. 1 of the first of the two deeds would not of itself constitute Mr. and the Misses Gretton grantors of the annuity but it was said that that clause combined with cll. 2 and 4 of that deed and implemented by the provision of the fund of £176,700 three per cent. Consolidated Bank annuities, afterwards represented by the same sum of two and three-quarters Consolidated Bank annuities, had that effect.

The only question argued before your Lordships was whether or not the annuity which ceased on the death of Lady Houston was that granted by the testator and it was admitted that if it was estate duty would be payable. The argument, as I understood it, was that under the terms of the two deeds Lady Houston surrendered the original annuity and received in its place a new annuity of a different amount, differently secured and from different grantors. In these circumstances I turn to the will and the two deeds.

The will gives a yearly sum or annuity of £6,000 for life free of legacy duty income tax and all other duties whatsoever payable quarterly starting three months from the testator's death and directs the trustees of the will to purchase an annuity, if the annuitant so desires. By the deed of Feb. 14, 1883, the terms of the will were exactly carried out subject to two variations, (i) the yearly sum was reduced to £5,000 in lieu and satisfaction of the annuity of £6,000 given by the will to be received out of the estate of the testator as mentioned in the will, and (ii) in place of the requirement that the trustees of the will should purchase an annuity at the annuitant's request, it was provided that Frances Gretton Clara Gretton and John Gretton or any or either of them might within five years purchase or transfer to two trustees a sum the interest or dividends of which would amount to the total of the said annuity of £5,000 and the tax and duties thereon and the trustees should hold the stock in trust to pay the annuity and subject to it as part of the residuary estate of the testator. No personal liability was imposed upon Frances or Clara Gretton, the residuary legatees under the will, nor was there any immediate release of the trustees appointed by it from their obligation to provide for the annuity, but the annuitant for five years waived and released the right given to her by the will of calling upon them to purchase an annuity.

My Lords I cannot think that these provisions constituted the Misses Gretton and John Gretton or any of them grantors of a different annuity in place of that given by the will. The yearly sum of £5,000 is a mere reduction in the sum granted and is expressly accepted in lieu of the £6,000 given by the will. No fresh liability is imposed upon anyone and no immediate release of the trustees of the will is executed. The annuitant, it is true, postpones her right to call upon the trustees to purchase an annuity and by cl. 4 of the deed agrees to substitute in its place as security for the payment of the yearly sum, a special fund to be provided by one or more of the members of the Gretton family if they so elect either individually or out of the testator's estate; an arrangement no doubt intended to be implemented by a transference of part of the testator's estate to the trustees. But the substitution of a fresh security has never been held to amount to the grant of a fresh annuity or to produce a new grantor.

The deed throughout speaks of "the said annuity" as that which Lady Houston is to receive and the said annuity means that of £5,000 in lieu of the original £6,000. The trustees of the will were under no obligation to purchase an annuity unless the annuitant desired them to do so. Lady Houston did not express any such desire and it is, I think, immaterial that she received some *quid pro quo* for foregoing her right.

If the trustees of the will did not or could not buy an annuity, they might have felt it necessary, in order to safeguard themselves, and would have been entitled, to retain the whole of the testator's estate. The arrangement come to is one not uncommonly provided for in the instrument by which an annuity is granted, so that some portion of the estate chargeable may be released to the ultimate beneficiaries. It did not change the source from which the bounty comes. It is true that by the terms of the second deed trustees other than those named in the will were appointed and that Mr. and the Misses Gretton could provide a portion or indeed the whole of the fund from outside sources in exoneration of the estate of the testator, but this was merely machinery by which the amount granted by the testator in his will and reduced by agreement was subsequently secured.

I should allow the appeal.

Lord Simonds: My Lords, the question for your Lordships' decision is whether, upon the death of the late Fanny Lucy Lady Houston, whom I will call "the annuitant," estate duty became payable under s. 2 (1) (*b*) of the Finance Act, 1894, to the extent to which a benefit arose or accrued by the cesser of an annuity of £5,000 to which she was entitled during her life under and by virtue of certain instruments which I must state in some detail. This question has been answered in the affirmative by MACNAGHTEN, J. ([1943] 2 All E.R., at p. 759), and in the negative by the Court of Appeal (SCOTT and DU PARCQ, L.JJ., GODDARD, L.J. dissenting) ([1944] 1 All E.R., at p. 624).

By his will, dated Aug. 26, 1882, Frederick Gretton (whom I will call "the testator") devised and bequeathed to the annuitant (then Fanny Lucy Radmall spinster) a clear annuity of £6,000 per annum during her life free of legacy duty, income tax and all other duties whatsoever, such annuity to be paid quarterly, and the first of such payments to be made three months after his death, and he directed his trustees at any time, if the annuitant should so desire, to lay out a sufficient portion of his estate in the purchase of such an annuity in her name either from the Commissioners for the Reduction of the National Debt or otherwise as therein mentioned, and he directed and declared that the said annuity of £6,000 a year was in addition to and not in substitution for any gift or benefit theretofore derived or which during his lifetime might be derived by the annuitant from him, but included an annual sum of £1,000 which the testator had by a bond dated Apr. 10, 1880, bound himself to pay to the annuitant during her life. After devising and bequeathing another annuity of £75 a year, the testator devised and bequeathed all his estate and property, real and personal, subject to the said two annuities of £6,000 and £75, unto and equally between his two sisters Frances (otherwise Fanny) Gretton and Clara Gretton. The testator died on Nov. 15, 1882, without having revoked or altered his will. He was survived by his two sisters named in his will, by a third sister, Mary Wigan, and by a brother, John Gretton, who was his heir at law.

After the death of the testator his brother John, for whom he had made no provision, and his sisters, Frances and Clara, whose residuary interests were subject to so large an annuity, threatened to contest the validity of the will, but after the execution of two deeds of compromise, to which I must next refer, the will was ultimately proved by the executors therein named on April 26, 1883. The estate was a large one, consisting, in addition to real estate, of personal estate of the net value of over £350,000.

By the first of the two deeds of compromise, which was dated Jan. 22, 1883, the claims of John Gretton as between himself and his sisters Frances and Clara were satisfied. It is sufficient to say that Frances and Clara each assigned to John a moiety of the share of the testator's residuary estate to which she was entitled under the will, subject to the payment of a proportionate part of the annuity of £6,000 or any annuity which might be substituted for it, and of a proportionate part of the said annuity of £75 and each of them, John Frances and Clara, entered into covenants with the others of them to make such provision as therein mentioned for the third sister, Mary Wigan.

It remained for the family thus united to settle with the annuitant, whose annuity would absorb so large a share of the estate, and this was effected by the second deed of compromise, which was dated Feb. 14, 1883, and was made between John, Frances and Clara of the first three parts and the annuitant of the fourth part. After reciting (*inter alia*) the threats that I have mentioned to contest the validity of the will and that, to prevent any litigation and to compromise and settle all questions between the parties thereto in reference to the rights of the annuitant under the will and in the estate of the testator, the annuitant, while insisting that the will was a good and valid testamentary disposition in all respects, had agreed to the arrangement thereinafter contained, it was by this deed witnessed –and here I think it necessary to state *verbatim* the primary provision of the deed :

> . . . that so far as the covenants herein contained are to be performed by them respectively each of them the said Frances Gretton Clara Gretton and Fanny Lucy Radmall hereby covenants with the others or other of them in manner following that is to say :—
>
> (i) In lieu and satisfaction of the annuity of £6,000 by the said recited will given to her the said Fanny Lucy Radmall will accept an annuity of £5,000 clear of legacy duty income tax and all other duties whatsoever which said annuity shall be received by her out of the estate of the said Frederick Gretton as mentioned in the said will or out of the shares of the said estate as herein mentioned but nothing herein contained shall be taken to impose any personal liability on the said Frances Gretton and Clara Gretton or either of them to pay the said annuity or any part thereof. The said annuity shall accrue as from Nov. 15, 1882, and be payable quarterly the first payment

to be made as on Feb. 15, 1883. And the said Fanny Lucy Radmall will for the period of 5 years from the day of the date hereof waive and release the right by such will given to her of calling upon the trustees thereof to purchase the annuity thereby provided for her or any part thereof.

By the second clause of the deed, which was in the form of a proviso, it was agreed that it should be lawful for Frances, Clara and John or any or either of them or their or any or either of their executors or administrators at any time within the period of 5 years from the date thereof to purchase or transfer into the names of two trustees to be chosen as therein mentioned a sum of stock of the Government of Great Britain, the interest or dividends whereof would amount to the total of the "said annuity of £5,000 and the tax and duties thereon as aforesaid, say £5,300," and that the trustees should hold the said stock in trust in the first place to pay the said annuity, tax and duties, and subject thereto as part of the residuary estate of the testator.

To the third clause I need not refer. By cl. 4 it was provided that if such purchase or transfer should be made within the said period of 5 years, then the right given by the will to the annuitant to call upon the trustees to purchase an annuity should absolutely cease and determine, and after such purchase or transfer the "said annuity of £5,000 and the tax and duties thereon as aforesaid" should be payable exclusively out of the income of the funds purchased or transferred, or if such income should be insufficient, then out of the *corpus* thereof, and after such purchase or transfer the remainder of the estate of the testator should be absolutely released from the same annuity and from all claims and demands in relation thereto. Then followed certain immaterial provisions. Then it was witnessed that John, Frances and Clara thereby withdrew all opposition to the admission of the will to probate, and that Frances and Clara as beneficial owners thereby charged their respective shares in the real and personal estate of the testator under his will or as two of his next of kin with the payment until such purchase or transfer to the annuitant of the annuity thereby covenanted to be accepted by her and the tax and duties thereon as aforesaid, and that John similarly charged all his interest in the same estate whether as heir at law or next of kin of the testator or under any testamentary disposition made by him. On Sept. 8, 1887, Clara died.

At some date within the prescribed period of 5 years John and Frances, in exercise of the power given to them by the second deed of compromise, transferred into the names of Robert Radcliff and Arthur Brinckman, the trustees chosen in the manner provided by that deed, a sum of Government stock, of which the dividends at the time of transfer amounted to the yearly sum of £5,300, and on June 8, 1888, the said trustees executed a declaration of trust, which was expressed to be supplemental to the second deed of compromise, whereby they declared that they stood possessed of the said sum of Government stock in trust in the first place to pay the said annuity of £5,000 by the principal indenture provided for the annuitant during her life and the income tax and all duties whatsoever which should become payable in respect thereof, such annuity, tax and duties to be paid at the times therein mentioned and in accordance in all respects with the terms of the principal indenture and subject to the payment of the said annuity, income tax and duties, would hold the said sum of stock and the dividends thereof as part of the residuary estate of the testator.

The respondents to this appeal are the present trustees of the declaration of trust. On Dec. 23, 1936, the annuitant died. She had enjoyed her annuity for over 50 years.

Before I revert to the claim for estate duty which arose upon her death I must mention one matter which has been much discussed before your Lordships. Until the year 1921 the trustees of the declaration of trust paid the annuity of £5,000 without deduction of income tax in accordance with the provision in that behalf of that deed, but in that year they applied to the Chancery Division of the High Court by originating summons, dated Dec. 23, 1921, for a direction as to the validity of the said provision. By an order of Romer, J., (as he then was) made on July 27, 1922, it was declared that the annuitant was not entitled to have the said annuity paid free of income tax or super tax. I shall at a later stage refer to this matter. I mention it now in order to explain why, upon the death of the annuitant, the claim for estate duty was in respect of the cesser of an annuity of £5,000 and no more.

My Lords, it is conceded by the respondents that estate duty is exigible in respect of the whole fund, subject to the trusts of the declaration of trust, if the annuity of £5,000 exhausted the whole income of that fund, or of a proportionate part of it if it did not, unless the respondents can establish that the case falls within the exemption provided by the Finance Act, 1894, s. 3 (1). I will read that subsection, omitting words which are not relevant to the present case. So read it runs thus :

> A Estate duty shall not be payable in respect of property passing on the death of the deceased . . . in respect of the determination of any annuity for lives where such . . . annuity [was] granted for full consideration in money or money's worth paid to the . . . grantor for his own use or benefit. . . .

It was then the task of the respondents to establish first that the annuity of £5,000 was granted, presumably by John, Frances and Clara or by John and Frances and secondly that it was granted for full consideration in money or B money's worth paid to them for their own use or benefit. In the course of the discussion in this House it was conceded by counsel for the respondents that, if he failed upon the first head of this argument, the second head did not arise, and in view of your Lordships' unanimous opinion upon the first head, I propose to say nothing upon the second.

The respondents' contention is thus succinctly stated in their case :

> C The annuity of £5,000 payable to the deceased during her life was not derived under the will of the said Frederick Gretton, but was a new annuity which became payable solely by virtue of the said deeds of Feb. 14, 1883, and June 8, 1888.

This contention found favour with the majority of the Court of Appeal.

My Lords, it appears to me that this conclusion ignores the substance of the matter and, ignoring substance, violates an important principle applicable to this branch of the law : see *A.-G.* v. *Smith Marriott* (2), and *L.-A.* v. *Lyell* (3). D When it is said that the annuity of £5,000 which ceased on the death of the annuitant, was not derived under the will of the testator, I ask at what stage then did it cease to flow from his bounty. The fact that the annuitant, in face of threatened opposition to the will, accepted a reduction of her annuity from £6,000 free of tax and duties to £5,000 similarly free, does not support the view that the smaller annuity was not derived under his will but was granted by someone else. Nor does the temporary and conditional surrender by her of an E ancillary right given by the will to require the purchase of an annuity assist the argument.

But then it is urged that, when the right given to John and his sisters to provide a security for the annuity and by so doing to procure a release for their own benefit of the residuary estate of the testator was exercised by them and the trust fund was established by the deed of June 8, 1888, then at least the annuity ceased to be derived under the testator's will and became a new annuity payable F only by virtue of the deeds of 1883 and 1888. But such a provision is surely a commonplace in the administration of estates. Where a testator by his will bequeathes an annuity in such terms that it is charged on the income and *corpus* of his estate and subject thereto disposes of his residuary estate, the administrative difficulty will commonly arise that the trustees are unwilling to make a distribution of residue lest they should retain an insufficient sum to G meet the prior claims of the annuitant. Often this difficulty is foreseen and met by the testator himself, who provides that his trustees may set aside and appropriate a sum sufficient by its income to meet the annuity and, having done so, distribute the residue. If he has not made such provision, the same result may be achieved by agreement between the parties, or, failing such agreement, by an order of the court. This and no more is what the parties have done in the present case. The annuity given by the will was charged upon income H and *corpus* of the estate. If no question of invalidity had arisen and the will had been proved without compromise, the trustees could not safely have distributed any part of the residue without the sanction of the annuitant, and her sanction could only have been obtained by the appropriation of an adequats fund to meet her annuity. So when she accepted her reduced annuity, it wae the natural corollary that she should accept also a proposal which would at the same time safeguard her interest and permit a distribution of residue. I find then in this provision nothing to justify the claim that the reduced annuity was derived from any other source than the testator's will. I should perhaps refer to one difficulty which is, I think, only verbal. Both the deed of 1883 and that of 1888 use the words "purchase or transfer" in regard to the right given by the former deed to provide a fund to secure the annuity. This is in any case an awkward expression in its context, but it means only that the appropriate Government stock which is to support the annuity will either be provided directly out of the testator's estate or will be purchased by means of a sale of a sufficient part of that estate. It cannot be contended that it means that John or his sisters were out of their own resources to provide the fund. A

My Lords, I have looked at this matter as one of substance. But I do not think that I could come to any other conclusion if I regarded form alone. For if the reduced annuity was not derived from the testator, it must have owed its existence to some other grant. I look in vain for such a grant. It is not to be found in the deed of Feb. 14, 1883, of which the primary provision is the acceptance by the annuitant of an annuity of £5,000 in lieu and satisfaction of the £6,000 which she claimed. And it is this annuity payable out of the estate B of the testator which is throughout this deed and the supplemental deed of 1888 referred to as "the said annuity." Nor did that later deed contain any grant. At the most, though even this is doubtful, it provided a new security.

Finally, my Lords, I must refer again to the judgment of Romer, J. As I have already mentioned, that judge held that the provision contained in the declaration of trust was invalid in so far as it provided for payment of the annuity free from income tax. The correctness of this decision, with which C your Lordships are not concerned, I see no reason to doubt. It was the undoubted fact that the deeds, under which the annuitant claimed, were so framed that they contained a contractual obligation which the income tax law rendered unenforceable. But this does not touch the question whether the reduced annuity of £5,000 was in substance derived from the will of the testator or from a grant by some other person. Upon this question I have already fully stated my D opinion. I hold that it was derived under the testator's will and, if and so far as it was payable under the provisions of some other deed, it was so payable only because the annuitant was content to surrender part of that which the testator had given to her. I would, therefore, allow this appeal.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Radcliffes & Co.* (for the respondents). E

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Erratum: counsel for the respondents in the above case were *Cyril King, K.C.,* and *A. P. Vanneck.*

Distinguished. Acme Flooring Co., Ltd. *v.* I.R.C. [1948] 1 All E.R. 546.

Explained and Distinguished. Birmingham Small Arms Co., Ltd. *v.* I.R. Comrs. [1951] 2 All E.R. 296.

INLAND REVENUE COMMISSIONERS *v.* TERENCE BYRON, LTD. F

[House of Lords (Viscount Simon, L.C., Lord Russell of Killowen, Lord Porter and Lord Simonds, **February 26, 27, 28, March 5, May 17, 1945.**]

Revenue—Excess profits tax—Capital employed in business during chargeable accounting period—Theatre destroyed by enemy action—Whether theatre remained "capital employed in the business"—Finance (No. 2), Act, 1939 G (c. 109), *ss.* 13 (3), 14 (2), *Sched. VII, Pt. II, paras.* 1, 2, 3.

The respondent company carried on the business of theatre proprietors, one of their theatres being the Alexandria Theatre, Hull, which they had purchased, in Apr., 1937, at a total price of £12,280. On May 7, 1941, this theatre was totally destroyed by enemy action. The freehold site continued to belong to the respondents. The appellant commissioners took the view that there had been, in the circumstances, a decrease in the H average amount of the capital employed in the respondents' business in the accounting period ending May 28, 1941, and that the standard profits should, therefore, be decreased in relation to that accounting period by the statutory percentage of 6 per cent. on the decrease of capital. It was contended, on their behalf, (i) that the destruction of the Hull theatre by enemy action left the respondent company with a new and different asset from the asset which they had acquired at the price of £12,280 in Apr., 1937; alternatively, (ii) that the damage which had occurred produced the result that whatever capital the respondent company previously had at Hull was no longer "employed in its trade or business." It was contended for the respondent company that, notwithstanding the destruction of the theatre, there had been no decrease in the capital employed by its business and, therefore, no reduction in the figure of standard profits was justified :—

HELD : (i) the destruction of the theatre by enemy action did not produce the result that the respondents no longer owned the asset and in its place acquired a new one. The value to be attributed to the asset for the purposes of tax was the price originally paid for it, and there was no decrease in capital when the capital was computed in accordance with the Finance (No. 2) Act, 1939, Sched. VII, Part II.

Merlimau Rubber Estates, Ltd. v. *Inland Revenue Comrs.* (1) *considered.*
Sungei Rinching Rubber Co., Ltd. v. *Inland Revenue Comrs.* (2) *distinguished.*

(ii) the destroyed theatre must still be regarded as "capital in the trade or business" within the meaning of the Finance (No. 2) Act, 1939, s. 13 (3), even though the asset was not actively or productively employed in the accounting period.

Decision of the Court of Appeal ([1944] 1 All E.R. 608) *affirmed.*

[**EDITORIAL NOTE.** The House of Lords here affirm the decision of the Court of Appeal, holding that for purposes of excess profits tax there is no reduction of capital in the case of a theatre destroyed by bombing, and that this capital still remains "employed in the business" of the theatre proprietors. VISCOUNT SIMON, L.C., examining Sched. VII, Part II, of the Finance (No. 2) Act, 1939, says that "changes of circumstances which in fact render the asset no longer worth its original value, do not affect the value to be put on the asset for excess profits tax purposes," and he holds that such a reduction in value does not result in the substitution of a new asset within the *Sungei Rubber Co.* decision (2). He expressed no opinion on the further argument of the company that, even if the damaged site were to be regarded as a new asset, the new asset must be valued after taking into account the fact that they have a war damage claim in respect of it, which (as was conceded) would leave the company's asset with an actual value not less than that attached to it before the bomb fell.

It is further held that, although the site alone remains, which cannot be productively employed during the accounting period, it remains capital employed in the business. The Lord Chancellor stated, however, that if the company decided to abandon the use of the site for the purpose of its business, different considerations might arise.

Although the decision in each court appears to have been based upon the facts of this particular case, the principles underlying the decision as enunciated in the course of the case appear to be relevant to every case in which a trading concern has suffered damage to its assets by enemy action or through other causes such as an ordinary fire.

FOR THE FINANCE (No. 2) ACT, 1939, s. 13 (3) AND SCHED. VII, PART II, PARAS. 1-3, see HALSBURY'S STATUTES, Vol. 32, pp. 1195, 1196, 1221.]

Cases referred to :

*(1) *Merlimau Rubber Estates, Ltd.* v. *Inland Revenue Comrs.*, [1923] A.C. 283 ; 92 L.J.K.B. 504 ; 129 L.T. 98.

*(2) *Sungei Rinching Rubber Co., Ltd.* v. *Inland Revenue Comrs.* (1925), 94 L.J.K.B. 865 ; 133 L.T. 670.

APPEAL by the Crown from an order of the Court of Appeal (SCOTT, GODDARD and DU PARCQ, L.JJ.), dated May 4, 1944, and reported [1944] 1 All E.R. 608, affirming an order of MACNAGHTEN, J., dated July 20, 1943, and reported [1943] 2 All E.R. 415, whereby an appeal on a case stated by the Commissioners for the General Purposes of the Income Tax for the Stockport Division of the county of Chester was dismissed and the decision of the commissioners was affirmed. The facts and arguments are fully set out in the opinion of VISCOUNT SIMON, L.C.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

Heyworth Talbot for the respondents.

VISCOUNT SIMON, L.C. : My Lords, the facts, which are quite short, give rise to a difficult question as to the interpretation and application of the Finance (No. 2) Act, 1939, ss. 13 (3), 14 (2), in respect of the calculation of the average amount of the capital employed in the trade or business of the respondent company in the chargeable accounting period ending May 28, 1941, for the purpose of an assessment to excess profits tax on the profits of the company's business in that accounting period.

The excess profits tax is charged upon the excess of profits arising in the chargeable accounting period over the standard profits, and standard profits are computed in accordance with sect. 13 of the Act. Generally speaking, therefore, once the standard profits have been correctly computed, all that remains to be done in a case where the profits in an accounting period have risen beyond this figure is to charge the prescribed rate of tax on the excess; and thus, in an ordinary case, no question of calculating the capital employed in the trade or business arises. If, however, the average amount of the capital employed in the trade or business in the accounting period is greater, or less, than the average amount of the capital employed therein in the standard period, an adjustment has to be made. If the average amount of such capital is greater than in the standard period, the standard profits are increased in relation to that chargeable accounting period, and if the average amount of such capital has decreased, the standard profits are, in relation to that chargeable accounting period, decreased by the appropriate statutory percentage. In the case of an increase in the average amount of capital in an accounting period the statutory percentage by which the standard profits are increased is 8 per cent. or 10 per cent. of the excess, as prescribed in sect. 13 (9). If the average amount of capital employed in the trade or business in the accounting period is less than the average amount employed therein in the standard period (and this is the case which is said to arise in the present appeal), the reduction in standard profits is arrived at by deducting 6 per cent. of the amount of the decrease. Some such adjustment of figures is manifestly necessary if the tax is to be equitably applied to a business the capital of which varies, for, with an increased capital, the business may be expected (if conditions remain otherwise the same) to make an increased profit, which, none the less, would not necessarily indicate an excess in the rate of profit made as compared with the standard profit.

The respondent company was incorporated in June, 1934, with the object, *inter alia*, of carrying on business as theatre, music hall and cinema proprietors. At all material times it carried on the business of theatre proprietors at five theatres of which it was the lessee and, until May 7, 1941, also at the Alexandria Theatre, Hull, of which it became the owner in Apr., 1937, by purchase at a total price of £12,280. This theatre was destroyed by enemy action on May 7, 1941. The freehold site continues to belong to the respondents.

In these circumstances the appellants contend that there has been a decrease in the average amount of the capital employed in the respondents' business in the accounting period ending May 28, 1941, and that the standard profits should, therefore, be decreased in relation to that accounting period by the statutory percentage of 6 per cent. on the decrease of capital. The respondent company, on the other hand, contends that, notwithstanding the destruction of the theatre, there has been no decrease in the capital employed in its business and, therefore, that no reduction in the figure of standard profits is justified. This latter contention has hitherto prevailed at every stage of the present litigation.

The Finance (No. 2) Act, 1939, Sched. VII, Part II, contains provisions for computing capital for the purposes of excess profits tax, and the question in dispute must be decided in the light of these provisions. An inspection of the terms of this Schedule shows clearly that the capital employed in a trade or business is not what, in other connections, might properly be described as the total capital, but is arrived at conventionally according to the rules laid down in the schedule for the purpose. Para. 1 of these provisions is as follows:

> (1) Subject to the provisions of this Part of this Schedule, the amount of the capital employed in a trade or business (so far as it does not consist of money) shall be taken to be—
>
> (*a*) so far as it consists of assets acquired by purchase on or after the commencement of the trade or business, the price at which those assets were acquired, subject to the deductions hereafter specified;
>
> (*b*) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts, subject to the said deductions;
>
> (*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business, subject to the said deductions.
>
> (2) The price or value of any assets other than a debt shall be subject to the following deductions—

(*a*) a deduction of any sum contributed, directly or indirectly, out of the Consolidated Fund of the United Kingdom or of Northern Ireland, or out of moneys provided by the Parliament of the United Kingdom or the Parliament of Northern Ireland, towards the acquisition of the asset;

(*b*) any such deductions for wear and tear or for depreciation as are authorised by the Income Tax Acts or Part I of this Schedule, and, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income tax purposes.

A (3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

What is particularly noteworthy in the above provisions of the Schedule is that the value of an asset, whether acquired by purchase or otherwise, is fixed as being the price at which the asset was acquired or the value of the asset when it became an asset of the trade or business, subject only to the deductions B mentioned in sub-para. (2). So long as the asset remains part of the capital employed in the trade or business, it would appear, therefore, that the value to be put upon it for the purposes of calculating excess profits tax is not to be increased with the increase of its real value, and, equally, that changes of circumstances which in fact render the asset no longer worth its original value, do not affect the value to be put on the asset for excess profits tax purposes. C In these respects, as well as in others, the valuation of capital under the Schedule for the purpose of calculating the tax is manifestly different from the valuation which would be proper in a balance-sheet or in the application of company law.

The Attorney-General and junior counsel for the Crown contended that the destruction of the Hull theatre by enemy action left the respondent company with a new and different asset from the asset which they had acquired by purchase at the price of £12,280 in Apr., 1937. According to this argument, the site with the D ruins of the theatre upon it is a different asset from the theatre which was bought. The Crown pointed out that previous decisions had recognised the possibility of an asset acquired by purchase and falling within para. 1 (1) (*a*) of the Schedule being so transformed that it is regarded as becoming a different asset and falling within para. 1 (1) (*c*). For example, under the analogous provisions of the former excess profits duty, in *Merlimau Rubber Estates, Ltd.* v. *Inland Revenue Comrs.* (1), where a property bought by the appellant E was an undeveloped rubber estate which as the result of further expenditure and cultivation became in time a fully productive rubber estate, it was contended that the treatment of the estate had the effect of transforming it into a new asset so that the property was no longer to be valued under para. (*a*), but was converted into a new asset falling into para. (*c*). The contention did not succeed, but LORD WRENBURY took the view that such a transformation was a possibility, F and that it was a question of fact whether what had happened since the original purchase had resulted in the disappearance of the old asset and the creation of another asset in its place. LORD WRENBURY illustrated his meaning by saying, at the top of p. 291, that:

> . . . if a man buys a quarter of an acre of land and builds a house upon it, he does not continue the owner of the bare land within (*a*) and become the owner of another asset—namely, a house upon the land within (*c*). A house cannot exist except in conjunction with the land on which it stands. The land was within (*a*), but when the house G was built the land so to speak ceased to be in (*a*) and the owner became entitled to a new asset—namely, the house with the land on which it stood within (*c*).

LORD BUCKMASTER, at p. 286, was not prepared to say that in certain circumstances this sort of transformation might not take place, but he found it unnecessary to decide the question because he and the other members of the House all came to the conclusion that in fact no sufficient transformation had taken H place in that case to produce such a result.

The matter was carried a little further in *Sungei Rubber Co.* v. *Inland Revenue Comrs.* (2), which was a case where the company had bought virgin jungle, and, as a result of large expenditure and the planting of trees, had turned it into a valuable rubber plantation. It was held, first by ROWLATT, J. and then by the Court of Appeal, that the rubber estate was a different asset from mere virgin jungle, and that the company had, therefore, acquired a new asset which would be valued under para. 1 (*c*) and not under para. 1 (*a*).

Adopting the principle involved in the *Sungei Rubber Co.'s* case (2), the Crown here argues that the asset which the respondent company bought at the price of £12,280 was a theatre, and that what it has been left with, as the result of enemy bombing, is a different asset, namely, the site with rubble upon it. I do not think that this is the proper view to take of the facts in this particular case, and in my opinion the company still has the asset which it originally bought, though the asset has been very much damaged by enemy action. If, instead of being laid waste by bombing, the theatre had been less severely damaged, for example, if a portion of it had been struck by lightning or consumed by fire, it could hardly be said that the asset originally bought had been turned into something else. The company in fact bought the freehold site with a valuable building upon it, and what has happened since does not produce the result that the company no longer owns the asset and in its place has acquired a new one. All that has happened is that, while the original asset continues to be owned by the company, its value has been greatly reduced by the damage which has occurred. On this view of the facts the value that must be attributed to the asset for the purposes of the tax is the price originally paid for it, and there is no decrease in the capital when the capital is computed in accordance with Sched. VII.

The Crown put forward, as an alternative contention, the view that the damage which had occurred produced the result that whatever capital the company previously had at Hull was no longer "employed in its trade or business." In my opinion, this contention is not sound. The fact that the Hull building has been so much damaged that it cannot at present be used as a theatre does not seem to me in itself to establish that the freehold site and what is upon it is not still "employed in the trade or business." If the company decided to abandon the use of the site for the purpose of its business, different considerations might arise. If, however, the theatre was for other reasons temporarily closed or if it was in course of reconstruction and improvement, this would not justify the contention that it formed no part of the capital referred to in Part II of Sched. VII. Even if it be the case that, for the purposes of excess profits tax, the capital employed in a trade or business of a company does not necessarily include all the capital of the company (and it certainly expressly excludes investments held by a company, the income from which is not to be taken into account in computing the profits of the trade or business: Sched. VII, Part II, para. 3), the asset at Hull must be regarded as still employed in the trade or business, even though it is not actively or productively employed in the accounting period.

I have not thought it necessary to discuss the further argument of the respondent company that, even if the damaged site at Hull were to be regarded as a new asset, it is an asset which must be valued after taking into account the fact that the company have a war damage claim in respect of it, which (as was conceded) would leave the company's asset with an actual value not less than that attached to it before the bomb fell.

In my opinion, this appeal should be dismissed. The facts of the case do not support the contentions of the Crown, and it is not necessary for the House to pronounce upon some of the difficult matters of a more general character which in another case might have to be explicitly decided. I move that the appeal should be dismissed with costs.

My Lords, Lord Macmillan, who is not able to be present, authorises me to say that he agrees with the opinion which I have just delivered, and that he has nothing to add.

Lord Russell of Killowen: My Lords, I also agree with the opinion which has just been delivered by Viscount Simon, L.C.

Lord Porter: My Lords, I had prepared a speech in this matter, but having heard the speech of Viscount Simon, L.C., I find it unnecessary to trouble your Lordships, as I entirely agree with the views expressed by him.

Lord Simonds: My Lords, I also concur.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Addleshaw, Sons & Latham*, Manchester (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* OSWALD.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Simonds), **March 12, 13, 14, April 19, 1945.**]

Income Tax—Mortgage interest—Mortgage of reversionary interest—Capitalisation of interest at option of mortgagee—Capitalisation not altering quality of interest—Addition of interest to capital not amounting to payment of interest—Reversion falling into possession—Funds handed over to trustees of mortgagee—Funds available in part for payment of interest—Income tax deducted by mortgagor at date of actual payment—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 21.

The respondent was the sole surviving trustee under a deed of settlement, dated June 8, 1885, under which B. was entitled to a reversionary interest. B. mortgaged her interest and a clause in the instrument provided that all interest which should not be paid within 21 days after falling due might, at the option of the mortgagee, be capitalised. The mortgagee died in 1920 and B., the mortgagor, in 1933. No interest was paid by the mortgagor after 1906. In 1935 the trustees acting under the mortgagee's will executed an instrument whereby in exercise of the option conferred they "capitalised" so much of the interest as had fallen due in the meantime and added the interest so capitalised to the principal sums "so as to form one aggregate sum charged on the property mortgaged" carrying interest at the rate provided. On Sept. 13, 1938, the mortgagee's trustees executed a further instrument capitalising in similar terms as from Aug. 18, 1938, the interest on the principal sums and on the interest thereon previously capitalised. On June 29, 1938, the mortgagor's reversionary interest fell in, and the proceeds thereof became available towards satisfying the mortgages. The value of the reversion was sufficient to pay off the original principal moneys in full and to leave a balance to meet in part the accrued interest. The Inland Revenue Commissioners claimed that notwithstanding the exercise by the mortgagee's trustees of the option of capitalising unpaid interest, the arrears of interest had never lost their character as interest and that the respondent was bound, when making payment to the mortgagee's trustees of the proceeds of the mortgagor's reversionary interest, to deduct and account for income tax on the part of the sum which represented arrears of interest. In view of that claim the respondent and the trustees of the mortgagee entered into an agreement on July 20, 1939, whereby the former undertook to transfer the reversionary fund to the latter, and it was stipulated that one-half thereof should be placed in their joint names as a security to the respondents against all claims by the appellants. It was contended for the appellants that the compulsory deduction required by the All Schedules Rules, r. 21, could only take place at the moment when actual payment was made to the mortgagee's trustees and that the appropriate sum to be deducted was a sum equivalent to tax at the rate then in existence upon so much of the fund as was rightly appropriated to interest, including capitalised interest. The respondent, while agreeing that the tax was deductible only on payment, contended, *inter alia,* that the capitalisation of interest under the terms of the mortgage deeds amounted to payment as each sum of interest became due or, at any rate, at the date of capitalisation, and that in making this payment the tax must be taken to have been deducted, by those who made the payment, at the rate then due; the payment must be taken to have been made as and when the interest became due by the person then owing the interest, and this was not, until after the reversion fell in, the respondent or his predecessors as trustees of the settlement:—

HELD: (i) capitalisation meant no more than that interest which continued to be interest, should be treated together with the capital sum due as itself interest-bearing but did not alter its quality as interest.

Re Morris, Mayhew v. *Halton* (3), *Re Jauncey, Bird* v. *Arnold* (4) *applied.*

(ii) there being no payment until the funds were handed over, the payment out of the available fund to the trustees of the mortgagee over and above the original capital loans constituted in law a payment of interest and not being made out of profits or gains brought into charge must suffer deduction of income tax at the standard rate in force at the date of payment, the respondent being accountable for it to the Inland Revenue under the All Schedules Rules, r. 21.

Paton v. *Inland Revenue Comrs.* (2), *and Raghunandan Prasad Singh* v. *Comrs. of Income Tax* (5), *applied.*

Inland Revenue Comrs. v. *Lawrence, Graham & Co.* (1) *overruled.*

Decision of Court of Appeal ([1944] 1 All E.R. 426), *affirming the decision of* MACNAGHTEN, J. ([1943] 2 All E.R. 754), *reversed.*

[**EDITORIAL NOTE.** This case decides two questions : (*a*) interest added to capital, whether under the terms of a mortgage, by agreement, or by custom, does not lose the character of interest ; (*b*) income tax must be deducted at the date such interest is actually paid and at the standard rate in force at that date, if the deduction is made under r. 21. It should be borne in mind that in circumstances where payment can be made under r. 19, out of profits or gains brought into charge to tax, the deduction is optional and not compulsory and is of tax at the standard rate or rates of tax in force during the period through which the interest was accruing due.

The decision sets at rest difficulties which arose upon the judgments in the Court of Appeal in the *Lawrence, Graham* case (1), and in attempting to reconcile the decision in that case with the decision in *Paton's* case (2). The crucial question is neatly expressed by LORD SIMONDS, at p. 652 *post*, as follows : " The question in the simplest terms is whether, when the mortgagee capitalises interest the mortgagor pays it and the answer, in terms as simple, is that the mortgagee capitalises it just because the mortgagor does not pay it." The Special Commissioners, the judge of first instance, and the Court of Appeal held otherwise, holding the case governed by the *Lawrence, Graham* case (1), but the House of Lords unanimously overrule *Lawrence, Graham's* case (1) holding that there is no distinction to be made in principle between the facts under consideration, and the case where bank interest was added to a loan (*Paton's* case (2)). On the meaning of capitalisation reference may be made to the words of LORD STERNDALE in *Re Morris* (3) on p. 651, *post.*

Cases referred to :

*(1) *Inland Revenue Comrs.* v. *Lawrence, Graham & Co.*, [1937] 2 K.B. 179 ; [1937] 2 All E.R. 1 ; Digest Supp. ; 106 L.J.K.B. 772 ; 157 L.T. 219 ; 21 Tax Cas. 158.

*(2) *Paton* v. *Inland Revenue Comrs.*, [1938] A.C. 341 ; [1938] 1 All E.R. 786 ; Digest Supp. ; 107 L.J.K.B. 354 ; 158 L.T. 426 ; 21 Tax Cas. 626.

*(3) *Re Morris, Mayhew* v. *Halton*, [1922] 1 Ch. 126 ; 28 Digest 72, *378* ; 91 L.J.Ch. 188 ; 126 L.T. 281.

*(4) *Re Jauncey, Bird* v. *Arnold*, [1926] Ch. 471 ; 32 Digest 407, *860* ; 95 L.J.Ch. 377 ; 134 L.T. 728.

*(5) *Raghunandan Prasad Singh* v. *Income Tax Comrs.* (1933), L.R. 60 Ind. App. 133.

*(6) *Holder* v. *Inland Revenue Comrs.*, [1932] A.C. 624 ; Digest Supp. ; 101 L.J.K.B. 306 ; *sub nom. Inland Revenue Comrs.* v. *Holder* (*H.C.*) *& Holder* (*J. A.*), 147 L.T. 68 ; 16 Tax Cas. 540 ; *affg. S.C.* ([1931] 2 K.B. 81) *on other grounds.*

APPEAL by the Crown from a decision of the Court of Appeal (LORD GREENE, M.R., MACKINNON and LUXMOORE, L.JJ.), dated Mar. 16, 1944, and reported [1944] 1 All E.R. 426, affirming a decision of MACNAGHTEN, J., dated Oct. 25, 1943, and reported [1943] 2 All E.R. 754. The facts and arguments are fully set out in the opinions delivered by LORD THANKERTON, LORD MACMILLAN and LORD PORTER.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the respondent.

LORD THANKERTON (read by LORD MACMILLAN) : My Lords, this appeal arises on a case stated by the Special Commissioners, who had discharged an assessment to income tax for the year ended Apr. 5, 1940, on the respondent, as sole surviving trustee of the Cosier settlement, in the sum of £6,500, made under rule 21 of the General Rules applicable to Scheds. A, B, C, D and E of the Income Tax Act, 1918. The decision of the Special Commissioners has been affirmed in both courts below.

The facts material to the decision of this appeal may be stated as follows : In 1899 Mrs. Elfrida Beyfus, who may be referred to as the borrower, mortgaged a reversionary interest to which she was entitled under a deed of settlement dated June 8, 1885, which may be referred to as the Cosier settlement, to Mrs. Emma Louise Liberty [later Lady Liberty], who may be referred to as the mortgagee, to secure the sum of £2,300 with interest at 5 per cent. per annum.

In 1901 the borrower further charged her reversionary interest to the mortgagee to secure a further advance of £500 with interest at 5 per cent. In 1905 the borrower assigned to Jonas Wolfe and certain other parties the sum of £500, part of her reversionary interest, but subject to the mortgages of 1899 and 1901. On May 18, 1905, the borrower executed a further charge of her reversionary interest to the mortgagee to secure a further advance of £300, and it was thereby provided that interest on the three sums of £2,300, £500 and £300 should thenceforth be paid at the rate of 5½ per cent., subject to a proviso for the reduction A of the rate to 5 per cent. on punctual payment. This further charge contained the following provision :

> And it is hereby further agreed and declared that all interest which shall fall due on the said sums of £2,300 £500 and £300 whether by virtue of the foregoing covenants or the covenants contained in the hereinbefore recited indentures and shall not be paid within twenty-one days after the dates thereby and hereby appointed for the payment thereof may at the option of the mortgagee be capitalised as from such last mentioned B appointed date and be added to the principal monies hereby secured so as to form one aggregate sum charged on the property hereby mortgaged and carrying interest at the rate aforesaid and the mortgagor doth hereby covenant with the mortgagee to pay to the mortgagee the interest on such capitalised interest at the rate aforesaid on the aforesaid days thereinbefore and herein appointed for payment of interest and nothing in this proviso contained shall prevent the mortgagee notwithstanding the capitalisation of the interest from subsequently exercising all the rights powers and privileges C of a mortgagee as if the interest had not been paid or capitalised and it shall be lawful for the mortgagee to treat a portion of the interest as capitalised and a portion as if no option as aforesaid had been exercised by the mortgagee.

Interest was paid on the advances up to Aug. 18, 1906, but after that date no interest was paid at least up to Aug. 9, 1935.

The mortgagee died on May 2, 1920, and the borrower died on Jan. 11, 1933. No representation was taken out to the borrower's estate, but the will and D codicils of the mortgagee were duly proved by H. C. Blackmore and V. W. G. Ranger, the surviving executors nominate. On Aug. 9, 1935, Messrs. Blackmore and Ranger, who may be referred to as Lady Liberty's trustees, executed an instrument whereby, in exercise of the power conferred by the indenture of further charge dated May 18, 1905, they capitalised as from May 18, 1935, so much of the interest fallen due on the principal sums of £2,300, £500 and £300 as was then capable of being capitalised and added the interest so capitalised E to the principal sums so as to form one aggregate sum charged on the property mortgaged by the said indenture of further charge and carrying interest at the rate thereby provided.

On June 29, 1938, the borrower's reversionary interest under the Cosier settlement fell into possession. On Sept. 13, 1938, Lady Liberty's trustees executed a further instrument under which they capitalised in similar terms as F from Aug. 18, 1938, so much of the interest fallen due on (*a*) the principal sums of £2,300, £500 and £300, and (*b*) the interest previously capitalised as was then capable of being capitalised by virtue of the provisions of the further charge dated May 18, 1905.

Following negotiations, an agreement was arrived at and was embodied in heads of agreement dated July 20, 1939, between Lady Liberty's trustees and the Cosier trustees, of whom the respondent was one. It will be necessary to G refer to the provisions of these heads of agreement in relation to a minor contention of the respondent.

The main question is whether by virtue of the two instruments dated Aug. 9, 1935, and Sept. 13, 1938, whereby the Liberty trustees exercised the option conferred by the indenture of further charge dated May 18, 1905, the unpaid interest so capitalised was paid within the meaning of rule 21 of the General Rules applicable to all Schedules, the material part of which provides as follows :

H

> 21.—(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of tax thereon at the rate of tax in force at the time of the payment.

The Special Commissioners, LAWRENCE, J., and the Court of Appeal have all held that the present case is ruled by the decision of the Court of Appeal in *Comrs. of Inland Revenue* v. *Lawrence, Graham & Co.* (1), which has not been previously considered by this House. The Crown challenge the correctness of that decision, and I shall now deal with it. That case related to a mortgage and two further charges on the security of a reversionary interest ; the mortgage contained a provision for the automatic conversion of unpaid half-yearly interest into principal money, carrying interest. Except that the clause operated automatically instead of resting on the optional exercise of a power, as in the present case, I find no material difference between the cases as regards the present question, nor can I see that that difference affects the decision of the A present question. In both cases the Court of Appeal considered on construction whether the sum to be capitalised was the gross amount of interest or the net sum—*i.e.*, after deduction of income tax, and in both cases the Court of Appeal has held that it was the net sum. But, my Lords, it seems to me, with all respect to the judges, to be idle to consider that question until and unless you have found that there was a payment of interest within the meaning of Rule 21 at the time of the capitalisation as otherwise you cannot find "the amount B of the tax thereon in force at the time of payment." In *Lawrence, Graham & Co.'s* case (1) the judgment of the court (LORD WRIGHT, M.R., ROMER and GREENE, L.JJ.) was delivered by ROMER, L.J., and it will suffice to quote one passage from the judgment, at p. 195 ([1937] 2 All E.R., at p. 10) :

> Turning once more to the rule, it will be seen that it imposes on every such person an obligation to deduct out of the interest a sum representing the tax thereon. It is C plain that this does not necessitate the actual setting aside of cash to meet the tax. A deduction in account is sufficient. If instead of paying the full amount of the interest the debtor pays to his creditor the interest less the tax, he has fulfilled his obligation, even though the payment exhausts his cash in hand, or, if paid by cheque, leaves nothing standing to his credit at his bankers. So long as the net interest and no more reaches the hands of the creditor the Crown has no cause for complaint. Nor can the Crown be concerned with the form in which the net interest reaches the hands of the creditor. The creditor may, if he thinks fit, agree to accept in full satisfaction of the D net amount a bill or a bond or a chattel provided that the money value of what he gets in exchange does not exceed the net interest due. If this be so, a mortgagor and a mortgagee may validly agree that, in the event of failure by a mortgagor to pay the net interest as it falls due, the mortgagee will from time to time accept in full discharge of the mortgagor's liability to pay it a capital charge for a like amount upon the mortgage security. As and when each charge takes effect the tax will have been deducted within the meaning of the rule, for the capital charge merely takes the place of a pay- E ment by the mortgagor of the net amount and can never exceed that net amount in money value. In our judgment the arrangement that was made between the mortgagor and the society in the present case was of that nature.

My Lords, I am not concerned in the present case to consider the first part of this passage in the suggestion that the debtor, if he have only enough money to pay the net amount, is entitled to pay it all to the creditor, having made the prescribed deduction from an amount which he does not possess. It is clear F that the interest due may be paid in money's worth in such a way as to discharge the debtor's liability for the interest. But I find myself quite unable to agree that the creditor's liability for the interest was discharged as the result of the arrangement between the mortgagor and the society in that case. I cannot but think that the judges did not sufficiently bear in mind the distinction between debt and security. In my opinion there was no discharge of the debtor's liability for the overdue interest, and the result of the arrangement was the G improvement of the security, and an increased liability for interest by the overdue interest being made to carry interest. The same result was effected in the present case by the exercise of the option conferred by the indenture of further charge dated May 18, 1905. Accordingly, I am of opinion that *Lawrence, Graham & Co's.* case (1) was wrongly decided. Though LORD GREENE, M.R., thought otherwise in the present case, I am of opinion that this case falls within H the principle of the decision of this House in *Paton* v. *Inland Revenue Comrs.* (2) in which it was held that the practice of banks to add interest to principal by half-yearly rests did not constitute as between the bank and its customer a payment of interest by the customer within the meaning of sect. 36 (1) of the Act of 1918, so as to entitle the trustee of the customer's estate to recover the amount of income tax thereon. As LORD MACMILLAN states, at p. 356 ([1938] 1 All E.R., at p. 794) :

> . . . it is a condition of a claim for repayment of tax on bank interest under sect. 36,

sub-sect. (1), that the taxpayer shall have "paid" to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact not a fiction.

I may add three *dicta* which appear to me to describe well the substance of the transaction presently under consideration. First, from the judgment of LORD STERNDALE, M.R., in *Re Morris* (3), at p. 133:

> A . . . when these sums of interest come to be paid at the end of the time when payment is made, although interest has been charged upon them, and, although as a matter of bookkeeping, they have from time to time been added to capital, they do not cease to be interest of money—that is to say, they are overdue interest upon which interest has been paid.

Secondly, a sentence from the judgment of LORD RUSSELL OF KILLOWEN—then RUSSELL, J.—in *Re Jauncey* (4), at p. 476:

> B . . . in the case of such a provision as is contained in the present deed, which enables the interest to be capitalised, the interest is not capitalised because it is in fact paid, but because it has in fact not been paid.

Thirdly, a passage from the judgment of the Privy Council in *Raghunandan Prasad Singh* v. *Comrs. of Income Tax* (5), which was delivered by LORD MACMILLAN, and which in my opinion, is equally applicable in the law of England. C In 1904 a new mortgage had been accepted for an amount which included both the principal and the arrears of interest due under a previous mortgage of 1894, which was then discharged. The question was whether the mortgagees had thereby received payment of the arrears of interest; if so, the assessment appealed against would be out of time, but this view was rejected by the Board. LORD MACMILLAN said, at p. 138:

> . . . their Lordships are of opinion that there was in the circumstances no realisation D of the principal and interest of the original mortgage of 1894, and that when the assessees received the new mortgage for Rs. 7,33,135 which included the principal and interest of the original mortgage, they did not thereby receive payment of the principal and interest of the original mortgage. No doubt the grantors of the new mortgage were not identical with the grantor of the original mortgage and the property mortgaged was greater in extent, but the substitution effected cannot in any real sense be described as the equivalent of a realisation of the original mortgage, principal and interest. What happened was that the assessees received a new and substituted security for an E existing debt. To give security for a debt is not to pay a debt. If the assessees had received payment in kind of the amount outstanding on the original mortgage in the shape, say, of realisable shares or bonds, the case would have been different, but they merely received further and better security for their debt. It is, in their Lordships view, quite immaterial that the assessees discharged the original mortgage and all liability under it, for that was merely an incident in the transaction whereby the new security was substituted for the old.

F Accordingly, I am of opinion that there was no payment of interest within the meaning of rule 21, by virtue of the two instruments dated respectively Aug. 9, 1935, and Sept. 13, 1938, executed by Lady Liberty's trustees.

The respondent submitted a further contention that he was not a person by or through whom any such payment was made within the meaning of rule 21, on the ground, as I understood, that he was merely handing over the investments specified in the schedule to the heads of agreement dated July 20, 1939. G This contention is clearly untenable, as the heads of agreement make provision for the Crown's claim against the respondent and provide for the retention of one half of these investments in joint names as a security for the indemnification of the respondent, personally undertaken by the Liberty trustees, against all claims by the Crown and all costs by the respondent in connection with such claim.

H I am, therefore, of opinion that the appeal succeeds, that the judgments appealed against should be set aside, and that the assessment should be upheld, subject to adjustment of the figures in accordance with the decision of this House. The case should be remitted to the Special Commissioners for that purpose. I move accordingly.

LORD RUSSELL OF KILLOWEN: My Lords, I have had an opportunity of reading and considering the opinions of my noble and learned colleagues in this case. Being in agreement with them, I do not find it necessary to say anything, except that I concur in the motion which is proposed.

Lord Macmillan: My Lords, the late Mrs. Beyfus, whom I shall call "the mortgagor" was entitled to a reversionary interest under a deed of settlement. On the security of this interest she borrowed from Mrs., afterwards Lady, Liberty, whom I shall call "the mortgagee," sums of £2,300, £500 and £300 in 1899, 1901 and 1905 respectively. The mortgages which were granted in respect of the loans of £2,300 and £500 stipulated for the payment of interest at five per cent. per annum by equal quarterly instalments and this interest was paid up to May 18, 1905. When the third sum of £300 was advanced the mortgagor by the deed which she then executed agreed that interest on all three loans should thenceforth be at the rate of five and a half per cent. per annum, payable quarterly as before, but the mortgagee agreed to accept payment at the rate of five per cent. per annum if made punctually. The third mortgage also provided as follows:

> And it is hereby further agreed and declared that all interest which shall fall due on the said sums of £2,300, £500 and £300 . . . and shall not be paid within 21 days after the dates . . . appointed for payment thereof may at the option of the mortgagee be capitalised . . . and be added to the principal moneys hereby secured so as to make one aggregate sum charged on the property hereby mortgaged and carrying interest at the rate aforesaid.

The mortgagor further covenanted to pay to the mortgagee "the interest on such capitalised interest at the rate aforesaid"; and it was provided that "notwithstanding the capitalisation of the interest" the mortgagee should remain entitled to exercise "all the rights, powers and privileges of a mortgagee as if the interest had not been paid or capitalised."

The mortgagee died in 1920 and the mortgagor in 1933. No interest was ever paid by the mortgagor after the granting of the third mortgage in 1906. She left no estate other than the equity of redemption in the reversionary interest which she had mortgaged. In 1935 the trustees acting under the mortgagee's will executed an instrument whereby in the exercise of the option conferred by the third mortgage they "capitalised" as from May 18, 1935, "so much of the interest fallen due on the principal sums of £2,300, £500 and £300. . . as is now capable of being capitalised," and added the interest so capitalised to the principal sums "so as to form one aggregate sum charged on the property mortgaged," carrying interest at the rate provided. On Sept. 13, 1938, the mortgagee's trustees executed a further instrument capitalising in similar terms as from Aug. 18, 1938, the interest on the principal sums and on the interest thereon previously capitalised.

The mortagor's reversionary interest fell into possession on June 29, 1938, and the proceeds thereof became available towards satisfying the mortgages. The sum appropriated by the trustees of the mortgagee, in accordance with the agreement hereinafter mentioned, was sufficient to repay the three principal sums in full and to leave a balance to meet in part the accrued interest. It is with regard to this balance that the present controversy has arisen. The appellants, the Inland Revenue Commissioners, maintain that notwithstanding the exercise by the mortgagee's trustees of the option of capitalising unpaid interest, the arrears of interest have never lost their character of interest and that the respondent, the surviving trustee under the settlement, is bound, when making payment to the mortgagee's trustees of the proceeds of the mortgagor's reversionary interest, to deduct and account for income tax on the part of the sum which represents arrears of interest. The respondent resists this claim on grounds which I shall indicate later but which I may compendiously describe as the *ratio decidendi* of *Inland Revenue Comrs.* v. *Lawrence, Graham & Co.* (1). In view of the claim of the Inland Revenue the trustees of the settlement and the trustees of the mortgagee entered into an agreement whereby the former undertook to transfer the reversionary fund to the latter to be appropriated by them as therein mentioned, and the parties agreed that one-half thereof should be placed in their joint names as a security to the trustees of the settlement against all claims by the Inland Revenue Commissioners.

An assessment was made on the respondent as the surviving trustee of the settlement in respect of the tax alleged to be deductible by him under rule 21 of the general rules applicable to All Schedules of the Income Tax Act, 1918, on his paying over to the mortgagee's trustees the available fund in his hands so far as representing arrears of interest. The Special Commissioners discharged the assessment on the ground that the case was ruled by the decision of the Court of Appeal in *Lawrence, Graham & Co.'s* case (1). On a case stated MACNAGHTEN, J., and the Court of Appeal affirmed the decision of the Special Commissioners, also holding that the case was governed by the decision in *Lawrence, Graham & Co.'s* case (1). Hence the present appeal by the Inland Revenue Commissioners.

Before considering the validity of the claim for the Revenue it is in my view A essential to ascertain first the nature and effect of the contracts between the mortgagor and the mortgagee. The Revenue authorities are not parties to these contracts, which make no reference to their claims. They stand, as it were, outside and intervene only in virtue of their statutory rights. For myself and apart from the highly sophisticated arguments in which the matter has become involved, I should have thought, as indeed I do think, that the contractual position as between the parties to the mortgages was quite plain. B Interest at five and a half per cent, is stipulated for on the three capital sums advanced. If the interest is punctually paid five per cent. will be accepted. If the interest is not paid as it falls due the mortgagee has an option to capitalise it and add the interest so capitalised to the principal sums, the aggregate then carrying interest at the rate of five and a half per cent. If there were no option to capitalise or the option were not exercised the arrears of unpaid interest at C the stipulated rate would accumulate at simple interest. The option to capitalise is an option to exact compound interest. The effect of an agreement to pay compound interest or to "capitalise" interest is stated with perfect clarity by LORD STERNDALE, M.R., in *Re Morris* (3), at pp. 131-133, a statement with which I entirely concur. Such an agreement merely means that the interest at the stipulated rate as it falls due if it remains unpaid is added to the borrower's indebtedness and itself yields interest at the stipulated rate. It is, of course, true D that if the interest were duly paid the borrower would be entitled or bound when making payment to deduct income tax and the lender would be bound to grant a discharge for the full amount of the stipulated interest on receiving that amount less income tax. But if the interest is not paid no right or duty to deduct tax arises. The unpaid interest accumulates at the stipulated rate. In the case of a provision :

> E . . . which enables the interest to be capitalised, the interest is not capitalised because it is in fact paid but because it has not been paid . . .

as was said by LORD RUSSELL OF KILLOWEN, then RUSSELL, J., in *Re Jauncey* (4), at p. 476. It is because the interest has not been paid that the rate of five and a half per cent. is applicable. At the end of the day if funds become available through the realisation of the security for payment of the borrower's indebtedness for principal and interest, then in paying the part of the indebtedness F which consists of accumulated unpaid interest the right or duty to deduct tax emerges, but not till then.

The unpaid interest never ceases to retain its character as interest, although it has from time to time been added to the capital indebtedness and has carried interest in turn. All this seems to me, I confess, reasonably clear and is in exact consonance with the view of LORD STERNDALE, M.R., as expounded in *Re Morris* (3).

G But the respondents have argued strenuously that this is not a true analysis of the situation and they invoke the authority of the judgment of the Court of Appeal in the case of *Lawrence, Graham & Co.* (1). Lest I do injustice to the respondents' main contention I shall state it in the words of the third reason appended to their printed case which reads as follows :

> Because as held by the Court of Appeal in the case of *Inland Revenue Comrs.* v. H *Lawrence, Graham & Co.* (1), on the capitalisation of each instalment of interest the borrower and the mortgagee should be deemed to have agreed that a capital charge for the net amount of the interest less tax should be accepted by the mortgagee in full satisfaction for the sum due by way of interest.

If this be accepted as an accurate statement of the import of the judgment of the Court of Appeal in the case of *Lawrence, Graham & Co.* (1), I agree that it would assist the respondent's contention. But the Crown maintains that that judgment was erroneous and has brought the present appeal with the avowed object of arguing that it should be over-ruled.

It will be observed that the respondents in their reason which I have quoted do not in terms state that in a question with the Inland Revenue the interest must be held to have been *paid* on capitalisation. I do not see how they could have said so consistently with the judgment of this House in *Paton* v. *Inland Revenue Comrs.* (2). That was a case under the Income Tax Act, 1918, s. 36 (1), whereas the present case is under rule 21 of the general rules applicable to All Schedules under the Act, but the condition precedent of the operation of sect. 36 (1) and of rule 21 is the same. The former applies where interest is "paid" to a bank, the latter applies "upon payment of any interest." In each case, therefore, the first thing to ascertain is whether there has in fact been any payment of interest. In *Paton's* case (2) it was sought to be made out that the bank by the accumulation of interest with capital on a loan account at half yearly intervals had in effect been paid the interest as it accrued. The House rejected this argument. Construing the word "paid" I said, at p. 356 ([1938] 1 All E.R., at p. 794), that :

> . . . in my opinion this means that the taxpayer must really and not merely notionally have paid the interest ; there must be payment such as to discharge the debt ; the payment must be a fact not a fiction.

I adhere to this opinion and I am equally satisfied that the word "payment" in rule 21 has the same effect. With much respect, I think that the reasoning of Romer, L.J., in delivering the judgment of the Court of Appeal in *Lawrence, Graham & Co.* (1), at p. 195, ([1937] 2 All E.R., at p. 10), is based on a misconception. He proceeds on the view that the contract between the parties provided for the capitalisation not of the stipulated interest but of the interest less tax and that is also the contention of the respondent in this case. As I have said I do not so read the contract in the present case and I should not have so read the contract in *Lawrence, Graham & Co.* (1). I can see no right or duty to deduct interest except when interest is paid and it is not paid when it is accumulated. There is a manifest confusion between what the lender must accept on payment and what is due. The lender must discharge the borrower's indebtedness to pay interest at the stipulated rate on being paid that interest less tax, but it is quite a different thing to say that what is due under the contract is the stipulated interest less tax. The contract fixes the rate of interest, the Income Tax Act creates a supervening right or duty to deduct tax. To say the least, the validity would be doubtful of such a contract as Romer, L.J., suggests in *Lawrence, Graham & Co.'s* case (1) (at p. 195, [1937] 2 All E.R., at p. 10), whereby the lender agrees to accept in lieu and in discharge of the unpaid stipulated interest an additional capital charge of an amount equivalent to the unpaid interest less tax. At any rate that is not in my opinion the legal effect of the contract which your Lordships have to construe in the present appeal. I do not wonder that the respondent shrank from saying that the "capitalised" interest was "paid" on capitalisation of a sum equal to the interest under deduction of tax, for if there was payment of interest less tax then, this being a rule 21 case it would have been the duty of the payer, presumably the mortgagor, to deliver to the Inland Revenue Commissioners "an account of the payment . . . and of the tax deducted out of the payment" with a view to the assessment of the payer. Nothing of the kind was done.

It so happens in the present case that the amount of the fund now available towards satisfying the mortgages is not sufficient after paying the original principal sums to provide enough to pay the arrears of interest whether those arrears are calculated on a net or a gross basis. But in my opinion whatever is paid now out of the available fund to the mortgagee's representatives over and above the original capital loans is in law a payment of interest and not being made out of profits or gains brought into charge must suffer deduction of income tax, the payer being accountable to the inland Revenue for the tax so deducted.

A point was taken on behalf of the respondent that he was not the person "by or through whom" the interest was payable. So far as I understand the argument it was based on the terms of the agreement under which the available fund has been handed over to the mortgagee's trustees. But the fund so far as required to meet arrears of interest stands in the joint names of the parties. There is no substance in the point.

In my opinion your Lordships should over-rule the judgment of the Court of Appeal in *Lawrence, Graham & Co.* (1), and allow the present appeal. The case will have to be remitted in order that the amount of the assessment on the respondent may be adjusted.

LORD PORTER (read by LORD SIMONDS): My Lords, in this case the revenue authorities seek to recover income tax in respect of the interest or part of the interest payable upon certain loans secured by mortgage. The lender was a Mrs. Liberty, the borrower, a Mrs. Beyfus, the security a reversionary interest, and the total amount of the money actually advanced £3,100. The sum lent was ultimately secured by a deed of May 18, 1905, under which the interest was to be five and a half per cent. per annum reducible to five per cent. on punctual payment and payable quarterly on Feb. 18, May 18, Aug. 18, and Nov. 18: the interest if not paid within 21 days after it became due might at the option of the borrower be capitalised as from the date it became due. No interest was in fact paid after Aug. 18, 1906, until the payment of capital and interest mentioned later. On May 7, 1920, Mrs. Liberty died and her will was duly proved by the executors named in it. Mrs. Beyfus died on Jan. 11, 1933, but no representation was taken out to her estate. On Aug. 9, 1935, and again on Sept. 13, 1938, the trustees of Mrs. Liberty's will exercised their option and capitalised the interest which had fallen due. Meanwhile on June 29, 1938, the reversionary interest, then in the hands of the respondent as the sole surviving trustee of the settlement of one R. W. Cosier, fell into possession. After paying all proper charges and expenses this fund was valued at £7,438 12*s.* 5*d.* The Liberty trustees thereupon claimed that there was owing to them a sum of £8,301 8*s.* 2*d.*, and this they calculated firstly by taking simple interest on the £3,100 from Aug. 18, 1906, to May 18, 1935, deducting the appropriate amount of income tax due from year to year and capitalising the balance and adding it to the original debt, and secondly by treating the sum so capitalised in a similar manner up to Aug. 18, 1938, and then capitalising the balance of interest as before. After that date interest less tax is charged on the final sum so capitalised but no further capitalisation is resorted to.

Some question was raised by the Crown as to whether the capitalisation was rightly calculated, and whether the gross sum of interest without deducting the appropriate amount of tax should not have been included in the final amount instead of the nett amount less tax, but whichever principle is adopted the sum available for answering the debt is less than what is due and having regard to the view which I hold it is unnecessary to consider which calculation is the correct one. In either event the Liberty trustees will get less than the sum they are owed.

Having regard to these facts the Inland Revenue authorities claimed that before making payment to the Liberty trustees the Cosier trustees ought to deduct and pay income tax on the interest capitalised as aforesaid and on the interest on that interest. The Liberty trustees disputed this contention whereupon an agreement in writing was come to between the two sets of trustees on July 20, 1939. By that document it was agreed that after deducting certain proper charges and expenses out of the fund, the Cosier trustees should transfer the residue to be appropriated in payment of (i) all proper costs, charges and expenses, (ii) the capital sums of £2,300, £500 and £300, making £3,100 in all, and (iii) all interest (including capitalised interest) owing under the mortgages. A further term of this agreement was that one-half of the funds so appropriated should forthwith after such appropriation be placed in the joint names of the two sets of trustees as a security for the complete indemnity of the Cosier trustees against all claims by the Inland Revenue Commissioners and the costs thereof.

In pursuance of this agreement on various dates in January and February, 1940, the Cosier trustees handed over to the Liberty trustees all the funds (both capital and interest) then remaining in their hands and one-half now stands in the name of the Liberty trustees and the other half in the joint names of the two sets of trustees. The appropriation is as follows:

	£	*s.*	*d.*
(i) To costs of the Liberty trustees	105	15	10
(ii) To repayment of the principal sum	3,100	0	0
(iii) To interest thereon (including capitalised interest)	4,399	3	0

The question therefore arises whether the Cosier trustees on paying the principal sum due were under an obligation to deduct some and what sum to answer the claim of the Crown for income tax. The solution depends primarily on the construction of rule 21 of the General Rules applicable to Schedules A, B, C, D and E, which are contained in the First Schedule to the Income Tax Act, 1918. Leaving out unnecessary expressions that rule runs as follows :

> (1) Upon payment of any interest of money . . . not payable . . . out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

Sub-rule (2) enacts that the person so deducting shall forthwith render an account to the commissioners of the amount so deducted.

The deduction is to be made " upon payment " and similarly rule 19 which deals with annual payments out of profits or gains brought into charge to tax permits deduction on making the payment, though in that case the deduction is optional, not compulsory, and the deduction is of tax at the rate or rates of tax in force during the period through which the payment was accruing due, not at the rate in force at the time of payment. In each case if the deduction is made, its maker is assessed upon the amount so deducted. The Crown in these circumstances contended that the compulsory deduction required by the statute could only take place at the moment when actual payment was made to the Liberty trustees and that the appropriate sum to be deducted was a sum equivalent to tax at the rate then in existence upon so much of the fund as was rightly appropriated to interest (including capitalised interest). The respondent, as I understood, agreed that tax was deductible only on payment, but said that the capitalisation of interest under the terms of the mortgage deeds amounted to payment as each sum of interest became due or at any rate at the date of capitalisation, and that in making this payment the tax must be taken to have been deducted, by those who made the payment, at the rate then due. The argument went on by contending that the payment must be taken to have been made as and when the interest became due by the person then owing the interest and that this was either Mrs. Beyfus or those representing her estate and was not, at any rate until after the reversionary interest fell in, the respondent or his predecessors as trustees of the Cosier estate.

In support of their argument the respondents relied principally upon the decision in *C.I.R.* v. *Lawrence, Graham & Co.* (1). That case, like the present, dealt with the position of trustees of a reversionary interest to pay income tax upon the sum available for payment of interest which had passed through their hands on its way to the mortgagee when the reversionary interest fell in. Two points were decided. It was held (i) that the capitalisation of interest from time to time did not constitute a payment or payments of the interest by the notional making of a further loan from the mortgagee to the mortgagor which was then added to the capital sum due. The case of *Holder* v. *Inland Revenue Comrs.* (6) (affirmed in your Lordships' House upon another ground) was distinguished on the ground that principles applicable to the capitalisation of interest by bankers did not apply to interest due on a mortgage debt ; but (ii) that the agreement for capitalisation followed by capitalisation, either because the mortgage deed provided for that result following or because an option was given by it to capitalise by the mortgagor, did amount to payment, since there was an agreement to substitute this capital charge for payment in cash.

It was held, however, that the obligation was only to pay a nett sum, *viz.*, the gross sum due less tax ; the nett sum, therefore, and not the gross sum should be added to the capital and the borrower must be taken to have deducted on each occasion the amount due for tax. The judgment goes on, on p. 196 ([1937] 2 All E.R., at p. 11) :

> This being so, when the respondents paid to the society out of the purchase money the sums which had been so added to their principal moneys secured, they were paying a sum that had already suffered tax, and were under no liability to make any further deduction.

So it was said here the Cosier trustees in handing over so much of the capital sum in their hands as was applicable for the payment of interest were handing over a sum from which tax had already been deducted ; they had received and were paying only a tax-free sum and although the rest of the estate of the late Mrs. Boyfus (if there had been any) would have been liable for the tax so notionally deducted, the Cosier trustees were not.

My Lords, the representatives of the Crown sought to distinguish that case from this on the ground that the mortgage agreement in the *Lawrence, Graham* case (1) stipulated for nett interest only, whereas the present case stipulated for gross interest. Whether the mortgage deed in the former decision did require a payment of nett interest only may perhaps be doubted, but whether it did so or not cannot, I think, affect the principles to be applied. If then the decision in that case be right the decision of the Court of Appeal in this case was right also. The commissioners accordingly argued that if no valid distinction could be made, *C.I.R.* v. *Lawrence, Graham & Co.* (1) should be overruled.

My Lords, I cannot think that the provision contained in the mortgage deed now in question, whereby an option was given to the mortgagee to capitalise interest unpaid for 21 days after it became due, amounted to payment. As LORD RUSSELL OF KILLOWEN, then RUSSELL, J., when dealing with the question of capitalised interest said in *Re Jauncey* (4), at p. 476:

> . . . in the case of such a provision as is contained in the present deed, which enables interest to be capitalised, the interest is not capitalised because it is in fact paid, but because it has in fact not been paid.

To the same effect LORD STERNDALE, M.R., in *Re Morris* (3), speaking of capitalisation in a case where capitalisation was not expressly provided for, said, at p. 133:

> I think the word "capitalisation" used in many of the books quoted is a convenient word, but for the purposes for which it has been used in the argument before us it is a fallacious word, because it is taken as referring to capitalisation for all purposes, income tax and otherwise. I do not think that is the meaning of the word. In my opinion—not to beg the question—when these sums of interest come to be paid at the end of the time when payment is made, although interest has been charged upon them, and although as a matter of bookkeeping, they have from time to time been added to capital, they do not cease to be interest of money—that is to say, they are overdue interest upon which interest has been paid.

Had the sum in question in the present case been bank interest upon a loan the question whether the interest there had been paid by adding it to the capital sum borrowed would have been determined by your Lordships' decision in *Paton* v. *Inland Revenue Comrs.* (2). At an earlier date in *Inland Revenue Comrs.* v. *Holder* (6), the Court of Appeal had decided that the capitalisation of bank interest ought properly to be regarded as a fresh borrowing of interest by the borrower from the bank followed by the application of the sum so notionally borrowed in payment of the interest due, with the result that there was a payment at the moment of capitalisation. In *Paton's* case (2) your Lordships held that this was not so and that the debiting of interest in the account did not constitute as between the borrower and the bank, a payment of interest under the Income Tax Act, 1918, s. 36 (1).

My Lords, I do not find myself able to distinguish in principle between that case and the one the House is now considering. In each case there is a debt and in each case there is a contract under which in default of payment a so-called capitalisation of interest takes place. It is true that in the one case the contract is constituted by the custom of bankers and in the other by a deed of mortgage, but the substance though not the machinery is the same.

Capitalisation means no more than that interest which continues to be interest shall be treated together with the capital sum due as itself interest-bearing but does not alter its quality as interest.

There being then no payment until the funds were handed over in pursuance of the agreement of July 20, 1939, there could be no earlier deduction and up to that time no deduction of tax had in fact taken place. The Cosier trustees were, therefore, under an obligation to deduct from the sum paid to the Liberty trustees and account to the Revenue for the tax then due unless for some other reason they were excused.

It was sought to find such an excuse by a contention that they had not handed over money and could not deduct money from an obligation which they had met by handing over a commodity.

This argument, as to the merits of which I say nothing, fails in my view *in limine.* I think the Attorney-General was right when he said that under the agreement of June, 1939, the parties were not seeking to avoid payment in sterling—they were merely seeking to arrange a satisfactory position in which the Cosier trustees should retain part of the sum due in order to answer their liability (if any) to account for income tax.

I should allow the appeal.

Lord Simonds: My Lords, the primary question for decision in this case, the facts of which I need not restate, is whether the capitalisation by mortgagees of arrears of mortgage interest is for the purpose of rule 21 of the General Rules of the Income Tax Act, 1918, as amended by the Finance Act, 1927, s. 26, to be regarded as payment by the mortgagor of such interest. The question is the same whether, as in the present case, the capitalisation depends on the exercise by the mortgagee of a contractual right or, as is often the case, takes place automatically under the terms of the mortgage deed when interest is in arrear. This is a question of wide importance, and it is the avowed intention of this appeal to obtain a review of the decision of the Court of Appeal in *C.I.R.* v. *Lawrence, Graham & Co* (1), which answered it in the affirmative. A further question, which has been much discussed in this appeal, but is necessary for decision only if your Lordships accept on the primary question the reasoning of the Court of Appeal, is whether the capitalised interest is the net interest which the mortgagor would pay if he in fact paid it, *i.e.*, the interest less income tax, or the gross interest without deduction of tax. In the view which your Lordships take of the primary question, I do not find it necessary to express any final opinion upon this second question.

The Court of Appeal in the present case have, as I have indicated, followed their previous decision in *Lawrence, Graham & Co.'s* case (1). The *ratio decidendi* in that case is to be found in the excerpt from the judgment cited by Lord Greene, M.R., in the present case ([1944] 1 All E.R., at p. 429), the conclusion of which is that:

> . . . a mortgagor and mortgagee may validly agree that, in the event of failure by the mortgagor to pay the net interest as it falls due, the mortgagee will from time to time accept in full discharge of the mortgagors' liability to pay it a capital charge for a like amount upon the mortgaged security. As and when each charge takes effect the tax will have been deducted within the meaning of the rule [*i.e.*, rule 21], for the capital charge merely takes the place of a payment by the mortgagor of the nett amount and can never exceed that nett amount in money value.

With so much of this citation as is concerned with the question of gross or nett interest, I need not deal. But I must express my disagreement with that part of it which purports to be an analysis of what takes place when mortgage interest is capitalised, for it appears to me inaccurate and inconsistent with the reasoning which led to the decision of this House in *Paton* v. *C.I.R.* (2). The question in the simplest terms is whether, when the mortgagee capitalises interest, the mortgagor pays it; and the answer, in terms as simple, is that the mortgagee capitalises it just because the mortgagor does not pay it. It is not a form of payment: it is not a substitute for payment; the interest remains unpaid, but it is impressed with a new quality, *viz.*, that it carries interest as if it were capital. The interest was always charged on the security: it adds nothing to speak of it as a capital charge. I will assume that a mortgagee may accept in full satisfaction of interest something that is not money but money's worth. But that assumption does not justify the further step in the reasoning of the Court of Appeal that capitalisation of interest is payment of interest. I would accept as an accurate statement of that process the judgment of Lord Sterndale, M.R., in *Re Morris* (3), and would respectfully adopt the observations made upon that case by Lord Russell of Killowen in *Re Jauncey* (4).

My Lords, in the interval between the decision of *Lawrence, Graham & Co.'s* case (1) and that of the Court of Appeal in this case, *Paton's* case (2) came before your Lordship's House. I do not find any reference to the former in the latter case. But I cannot reconcile the two decisions. In *Paton's* case (2) the question was whether one who had borrowed money from his bankers "paid" the interest on that money when the bankers, in accordance with their usual practice, debited his account at the close of each half-year with that interest and carried it forward as part of an aggregate interest-bearing debt. To that question this House unanimously answered "No." LORD ATKIN cited with approval the observations of LORD RUSSELL OF KILLOWEN, then RUSSELL, J., in *Re Jauncey* (4), to which I have already referred. LORD MACMILLAN, in words which I would venture to repeat as decisive equally of that case and this, said at p. 356 ([1938] 1 All E.R., at p. 794) :

> . . . it is a condition of a claim for repayment of tax on bank interest under s. 36 (1) [of the Income Tax Act, 1918] that the taxpayer shall have "paid" to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact, not a fiction.

I can find no valid distinction between the so-called capitalisation of interest under such a mortgage deed as that now under consideration and the process of adding interest to capital with half-yearly rests according to the practice of bankers which was considered in *Paton's* case (2). If there is not payment of interest in the one case, so there is not in the other. I am willingly led to the conclusion that *Paton's* case (2) is an authority binding on your Lordships for the proposition that in this case there was no payment of interest when the mortgagees exercised their right of capitalisation.

A further question has been raised whether the respondent was a person "by or through whom" the payment of interest was made, when upon the falling in of the reversion in the funds constituting the mortgagees' security the agreement of July 20, 1939, was reached and carried out. Upon this question I entertain no doubt and will do no more than concur in the opinions expressed by your Lordships.

I concur in the motion that this appeal should be allowed.

Appeal allowed. Case remitted to the Special Commissioners for adjustment on the assessment.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Ranger, Burton & Frost* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MARSHALL *v.* THE ENGLISH ELECTRIC CO., LTD.

[COURT OF APPEAL (Lord Goddard, MacKinnon and du Parcq, L.JJ.), **March 20, 21, April 19, 1945.**]

Emergency Legislation—Essential work—Engineer—Employment prior to operation of Essential Work Order—Recognised practice of employers to suspend workman without pay for breach of discipline—Suspension implied term of contract of service—Practice recognised by the Order—"In accordance with the conditions of his service"—Suspension remaining part of employers' right—Essential Work (General Provisions) (No. 2) Order, 1942 (*S.R. & O.,* 1942, *No.* 1594), *art.* 4 (3).

The appellant was employed for many years as an engineer by the respondents in their works in Staffordshire to which subsequently the Essential Work Order applied. By the terms of the employment his contract of service could be terminated by an hour's notice on either side and he could be dismissed summarily for any act of indiscipline not amounting to serious misconduct. The Essential Work (General Provisions) (No. 2), 1942, art. 4 (*c*) provided, however, that employers, in the case of a breach of discipline not sufficient to constitute serious misconduct, might suspend a workman from his work without pay for a period not exceeding three days if such suspension was "in accordance with the conditions of his service." There existed at the respondents' works a well established and well recognised practice of suspending workmen for breaches of discipline, including negligence in the performance of work. On Jan. 9, 1944, the appellant was suspended for three days without pay for a breach of discipline. The local appeal board dismissed his appeal. The appellant then brought an action asking for a declaration that his suspension was not in accordance with the terms of his contract of service. It was contended on behalf of the appellant that as the express contract of employment could be terminated by an hour's notice it was impossible to suppose that there could be an implied term as to suspension. It was contended on behalf of the respondents that there was an implied term in the appellant's contract of service which entitled them to suspend the appellant from pay and work for a reasonable period and that this implied term arose (*a*) from the practice of the respondents of which the appellant was aware, and (*b*) from the custom in the engineering trade in England or, alternatively in Staffordshire :—

Held (du Parcq, L.J., dissenting) : the Order on coming into operation had the effect of making the right of suspension part of the rights of the respondents towards the appellant, and the practice at the respondents' works was, therefore, a condition of the appellant's employment within the true intent and meaning of the order.

[**EDITORIAL NOTE.** This case discusses the effect of the Essential Work Order upon the practice of suspending workmen for breach of discipline. The workman was here liable by the terms of his contract to dismissal at an hour's notice and it is said by Lord Goddard that in such circumstances the so-called right of suspension is in reality a right of dismissal with an option to re-employ. Whatever its nature, it is held by the majority of the court that the practice is an implied term of the contract of employment and being so, is in accordance with the conditions of the service within the meaning of the Essential Work Order. MacKinnon, L.J., suggests that the phrase " conditions of his service " might cover a practice such as that of suspension, which is wide-spread in the engineering trade, even if it could not be regarded as a contractual right. du Parcq, L.J., who dissents from the majority of the court, fails to find evidence that the workman was bound to obey the practice found, and holds, therefore, that the practice in question is not a term of the employment. He also questions whether, had the workman succeeded, it would have been a proper case for a declaratory judgment at all since he was in effect asking the court to inform him how he would stand if he should do any illegal act. It is important that this case should be compared with *Bird* v. *British Celanese, Ltd.*, p. 488, *ante*. In that case it was decided that such a suspension clause did not make the contract of employment illegal under the Truck Act and it must be noted that all the members of the Court of Appeal accepted the clause as a term of the contract. The operation of the Essential Work Order was only considered incidentally.

As to Essential Work (General Provisions) (No. 2) Order, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION [12] 397.]

Cases referred to :

*(1) *Sagar* v. *Ridehalgh (H.) & Son, Ltd.*, [1931] 1 Ch. 310 ; Digest Supp. ; 100 L.J.Ch. 220 ; 144 L.T. 480.

(2) *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438 ; 30 Digest 144, *199* ; 90 L.J.K.B. 1089 ; 126 L.T. 35.

Appeal by the plaintiff from a decision of Singleton, J., dated Dec. 7, 1944. The facts are fully set out in the judgment of MacKinnon, L.J.

J. W. Morris, K.C., and *N. R. Fox-Andrews* for the appellant.

Sir Walter T. Monckton, K.C., *G. O. Slade, K.C.*, and *B. J. M. MacKenna* for the respondents.

Lord Goddard [read by du Parcq, L.J.] : The facts of this case and the findings of Singleton, J., are sufficiently stated in the judgment that MacKinnon, L.J., is about to deliver and I need not repeat them in detail. In finding that there was in the respondents' works a well established and well recognised practice of suspending workmen for breaches of discipline including negligence in the performance of work the judge was well warranted by the evidence.

The question is whether that practice can be said to be in accordance with the conditions of the appellant's service within the meaning of the Essential Work (General Provisions) (No. 2) Order, 1942, art. 4 (3) (ii) (*a*). The appellant is not claiming either damages or wages but only a declaration, and in my opinion the case must be regarded as relating solely to the respective rights and liabilities of the parties under that Order, because it does not appear to me that it would be right for a court to be asked to make a declaration as to the terms of any particular contract of service generally where no relief is claimed in the action. As is well known the Essential Work (General Provisions) Order, 1942, drastically restricts the right of either master or workman to determine a contract of service to which the Order applies, and no doubt this has in some cases proved an obstacle in the way of maintaining discipline in places where work of national importance is in progress. It may well be that it was for that reason that the original Order was amended by introducing the paragraph which we have to consider. Its wording is involved, but the effect is that an employer may suspend a workman without pay for a period not exceeding three days as a disciplinary measure if the conditions of his service permit and subject to an appeal.

We are here dealing with a man whose contract of service was liable to be determined by an hour's notice given by either side, as indeed are those of the great majority of manual workers in factories and kindred establishments throughout the country. *Sagar* v. *Ridehalgh (H.) & Son, Ltd.* (1), shows that an established practice at a particular factory may be incorporated into a workman's contract of service, and whether he knew of it or not, it must be presumed that he accepted employment on the same terms as applied to other workers in that factory. The findings of the judge show that there was this practice at the respondents' factory; the employers had always asserted a right to suspend, the workmen had acquiesced in it and moreover in one instance had insisted on this penalty being imposed on an inspector who had struck a youth. It seems, therefore, that in the days before the Essential Work Order men including the plaintiff who could have left at an hour's notice if they did not like this practice have continued in their employment with knowledge of it and have insisted on its enforcement when they thought it right to do so. In my opinion it follows that the practice ought to be regarded as incorporated in the contract of service. But it is said that when analysed this practice is not suspension but dismissal in the case of a man subject to an hour's notice. As to this the respondents say that the contract is continuous; it does not renew from hour to hour but exists until notice is given and may last, and very likely in many cases does, for 20 years or more. So they contend that if they merely suspend and do not give a man notice they do not dismiss him but merely tell him that he is not to work for a specified time and they are not going to pay him during that time. What then is left of the contract of service during that time? Everything, say the respondents, except the obligation to work on the one side and to pay on the other. But in the case of an hourly servant are there any rights or obligations left except possibly the obligation to pay for one hour? It was suggested there might be pension rights, but there was no evidence that the appellant had any right to a pension, nor would one expect that a pension was secured as of right to a man subject to dismissal at one hour's notice.

In my opinion what is called suspension is in truth dismissal with an intimation that at the end of so many days, or it may be hours, the man will be re-employed if he chooses to apply for re-instatement. This indeed seems to be the effect of the evidence as the witnesses called for the respondents appear to agree that a suspended man can go off and seek employment elsewhere if he chooses to do so; he is under no obligation to return if he does not wish to submit to suspension. The fact is that were the Order not in existence the question could not in practice arise; if a man challenged the right of the employer to suspend him, or, while acknowledging the right, did not wish to submit to it an hour's notice from one or the other would have been the answer. But this does not destroy the practice, by whatever name it may be called, of dismissal mitigated at the discretion of the employer by a promise to re-employ. It is this practice which in my opinion the Order recognises under the term "suspension," and I think that within the true intent and meaning of the Order the practice is a condition of the employment. I, therefore, agree with the conclusion at which the judge arrived. As the practice was found to be well established at the respondents' works it is unnecessary to consider whether the evidence proved a trade usage to a like effect throughout Staffordshire. Considering that there was only evidence as to its existence at one other works, and beyond that all that could be said was that the respondents' witnesses would expect to find that it prevailed at other places in the country it must not be taken that I agree that a trade usage was proved but it is unnecessary to decide this matter. I agree with MACKINNON, L.J., that the appeal should be dismissed.

MACKINNON, L.J.: In one aspect this case only involves the question whether the respondents are liable to pay £2 12*s*. to the appellant, and it would, therefore, appear to be of trifling importance. But in the dispute underlying that question it is obviously one of immense importance to the respondents.

The appellant has for many years been employed by the respondents in their factory at Stafford. A term of that employment as to which there is no dispute, has been that the contract could be terminated by one hour's notice on either side. That power of dismissal by the respondents in fact, no doubt, provided them with a ready means of enforcing obedience by the appellant to their commands, and maintaining discipline among the workmen of whom the appellant was one.

The Essential Work (General Provisions) (No. 2) Order, 1942, which applies to the appellant and the respondents, by art. 4 deprived the respondents of any power to exercise their contractual right of dismissal, except for serious misconduct, or with the permission of a national service officer. But art 4 (3) provides, in effect, that the respondents in case of a breach of discipline not sufficient to constitute serious misconduct within the above clause, may suspend a workman from his work without pay for a period not exceeding three days if such suspension "is in accordance with the conditions of his service." There is a proviso under which the man so suspended may appeal to a local appeal board.

On Jan. 9, 1944, a responsible officer of the respondents for reasons of a disciplinary character suspended the appellant for three days without pay. The appellant appealed from this sentence to the local appeal board, and his appeal was dismissed. On Mar. 17, 1944, the writ in this action was issued. Its original claim was for £2 12s., the amount of wages lost to the appellant by his three days' suspension. The amended claim is in effect for a declaration that such suspension was not in accordance with the conditions of the appellant's service, and was, therefore, not within the rights of the respondents. The respondents obviously desire to contest this proposition so that there may be preserved to them the only means permitted to them by the Essential Work (General Provisions) (No. 2) Order, 1942, of enforcing discipline in their factory. The appellant, and those who support him, presumably desire that, by the respondents being deprived of this only means, there shall be complete liberty, or licence, for the workmen to do, or not to do, anything they please short of "serious misconduct."

The main contention of the respondents was that it was an implied term of the original contract between them and the appellant that the respondents should be entitled to suspend him from work and pay for a reasonable period, and that this implied term arose (*a*) from the practice of the respondents as to all their workmen which was known to the appellant, and (*b*) from the custom of the engineering trade in England or alternatively in Staffordshire. The appellant denied the existence of any such term, practice, or custom.

SINGLETON, J., heard a mass of evidence on five or six days and on Dec. 7, 1944, delivered a most elaborate and careful judgment. His first material conclusion was:

> In my judgment there was in the defendants' [respondents'] works at Stafford a well-established and well recognised practice of suspending workmen for breaches of discipline, disobedience to orders, and offences against good conduct in general.

Obviously there was abundant evidence to justify that conclusion, and I am satisfied it was a correct one. The judge then proceeded to consider, with the like elaboration and care, the question whether the respondents could say that by an implied term of the pre-war contract of employment the appellant agreed that the respondents should have the right to exercise this power of suspension. He decided this in favour of the respondents. It is this second question which has been mainly debated before us.

One matter discussed at much length was as to the precise terms of this suggested implied term if written out expressly. Three, if not five, possible versions are apparent, (i) the employer may suspend for a reasonable time for an act of indiscipline; (ii) the employer may suspend for a reasonable time for what he considers to be an act of indiscipline; (iii) the employer may suspend for what he considers a reasonable time for what he considers to be an act of indiscipline. Counsel for the respondents handed up to us a lengthy statement of what he suggested was the whole contract between the parties; in this the implied term as to suspension is in the first of the above three.

I think the chief argument for the appellant was that, as the express contract of employment was one which could be terminated by an hour's notice, it was impossible to suppose that there could be the suggested term as to suspension. And it was said that in truth the practice had been exercised not by virtue of any contractual right to exercise it,, but because of the obvious fact that the employer could insist on its acceptance under threat of dismissal if it were refused. There is obviously reason for the suggestion. But it seems to me far from conclusive against the existence of the right, as matter of contract. The written version, submitted by counsel for the respondents, of the whole contract is clearly a possible one, and I see no reason why it should be thought an unlikely one. A good many cases were cited to us, none of which seemed to me very directly in point. It is, I hope, no disparagement of the careful argument of counsel for the appellant if I say that I do not think I need discuss them.

In my opinion the judge was right in his conclusion that the right of suspension, which in fact had for years been exercised by the respondents, was exercised by virtue of an implied term in the appellant's contract of employment.

I would, however, add that I am by no means satisfied that it is essential to come to that conclusion so as to decide this case in favour of the respondents. The clause in the Essential Work (General Provisions) (No. 2) Order, 1942, permitting suspension for not exceeding three days is subject to a condition. That condition is not " if in accordance with the terms of his contract of employment." It is " if in accordance with the conditions of his service." The evidence in this case showed that in the engineering trade the practice of suspension was widespread and notorious. It seems to me at least likely that the conditional sentence in the Order was worded as it is for the very reason that by the practice of some trades such suspension was in fact exercised, though it might be doubtful if it could be said to be by reason of a contractual right to do so. Be that as it may, as the judge has found, as I think rightly, that there was before the Order came into operation " in the defendants' works at Stafford a well established and well recognised practice of suspending workmen," why was not that practice " a condition of the plaintiff's employment," even if it was not exercised by " a term of his contract of employment ? " I think it was. In other words it seems to me that the Order has made the right of suspension part of the rights of the respondents towards the appellant ; just as it clearly would have done if the words " in accordance with the conditions of his service " had been omitted though in that case it would have imported the right into all trades and not merely into those in which it had previously been in practice exercised.

I think the appeal fails and should be dismissed.

du Parcq, L.J. : I have had an opportunity of reading in advance the judgments which have been delivered. While I fully appreciate their force, I do not feel able to concur in the view that the respondents have proved that the penalty of suspension was inflicted on the appellant " in accordance with the conditions of his service." The question is a difficult one, and I differ with hesitation and regret from the opinion of Singleton, J., and of my Lords.

The judge found that " there was in the defendants' [respondents'] works at Stafford a well established and well recognised practice of suspending workmen " for breaches of discipline, disobedience to orders and offences against good conduct in general. Those included (he said) " negligence in the performance of work or carelessness in carrying out work." I am prepared to accept this finding, but it is not in my opinion conclusive. Such a practice as the judge finds to have existed may imply the existence of a rule empowering the employer to make, and compelling the workman to submit to, an order suspending the workman. On the other hand, it may be accounted for by the facts that a workman is in most cases willing to submit to suspension lest a worse fate befall him, and that in a number of instances workmen have so submitted not as a matter of legal obligation but of their own choice. In the former case it may well be true that every man who takes employment in the factory impliedly binds himself to submit to the rule. It may be said either that he knew of the rule and by accepting employment agreed to be bound by it, or that, without particular enquiry, he impliedly bound himself to observe whatever rules prevailed in the factory. If, however, all that is proved is a practice under which the workman elects whether he will be suspended or not, it is in my opinion impossible to say, when he does so elect, that he is being suspended " in accordance with the conditions of his service." The master's right to offer him the alternative of suspension, and the workman's right to accept or refuse the offer at his own pleasure, form no part of the conditions of the service. Any contract may be varied by agreement between the parties, not because there is an implied term in the contract under which they are empowered to vary it, but because the parties remain free to make what new bargain they please. A workman who knows of a so-called practice according to which he may enter into a new bargain, is certainly not binding himself to make a new bargain. The distinction between a practice which can be said to import a condition into contracts made with reference to it, and a practice which is no more than a series of fresh bargains seems to me to be of radical importance for the present purpose.

When the evidence is read with this distinction in mind, it seems to me to lead to the conclusion that the respondents failed to prove a practice of the kind which would import into all their service agreements a term under which the penalty of suspension might be imposed *in invitum.* I will deal only with the appellant's agreement, for we are not directly concerned with any other. He was paid by the hour. His employment could be terminated by an hour's notice on either side. Down to 1939, it could apparently have been terminated by one minute's notice. He could, of course, be dismissed without notice for misconduct inconsistent with the due and faithful discharge of his duties. It may have been, and I think probably was, a term of the contract that he could be summarily dismissed for something less than such misconduct, namely for "any form of indiscipline." So at least the respondents seem to have believed, since they had in 1943 warned their employees that any form of indiscipline rendered offenders liable to instant dismissal. The warning is contained in a booklet which purported to record "in a convenient manner existing works rules and regulations," and it was not suggested that there had been any material alteration in the rule as to dismissal during the period of the appellant's service or at any relevant time.

Now the condition which is said to be implied in the appellant's contract of service is "that if the appellant should be guilty of indiscipline the respondents should be entitled to suspend him from their employment without pay for a reasonable period." The manager's evidence showed that when the alleged right was exercised against other workmen no notice was given and the workman was not paid for an hour which he had not worked. It comes to this, therefore, that the respondents, claiming the right to dismiss summarily for acts of indiscipline, claim to be alternatively entitled to impose the lesser penalty of suspension. The distinction between suspension (in the sense in which the respondents use the word) and summary dismissal with an offer of new employment is one which I find it difficult to grasp. It was suggested by counsel for the respondents that one advantage of suspension from the workman's point of view was that he would not lose any right which he might have to a pension, but if the respondents' understanding of the practice is right this beneficial result does not attach to suspension necessarily or as of right. The respondents' manager went no further than to say with reference to his firm's pensions scheme and death benefit scheme that in the case of a short suspension they would probably not exclude the employee from the scheme. This seems to be another way of saying that if a dismissed servant is reinstated his employer may or may not restore to him a privilege to which he has no legal right.

Assuming, however, that the distinction between suspension on the one hand and dismissal with reinstatement on the other can be said to exist, the question remains whether, by the practice found, suspension was imposed *in invitum* upon the workman, or was agreed to by him in substitution for the greater penalty of summary dismissal or, possibly, in substitution for dismissal with an hour's notice. If any act of indiscipline was in truth enough to justify instant dismissal it follows that in every case in which the respondents suspended a workman they could if they chose have dismissed him summarily. If the respondents' right to dismiss for misconduct was not enlarged by contract, they could at any rate determine his employment by an hour's notice. It is thus plain that a workman who did not wish to leave the respondents' employment was under a strong inducement to acquiesce in an order of suspension. But was he, according to the practice found, bound to obey it? If not, it was not a condition of his service. The evidence seems to me to indicate that he was not so bound, and certainly to be consistent with his not being so bound.

The respondents were faced with a difficulty inherent in the nature of the practice alleged. If one is to judge from conduct alone, it is difficult, if not impossible, to say whether a workman is accepting a sentence of suspension because it is a term of his employment that he must accept it and the penalty for refusal to accept it is dismissal, or is accepting it because in the circumstances it suits him to accept it. Faced by such a problem it is natural to look for some documentary record of the contract between the parties. The only record we have here is the booklet to which I have referred, and it contained no reference whatever to suspension. The judge was perhaps right in saying that this omission is not conclusive, but it seems to me to be of much greater significance than he thought, and considerably to weaken the respondents' case. After a careful consideration of the evidence I cannot find that the respondents have proved that they had a contractual right to suspend the appellant. The question might have been settled one way or another if a workman who, after a sentence of suspension, neither gave notice to terminate his employment nor returned to it, had ever been sued for a breach of his contract. No such proceedings were ever taken, and indeed it seems to have been the respondents' view that in such circumstances a workman was free to go without notice if he so chose.

Many questions were raised in the arguments at the Bar, or suggest themselves, with which I do not now find it necessary to deal. If the respondents have a right to impose a sentence of suspension, is their right to give an hour's notice suspended during the period of suspension ? What of the payment of National Health Insurance contributions ? If there is an ascending scale of punishment for indiscipline—reprimand, suspension, dismissal—can a workman bring before the courts a complaint that he ought merely to have been suspended and not dismissed ? These and other questions must be left for consideration in any case in which they may hereafter arise.

For the reasons which I have given I am of opinion that the respondents failed to discharge the burden of proof which they assumed. As my opinion will not prevail, it is unnecessary for me to come to a final conclusion on the further question, which otherwise would have arisen *in limine* whether this is a case in which a declaration ought to be made in the appellant's favour. But for the provisions of R.S.C., Ord. 25, r. 5, it would be impossible to say that there was any *lis* between the parties. The appellant did not ask for damages. At one time he appears to have acquiesced in the view that it was lawful to suspend him if he had deserved that penalty, for he appealed against his suspension to the local appeal board. He is now willing to let bygones be bygones, but he wishes for guidance for the future as to his position. The respondents do not claim any right to suspend except for acts of indiscipline, or of carelessness, in the sense, I understand, of culpable negligence. Such acts are clearly breaches of contract and as such are wrongful and illegal acts, the gravity of which is increased by the fact that the country is at war. In effect, therefore, the appellant is asking the court to inform him how he would stand if he should do an unlawful act. If he intends to act lawfully, the question is merely academic. If he has it in mind to act illegally and wrongfully, it is no doubt convenient for him to know how severe the penalty is likely to be, or how easily he is likely to escape, but it seems strange that a court of law should be asked to expend time and trouble on providing him with this information. On the other hand it is right to say that the respondents are just as anxious as he is to know the legal position, and perhaps SINGLETON, J., was right to set himself the task of ascertaining the rights of the parties in circumstances which one may hope will not often arise. As LORD PARMOOR said in *Russian Commercial Bank* v. *British Bank for Foreign Trade* (2), at p. 457 : " . . . the matter is one of discretion and not of jurisdiction . . ." Though I confess my personal sympathy with the views which were stated *obiter* by LORD DUNEDIN in the case which I have just cited, I think it right to express the doubt which I feel whether it would have been desirable or proper to grant a declaratory judgment in the present case.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *W. H. Thompson* (for the appellants) ; *Joynson-Hicks & Co.* (for the respondents)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re COCHRANE, COCHRANE *v.* TURNER.

[Court of Appeal (Scott and Morton, L.JJ., and Cohen, J.), **March 28, 1945.**]

Estate Duty—Marriage settlement—Provision for application of settled income to household expenses—Income used by wife for personal purposes only—Husband's acquiescence in settled income used for wife's personal purposes—Husband's life interest in settlement reserved—Customs and Inland Revenue Act, 1881 (*c.* 12), *s.* 38—*Customs and Inland Revenue Act,* 1889 (*c.* 7), *s.* 11—*Finance Act,* 1894 (*c.* 30), *s.* 2 (1) (*c*).

Under a marriage settlement certain investments producing an income of £400 a year were settled by a husband upon trust to pay the income to his wife for life and after her death to the husband for life and thereafter for all the children of the husband from any marriage. The settlement contained the provision that the income so derived was to be expended by the wife "in current household expenses and management," but the wife, with the husband's knowledge, had used this income exclusively for her personal purposes. The husband died on Nov. 22, 1941, and the wife six months later. In determining whether estate duty became payable under the Finance Act, 1894, s. 2 (1) (*c*), the questions for the consideration of the court were: (i) whether an interest in the trust fund was reserved to the husband (who was the settlor) by the marriage settlement; and, if so, whether the interest reserved to the husband for life or any other period was determinable by reference to death; (ii) whether such interest in the settlement was released or abandoned by the husband at any time prior to his death by reason of the husband's acquiescence in his wife's use of the settled income for her personal purposes:—

Held: (i) on a proper construction of the settlement the husband would be entitled to an interest in the trust fund during the whole of his life. There was, therefore, an interest reserved to the husband for life determinable on his death within the meaning of the Finance Act, 1894, s. 2 (1) (*c*).

(ii) the fact that the wife applied the income received under the settlement for "current household expenses and management" for her personal purposes with the husband's acquiescence, was not sufficient evidence that the husband abandoned or released his right to have the income applied in accordance with the terms of the settlement.

Decision of Uthwatt, J. ([1945] 1 All E.R. 97) *affirmed.*

[**EDITORIAL NOTE.** A pre-nuptial settlement contained a provision whereby the settled income was to be expended by the wife in current household expenses, but with the husband's acquiescence had been used by the wife for personal expenditure. The Court of Appeal here affirm the decision of Uthwatt, J., holding that this curious provision, for which there is apparently no precedent, amounts to an interest for life within the Finance Act, 1894, s. 2, and the court refuses, on the facts, to draw any inference that the husband had abandoned or released his interest. The possible change in the character of the interest if the husband should survive the wife is held, as it was held in the court below, to be immaterial. Whether the wife continued to be bound by the trust for payment of the household expenses on surviving the husband is a difficult question on which the court refuses to express an opinion.

As to Settlements with Reservations, see HALSBURY, Hailsham Edn., Vol. 13, pp. 240, 241, paras. 230, 231; and for Cases, see DIGEST, Vol. 21, pp. 13-15, Nos. 61-72.]

Cases referred to:

*(1) *Tennant* v. *Lord Advocate*, [1939] A.C. 207; [1939] 1 All E.R. 672; Digest Supp.; 108 L.J.P.C. 65; 160 L.T. 441.

*(2) *A.-G.* v. *Farrell*, [1931] 1 K.B. 81; Digest Supp.; 99 L.J.K.B. 605; 143 L.T. 639.

(3) *Re Cochrane* (1), [1905] 2 I.R. 626.

Appeal from a decision of Uthwatt, J., dated Dec. 7, 1944, and reported [1945] 1 All E.R. 97. The facts are fully set out in the judgment of the court delivered by Morton, L.J.

R. F. Roxburgh, K.C., and *Hubert A. Rose* for the appellants.

J. H. Stamp for the Crown.

Morton, L.J. [delivering the judgment of the court]: This is an appeal by the trustees of a marriage settlement, and a beneficiary under that settlement, from a decision of Uthwatt, J., in favour of the Crown.

On Sept. 23, 1884, a settlement was executed in contemplation of the marriage, shortly after solemnised between Alfred Ormesby Cochrane and Adelaide Sophia Coleman. At the date of the settlement Cochrane (hereafter called "the husband") was a widower with two children, and Miss Coleman (hereafter called "the wife") was a spinster. The settlement was made between the husband of the first part, the wife of the second part, and two trustees of the third part. It recited the intended marriage, and recited that upon the treaty for the intended marriage it was agreed that certain investments should be settled by the husband and that these investments had been transferred into the joint names of the trustees. It was agreed and declared that after the intended marriage the trustees should hold the trust fund upon trust to pay the income thereof to the wife during her life, and after her death to pay the income thereof to the husband, if he should survive the wife, for his life, and that after the death of the survivor of the wife and husband the trust fund should be held in trust for all the children of the husband, whether of the intended marriage or any other marriage, who being a son or sons should attain the age of 21 years or being a daughter or daughters should attain that age or marry under that age in certain proportions.

Next came certain powers of maintenance and advancement and an ultimate trust of the capital for the husband in an event which did not happen. Then came the following words:

> And it is also agreed and declared that the income arising from the said trust fund to be paid by the trustees or trustee to the said Adelaide Sophia Coleman during her life shall be expended by her in current household expenses and management.

We shall refer to this agreement and declaration as "the income provisions." The remainder of the settlement is not material for the present purpose.

The income provision is a most unusual one. No member of this court, and no one of the counsel engaged in this case, had ever seen such a provision in any marriage settlement, and we were told that it does not occur in any of the well known books of precedents. It looks as if the husband, while he was willing to give the first life interest to the wife, desired to ensure that the income paid to her would be applied in payment of expenses which would ordinarily fall upon him. This may well have been a prudent provision at the time, but it is this part of the settlement which has given rise to the questions now before this court.

The husband died on Nov. 22, 1941, and the wife died on May 2, 1942. It is contended by the Crown that estate duty became payable in respect of the trust fund on the death of the husband under the Finance Act, 1894, s. 2 (1) (*c*), and that contention succeeded before UTHWATT, J. That sub-section provides that property passing on the death of the deceased shall be deemed to include (*inter alia*) property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, and as amended and re-enacted by the Finance Act, 1894. The relevant portion of the Customs and Inland Revenue Act, 1881, s. 38 (2), as amended by sect. 11 of the 1889 Act, and as amended and re-enacted by the 1894 Act, is as follows:

> The real and personal or moveable property to be included in an account shall be property of the following descriptions, *viz.* :—. . . (*c*) any property passing under any past or future settlement (including any trust whether expressed in writing or otherwise) made by any person dying after such day [that is, after Aug. 1, 1894] by deed or any other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor . . .

The questions argued before us were as follows: (i) Was an interest in the trust fund reserved to the husband (who was, of course, the settlor) by the marriage settlement? (ii) If so, was an interest in the trust fund reserved to the husband for life or any other period determinable by reference to death? (iii) If so, was such interest released or abandoned by the husband at any time prior to his death? There is no doubt that estate duty became payable in respect of the trust fund either on the death of the husband or on the death of the wife, but the duty payable will be very much larger if it is payable on the death of the husband, because the rate of estate duty payable in the case of the husband's free estate is much higher than that payable in respect of the free estate of the wife. The difference between the duty payable if the trust fund is aggregated with the husband's free estate and the duty payable if the trust fund is aggregated with the wife's free estate is a sum of over £4,000. Accordingly, it is in the interest of the Crown to contend that the property passed on the death of the husband.

In order to answer the first two questions, it is necessary to construe the settlement, and in particular the income provision. In our judgment the effect of the income provision is to make the wife a trustee of each sum which is paid to her by the trustees, in respect of the income of the trust fund, as and when she receives it. The provision imposes a trust upon her to expend the whole of each such sum in "current household expenses and management." The ambit of expenditure is reasonably well defined by these words, and if any doubt were to arise as to whether any particular expenditure was or was not within the words "current household expenses and management," such question could and would be determined by the court. Does the existence of this trust give the husband an interest in the trust fund ? Uthwatt, J., thought that it did, and we agree with him. It is, of course, quite clear that an interest in the income of property can be an interest in such property within the meaning of the subsection now under consideration, and the husband had a right to require that the wife should apply the income of the trust fund for a purpose which would wholly or partly relieve the husband of a liability, namely, the liability to pay current household expenses and management. The word "interest" has been given a wide construction. In *Tennant* v. *Lord Advocate* (1), Lord Russell of Killowen, dealing with the Finance Act, 1894, s. 4, said, at p. 213 :

> The word "interest" is a word capable of wide meaning, and I see no valid reason for limiting its scope in s. 4 as was suggested in the course of the argument.

In *Attorney-General* v. *Farrell* (2), it was held that a resettlement made by Major Alfred Stourton and his mother under a joint power was a settlement within the meaning of the subsection now under consideration, and that as Major Stourton was one of the objects of a discretionary trust of income under that resettlement, there was reserved to Major Stourton an interest in the property settled. The interest of the settlor in the trust fund in the present case is a substantial one ; much more substantial, in our view, than the interest of Major Stourton in the case of *Attorney-General* v. *Farrell* (2). In the latter case it was quite possible that Major Stourton would receive no income at all, while in the present case it was expressly provided that the whole of the income should be dealt with in the manner which we have mentioned, in relief of the husband.

We must now consider whether the interest reserved to the husband was reserved for his life or for any other period determinable by reference to his death. We insert the word "his" before "life" and before "death," because it is clear that the words "life" and "death" in the subsection mean the life and death respectively of the settlor : see *Re Cochrane* (3), at p. 634. In our judgment this question must be answered in the affirmative. We heard considerable argument on the question whether the income provision was effective only during the joint lives of the husband and the wife, or whether it would continue to be binding on the wife after the death of the husband. Uthwatt, J., thought that the former was the correct view. He held that the current household expenses referred to were the current household expenses of the matrimonial home and must be limited to expenses of the kind specified arising during the joint lives of the parties. We feel some difficulty in accepting this construction, having regard to the fact that the provision is expressed as applying to the income to be paid by the trustees to the wife "during her life," but it is unnecessary, for the purpose of this appeal, to express a concluded view as to whether the wife continued to be bound by this provision after the death of the husband. However this may be, it is clear that the "interest" of the husband in the trust fund under the income provision came to an end on his death. It is true that if the husband had survived the wife, that interest would have ceased while the husband was still living ; but in that event the husband would at once acquire on the death of his wife another interest in the income by virtue of the reversionary life interest reserved to him by the settlement. Thus it was certain, from the time when the settlement was executed, that the husband would have an interest in the trust fund during the whole of his life. If he should predecease the wife, that interest would remain unchanged during his life. If he should survive the wife, that interest would be changed from an interest under the income provision to an ordinary life interest. We agree with the observation of the judge ([1945] 1 All E.R. 97, at p. 100) :

> In one way or another the interest attached to the whole settlement income during the husband's life. The possible change in its character, is, in my view, immaterial.

Further, the interest which the husband was enjoying immediately prior to his death, whether under the income provision or by reason of his reversionary life interest, was bound to end at his death.

The result is that estate duty must be payable on the death of the husband unless it is established, the burden of proof being on the appellants, that the interest of the husband was abandoned or released by him. The evidence on this point is contained in the joint affidavit of the trustees. It is clear that from 1918 onwards, and possibly from a much earlier date, the whole of the income of the trust fund, amounting on the average to about £400 per annum, was paid into a " B " account in the name of the wife, and was used by the wife, not in accordance with the income provision, but exclusively for her own private purposes such as dress and other personal expenditure. This fact, and other facts to which we need not refer in detail, were relied upon by the appellants. No express release or abandonment by the husband, either oral or in writing, was proved, but the appellants invited this court to draw the inference that there had been such a release or abandonment. In our view, the facts proved are insufficient to make it right for this court to draw such inference. All the facts proved are equally consistent with the view that the husband, while acquiescing year by year in such user of the income, retained his right to object in any future year, though he did not choose to assert his right in any year prior to his death. It was very natural that the husband, who appears to have been prosperous during his life, should allow the wife year by year to use the income of the trust fund for her personal expenditure. The evidence is that the wife had no income of her own, and if the husband had not allowed this user of the trust income, he would naturally have thought it right to supply his wife with an allowance for her personal needs from some other source. We find nothing in the evidence which would preclude the husband in any year from saying to the wife : " I have not so far insisted upon the performance of the trust contained in the settlement, but I now insist on the income of the trust fund being applied this year in or towards current household expenses and management." As the judge put it, at p. 99 :

> His acquiescence contained no promise as to the future. The sword remained in its sheath ; it was not thrown away.

There being, in our view, no release or abandonment by the husband, it is unnecessary to consider the Finance (1909-10) Act, 1910, s. 59, as amended by the Finance Act, 1940, s. 43. It is also unnecessary to consider whether the income provision could have been enforced by anyone other than the husband. UTHWATT, J., thought not, but we doubt whether this is not too narrow a view of the obligation undertaken by the wife.

The result is that the husband thought fit to reserve to himself an interest in the trust fund for the whole of his life, and that the appellants have failed to prove that such interest was released or abandoned by the husband at any time prior to his death. This being so, the appeal fails and must be dismissed.

Appeal dismissed with costs. Order as to costs in the court below to stand.

Solicitors : *Bentleys, Stokes & Lowless*, agents for *Belk & Smith*, Middlesbrough (for the appellants) ; *Solicitor, Inland Revenue* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LESLIE POWERS *v.* R. BOWYER & SONS.

[Court of Appeal (MacKinnon, Lawrence, and Morton, L.JJ.), **April 11, 1945.**]

Workmen's Compensation—Partial incapacity—Workman employed after accident in different trade—Post-accident employment subject to trade board—No application made to remunerate as learner or as disabled man—Wages paid less than minimum rate—Full minimum rate to be brought into account in A *assessing compensation for partial incapacity—Trade Boards Act,* 1909 (c. 22), *s.* 6 (3)—*Trade Boards Act,* 1918 (c. 32), *ss.* 4, 5 (5), 9 (1), (2)—*Workmen's Compensation Act,* 1925 (c. 84), *s.* 9 (3) (i)—*Boot and Shoe Repairing Trade (Great Britain) Order D.* (76), 1943.

In 1941, during the course of his employment as a milk roundsman with the appellants, the respondent met with an accident as a result of which he was partially incapacitated. In July, 1944, the respondent B obtained employment as a boot repairer at the rate of 25*s.* a week. By Orders made in 1943 and 1944 under the Trade Boards Acts, 1909 and 1918, minimum rates of wages had been fixed for employees in the boot repairing industry. Such minimum rates were very much higher than the amount which the respondent was receiving. If proper applications had been made under the Acts and Orders, he could have received a smaller wage (i) by reason of his being disabled and (ii) by reason of his being a learner. No C such applications had been made and he was, therefore, entitled to the full wages of an operative of his class in the trade. The appellants contended that, since the respondent was legally entitled to the minimum rate fixed by the Orders and had a right of action against his present employer for the difference between the amount he was paid and the minimum rate fixed by the Orders, the rate of compensation payable under the Workmen's D Compensation Act, 1925, s. 9 (3) (i) must be calculated with regard to the minimum rate of wages which the respondent should be receiving and not with regard to the wages which he was actually receiving:—

Held: in view of the fact that the workman had a right of action against his present employer for the difference between the amount which he was being paid and the amount to which he was legally entitled, the words in sect. 9 (3) (i) of the 1925 Act, "the average weekly amount which he is E earning" meant the amount which the workman was legally entitled to receive under the Orders made under the Trade Boards Acts, 1909 and 1918, and not the amount which he was actually receiving.

[**EDITORIAL NOTE.** In this case an injured workman was employed after his accident at a wage lower than the minimum wage to which he was entitled under the Trade Boards Acts and Orders made thereunder. It is held that for the purpose of calculating compensation for partial incapacity the post-accident earnings were to be taken as F those to which he was legally entitled and not those which he was in fact receiving. The employer is entitled to the benefit of the right of action of the workman for the underpayments, although the workman was in fact incapable of doing the work for which full payment was contemplated by the Orders.

As to Compensation for Partial Incapacity, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914-917, paras. 1258-1260; and for Cases, see DIGEST, Vol. 34, pp. 414-416, Nos. 3364-3383. See also WILLIS'S WORKMEN'S COMPENSATION, G 36th Edn., p. 296.]

Case referred to:

(1) *Delta Mill* (1919), *Ltd.* v. *Blakemore* (1935), 104 L.J.K.B. 459; Digest Supp.; *sub nom. Blakemore* v. *Delta Mill* (1919), *Ltd.*, 28 B.W.C.C. 193.

Appeal by the employers from an award of His Honour Judge Hurst, K.C., made at the Tunbridge Wells County Court, and dated Feb. 15, 1945. In H 1941, in the course of his employment as a milk roundsman, the workman met with an accident as a result of which he was partially incapacitated. The facts are set out in the judgment of MacKinnon, L.J.

F. W. Beney, K.C., and *Gilbert Dare* for the appellants.

F. A. Sellers, K.C., and *A. A. Pereira* for the respondent.

MacKinnon, L.J.: This is an appeal from the decision of an arbitrator under the Workmen's Compensation Acts arising out of a claim by the applicant for compensation for an injury he had sustained. Unfortunately when employed by the appellants he met with an accident which resulted in damage to his foot. That caused a mysterious incapacity to use his foot owing, it is said, to a purely hysterical but perfectly genuine condition affecting him psychologically. He applied for compensation and the problem for the county court judge to settle was that propounded by sect. 9 (3) (i) of the Act of 1925 :

> . . . in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

We have been reminded by a decision of the House of Lords, in *Blakemore's* case (1) that those words " in some suitable employment or business " are only attached, or should be attached, to the second alternative. The difference to be considered is the difference between his pre-accident earnings and either the average weekly amount that he is earning or, if that is not available, the average weekly amount he is able to earn in some suitable employment or business.

There is no doubt about his pre-accident earnings. The question arises what were the post-accident earnings at the time of the arbitration in Feb., 1945, which were to be contrasted with and subtracted from those pre-accident earnings in order to ascertain the amount of his compensation for his partial incapacity. There is no doubt on the evidence that between July, 1944, when he entered the employment of a man named Parks, up to the time of the arbitration in Feb., 1945, he was being paid 25s. a week. Parks' business was that of a boot repairer. The case made by the appellants is that, inasmuch as this occupation in which the applicant was engaged with his employer Parks was that of boot repairer, their relations and his right to remuneration from Parks depended upon the provisions of the Trade Boards Act, 1909, and the Trade Boards Act, 1918, and two immensely complicated Orders (Boot and Shoe Repairing Trade (Great Britain), D. (76) of 1943 and D. (78) of 1944). It was pointed out that if this man was engaged as a boot repairer pursuant to the provisions of those Acts and those Orders, Parks was legally bound to pay him at a certain minimum rate fixed thereunder, that Parks was liable to be convicted if prosecuted for having paid him less, and that under these Acts the applicant would have either a right to ask, during the prosecution of Parks, that the difference between what he ought to have paid him and what he did pay him should be made payable by Parks over two years, or a civil right of action in the ordinary courts for that difference up to, I suppose, the period settled by the Statute of Limitations : (See the Trade Boards Act, 1918, s. 9 (1), (2)).

It is said that in considering the second limb of the sum to be considered under sect. 9 (3) (i) of the Act of 1925, *i.e.*, " the average weekly amount which he is earning," you ought to consider that which legally he has been entitled to be paid by Parks. That sum was not 25*s.*, but was a considerably greater sum which, under the Trade Boards Acts and the Orders, Parks was bound to pay. It is true that the county court judge has on the facts found that probably Parks employed him as a disabled man more or less as an act of charity and that he was not really the sort of person to whom the provisions of the Trade Boards Acts and the Orders under them were contemplated as ever applying. But the difficulty with regard to that is that these most elaborate provisions of the Trade Boards Acts and the Orders contemplate that sort of position, because under the Trade Boards Act, 1909, s. 6 (3), as amended by sect. 5 (5) of the 1918 Act :

> If a Trade Board are satisfied that any worker employed or desiring to be employed in any branch of a trade to which a general minimum time-rate . . . is applicable is affected by any infirmity or physical injury which renders him incapable of earning that minimum rate and . . . are of opinion that the case cannot suitably be met by employing him on piece-work, the Trade Board may, if they think fit, grant to the worker, subject to such conditions, if any, as they prescribe, a permit exempting the employment of the worker from the provisions of this Act . . .

It would have been impossible for the unfortunate Parks, who had no doubt never heard of the Trade Boards Act and knew still less of the Orders, to have made an application for a certificate pursuant to that provision. He never did so and there was no such certificate in existence.

Then, secondly, it was apparent from the evidence that when this man began to be employed by Parks in July, 1944, he knew nothing about boot repairing and was really a disabled man who was coming in to do his best to learn this job and to do a little work on behalf of Parks. As a learner and not really a skilled boot repairer it would be absurd to insist that he should be paid the very considerable rate of wages provided under the Trade Boards Acts and the Orders. That situation, the possibility of legally paying a man less than the minimum high wage fixed by the Acts and the Orders, is provided for in Pt. II of Order D. (76) of 1943, which provides (in para. 13 (2)) that the Trade Board may issue a certificate to learners and that :

> The learner must be the holder of a certificate issued by the Trade Board in accordance with rules from time to time laid down by the Trade Board or have made application to the Trade Board for such certificate which has been duly acknowledged and is still under consideration.

Here again neither Parks nor the applicant had ever heard of any of these things. I have little doubt that Parks did not apply for a certificate by the learner and there was none in existence.

I have striven to the utmost of my ability to see some means by which I might be enabled to say that the judgment of the county court judge, which I think was thoroughly sound sense, can be said to be right in law having regard to these most obscure and complicated pieces of legislation. To my great regret I have failed because it seems to me that under these complicated provisions there is in existence a right of action by the applicant, Powers, against Parks for the difference between the 25*s.* which he has been paid during that period from July, 1944, to Feb., 1945, and the minimum rate which is fixed under the Trade Boards Act and the Orders. The result is that I can see no escape from the conclusion that in fact the first item in the sum set for the consideration of the county court judge under sect. 9 (3) (i) of the 1925 Act, *i.e.*, "the average weekly amount which he is earning," is the amount which legally under these Acts he was entitled to receive and (if it is worth his while pursuing it) can now sue for and recover from Parks. That being so, with great reluctance I come to the conclusion that the county court judge was wrong in saying that what he was in fact receiving, namely, 25s., was, within the meaning of all these provisions, that which he was earning. As a result, unless the parties can agree the figure, I think the case must go back to the county court judge, in the light of the view which I have expressed, to ascertain what was the amount which he was entitled to receive from Parks under the legislation and to take that as what I call the primary figure under this section and to deduct that which is lower from the agreed figure of his pre-accident earnings and so ascertain the rate of his compensation for partial incapacity.

As I have said already, I have arrived at this conclusion with the greatest possible regret. It seems to me to be a totally unforeseen result of this combination of extremely complicated legislative provisions which are inelastic and which allow no discretion to those who have to administer them in cases in which they are perfectly inapplicable, or would have been regarded as perfectly inapplicable by any legislature which was facing them, but which unfortunately as a result of the language used, seem to me to result in the necessity of my saying that this appeal, to the extent I have indicated, must be allowed.

LAWRENCE, L.J. : I agree, and have nothing to add.

MORTON, L.J. : I also agree.

Appeal allowed with costs.

Solicitors : *Kingsley Wood, Williams & Murphy*, Tunbridge Wells (for the appellant) ; *C. Howe Browne*, agent for *Cripps, Harries, Hall & Co.*, Tunbridge Wells (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* J. BIBBY AND SONS, LTD.

Applied. I.R. Comrs. *v.* Silverts, Ltd. [1951] 1 All E.R. 703.

[House of Lords (Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter and Lord Simonds), **March 15, 19, May 17, 1945.**]

Revenue—Excess profits tax—Controlling interest in company—Directors holding shares as trustees of settlement—Directors with contingent beneficial interest in shares—"Controlling interest" meaning "controlling voting power"—Finance (*No.* 2) *Act*, 1939 (*c.* 109), *s.* 13 (2) (*b*), (3), (9), *Sched. VII, Pt. I, para.* 10 (2).

The issued capital of the respondent company consisted of 750,000 £1 preference shares and 500,000 £1 ordinary shares. The preference shares carried no votes. Each ordinary share carried one vote on a poll. There were eight directors who were respectively beneficial owners and registered holders of ordinary shares which amounted to a total of 209,332 shares. Three of the directors were registered as joint holders of 57,500 other ordinary shares which they held as trustees of their sister's marriage settlement. The respondent company employed in its business in the charge-accounting period from Apr. 1, 1939, to Dec. 31, 1939, an average amount of capital greater than the average amount in the standard period and was, therefore, by virtue of the Finance (No. 2) Act, 1939, s. 13 (3), entitled to have its standard profits increased by a percentage of the increase in its capital. Subsect. (9) of the same section provided that if the directors have a "controlling interest" in the company, the standard profits might be increased by 10 per cent., but where they had no such interest, only by 8 per cent. The question for the determination of the court was, therefore, whether the 57,500 shares ought to be added to the 209,332 shares for the purpose of determining whether the directors had a controlling interest in the respondent company:—

Held: upon a true construction of the Finance (No. 2) Act, 1939, the words "controlling interest" did not refer to the directors' beneficial interest in the company, but to the power of controlling by votes the decisions binding on the company in the shape of resolutions passed at a general meeting. The fact that a vote-carrying share was vested in a director as trustee was, therefore, as far as the company was concerned, immaterial. Accordingly, the directors were entitled to include the shares held by them as trustees in computing the total number of the shares held by them for the purpose of ascertaining whether they had a controlling interest in the company.

British American Tobacco Co., Ltd. v. *Inland Revenue Comrs.* (1) *applied.*

Decision of the Court of Appeal ([1944] 1 All E.R. 548), *affirmed.*

[**EDITORIAL NOTE.** This is an important decision in regard to excess profits tax in the case of director-controlled companies. The House of Lords hold, affirming the Court of Appeal, that in calculating whether directors have a controlling interest in a company, for the purpose of arriving at the statutory percentage in respect of the increase in its capital allowed by the Finance (No. 2) Act, 1939, s. 13, shares held as trustees may be included. The control of a company resides in the voting power of the shareholders. "Controlling interest" means the extent to which they have the power of controlling the decisions of the company by vote. From this point of view the fact that the beneficial interest in the shares is in a third party is immaterial, and no distinction can be made between the case when the director-trustee has, and when he has not, a beneficial interest in the shares. The share register is conclusive, and the company is not concerned with trusts affecting the shares. In Scotland, as Lord Macmillan points out, trustee shareholders are registered as such, but the trustee shareholders are in no different position *vis-a-vis* the company, and it is desirable that the Act should have an interpretation equally applicable in Scotland and England. The Court of Appeal made an exception from their decision for the case of a bare trustee but the members of the House of Lords refuse to give a decision upon this point, as not being in issue.

It was argued that the reason for the extra 2 per cent. increase in the standard profits in the case of director-controlled companies is as a compensation for the restriction on the diversion of profits by directors to their own remuneration, and that this would not apply if they were trustee directors, but the House refuses to accept this as a conclusive argument against including shares held as trustees.

For the Finance (No. 2) Act, 1939, s. 13 (9), see HALSBURY'S STATUTES, Vol. 32, p. 1197.]

Cases referred to :

*(1) *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.*, [1943] A.C. 335 ; [1943] 1 All E.R. 13 ; 112 L.J.K.B. 81 ; 169 L.T. 98 ; *affg.*, [1941] 2 K.B. 270 ; [1941] 2 All E.R. 651.

(2) *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610 ; 9 Digest 446, *2889* ; 48 L.J.Ch. 65.

(3) *Puddephatt* v. *Leith*, [1916] 1 Ch. 200 ; 9 Digest 413, *2664* ; 85 L.J.Ch. 185 ; 114 L.T. 454.

*(4) *Income Tax Comrs.* v. *Gibbs*, [1942] A.C. 402 ; [1942] 1 All E.R. 415 ; 111 L.J.K.B. 301 ; 166 L.T. 345.

(5) *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337 ; 9 Digest 200, *1242* ; 40 L.T. 339.

APPEAL by the Crown from an order of the Court of Appeal (LORD GREENE, M.R., MACKINNON and LUXMOORE, L.JJ.), dated May 2, 1944, and reported [1944] 1 All E.R. 548, reversing an order of MACNAGHTEN, J., dated July 28, 1943, and reported [1943] 2 All E.R. 419, disallowing an appeal by the taxpayer from a decision of the Special Commissioners confirming an additional assessment to excess profits tax for the chargeable accounting period Apr.-Dec., 1939. The facts and arguments are set out in the opinions of LORD RUSSELL OF KILLOWEN and LORD SIMONDS.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., *J. S. Scrimgeour* and *Terence Donovan* for the respondents.

LORD RUSSELL OF KILLOWEN : My Lords, this appeal arises out of an assessment to excess profits tax of the respondent (which I will refer to as the company), the dispute being whether the company is entitled to have its standard profits increased by 10 per cent., or only by 8 per cent. The decision depends upon the answer to the question whether the company is or is not " a company the directors whereof have a controlling interest therein," within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9).

The only relevant facts (and they are not in dispute) are these : The company's issued capital consists of 750,000 £1 preference shares and 500,000 £1 ordinary shares. The preference shares carry no votes. Each ordinary share carries one vote on a poll. There are eight directors who are respectively beneficial owners and registered holders of ordinary shares which amount to a total of 209,332 shares. Three of the directors are registered as joint holders of 57,500 other ordinary shares which they hold as trustees of their sister's marriage settlement, under the trusts of which they are entitled to a contingent reversionary interest in the shares. Upon these facts it is apparent that if these trustee shares are not to be taken into account in considering the question whether the directors have a controlling interest in the company, the answer must be that the company is only entitled to an increase of 8 per cent. Its business falls within subsect. (9) (*a*). If the trustees shares are to be taken into account the answer would seem equally clear. The company's business would then fall within subsect. (9) (*b*), and it can claim an increase of 10 per cent.

MACNAGHTEN, J., affirming the decision of the Special Commissioners, held that the trustee shares must be excluded from consideration. His opinion was thus expressed ([1943] 2 All E.R., at p. 421) :

> . . . as trustees they have no " interest " in the shares ; and as beneficiaries they have no " control " over the company ; and, therefore, in order to ascertain whether the directors of the company have a " controlling interest " therein, the shares held by them as trustees must be excluded.

This, as I read it, means that the control must be derived solely from voting power attached to shares which are held by the directors and of which the directors are the absolute beneficial owners.

The Court of Appeal took a different view, being of opinion that there was no justification for limiting the phrase " controlling interest " in sect. 13 to the case of beneficial interests, and that shares held by the directors as trustees must be taken into account. Further they were of opinion that the possession by the directors of some beneficial interest in the shares of which they were trustees was an irrelevant fact. I quote their words ([1944] 1 All E.R., at p. 552) :

It appears to us that, apart from the special case of a bare trustee, there is no half-way house between an interpretation which limits the expression to the case of beneficial ownership and one which includes ownership by trustees, irrespective of the fact whether or not they also have some beneficial interest in the shares which give control.

My Lords, I agree with the view of the Court of Appeal. When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words "controlling interest" is not the extent A to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from subsect. (9) (*a*) and include it in (9) (*b*), is the voting B power of its directors, not their beneficial interest in the company.

For the purpose of such a test the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast *vis-a-vis* the company, and the resolution until rescinded would be binding on it. The contention that upon the wording of sect. 13 the interest must be confined to beneficial interests appears to me to be but a C repetition of the argument which was rejected by this House in the case of *British American Tobacco Co.* v. *C.I.R.* (1) in relation to National Defence Contribution and the Finance Act, 1937.

It may be that, as the appellants contended, an object of the subsection now in question was to compensate a director-controlled company for the disability imposed on it by para. 10 of Pt. I of Sched. VII to the Act, but I cannot deduce from this fact, if it be a fact, that controlling interests must be confined D to beneficial interests which give control. I agree with the view of the Court of Appeal that upon the true construction of s. 13 (9) standing alone there could be no justification for so restricting the words, or reading into the subsection a provision to the effect that control held as a trustee should be disregarded.

A long and detailed argument was however addressed to us based upon other sections of the 1939 Act, and some provisions of the Finance Act, 1937, in which E the phrase "the directors whereof have a controlling interest therein" occurs, and in which it was contended that the word "interest" was necessarily limited to a beneficial interest. Therefore it was said, the word must be so limited in sect. 13 (9).

Thus the provisions in paras. 4 (*b*), 7 (*b*), 11 and 12 of Sched. IV to the Finance Act, 1937, were relied upon for this purpose. They are provisions which (to F put it shortly) prohibit or restrict the permissible amount of deductions from profits in the case of companies "the directors whereof have a controlling interest therein." The deductions being deductions in respect of payments which the company would be making to the directors or some or one of them for their or his own beneficial enjoyment (*e.g.*, for remuneration or rent) it follows so it was contended, that the controlling interest must also be one enjoyed by them beneficially. With all respect to those who advance this argument, G I can only answer *non sequitur*. I can find in it no compulsion so to restrict the meaning of the words "controlling interest." Reliance was also placed on the Finance (No. 2) Act, 1939, s. 13 (2) (*b*), in which, it was said, the phrase "owning not less than one-fifth of the share capital" could not mean owning as trustee, and therefore the controlling interest referred to earlier in the subsection could not refer to an interest owned as trustee. I am not prepared, as at present advised, to concede the first part of this proposition. Director-H controlled companies are as a rule private companies in which trustee directors are a not uncommon feature, just as in partnerships one may find a partner who, as the representative of a deceased former partner, is carrying on the business, for the benefit of beneficiaries, in partnership with a surviving partner.

Much reliance was placed on the provisions contained in para. 10 of Pt. I of Sched. VII to the Finance (No. 2) Act, 1939. The argument founded thereon is fully stated and dealt with in the judgment of the Court of Appeal. I need only say that I agree with the criticism and conclusion contained in that judgment. I agree also with the sympathy expressed with the taxpayer who (according to the appellants) has to discover the true meaning of the Finance (No. 2) Act, 1939, s. 13 (9), by a close scrutiny and analysis of other provisions of that and other Finance Acts. If his scrutiny and analysis were sufficiently close he might notice that para. 10 (2) suggests that a registered shareholder who is not a beneficial owner may directly control shares, and he might perhaps wonder, on reading the Finance Act, 1940, why the legislature had not inserted in the 1939 Act a provision similar to that which is contained in sect. 55 (5) of the 1940 Act.

Counsel for the appellants, at one stage of the argument, suggested that shares registered in the name of a director but held by him as trustee might be included in reckoning the controlling interest in cases where the trustee had also what was described as a predominating beneficial interest in the shares. For myself I am unable to appreciate how these supposed different degrees of beneficial interest, or the existence in the trustees of any beneficial interest can affect the question of control. The words " controlling interest " mean " controlling voting power " : that is the interest in view, not beneficial interest. As at present advised I agree with the Court of Appeal in the view that there is no half-way house between a construction which restricts the controlling interest to shares which are in the absolute beneficial ownership of the trustees and a construction which includes all shares of which the directors are registered holders. It is true that the Court of Appeal except the case of what they describe as a bare trustee, but express a view that the control would reside in the beneficial owner of the shares. The case envisaged is no doubt the case of the director who puts shares into the name of a nominee, taking probably a blank transfer executed by the nominee. I prefer to express no definite opinion in relation to this question, but to keep it as an open question to be debated when the necessity for a decision thereon in fact arises.

I would dismiss this appeal with costs to be taxed as between solicitor and client in accordance with the undertaking given by the appellants to the Court of Appeal.

My Lords, Lord Wright, who is unable to be present to-day, has asked me to say that he concurs in the opinion which I have just delivered.

Lord Macmillan [read by Lord Porter] : My Lords, the question is whether the directors of the respondent company have " a controlling interest therein " within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9) (*a*). The answer will affect the extent of the company's liability to excess profits tax for the chargeable accounting period from Apr. 1 to Dec. 31, 1939. The company employed in its business in that period an average amount of capital greater than the average amount employed in the standard period and is, therefore, entitled to have its standard profits increased by a statutory percentage of the increase in its capital. If the directors have a controlling interest in the company the statutory percentage applicable is ten per cent. ; if not, the statutory percentage applicable is eight per cent.

The control of a company resides in the voting power of its shareholders. In the respondent company the ordinary shares alone confer a right to vote at a general meeting. The directors are the registered proprietors of a majority of the ordinary shares. It would, therefore, appear to follow that the directors have a controlling interest in the company. The appellants, however, maintain that this is not so, for the reason that certain of the ordinary shares held by three of the directors are held by them as trustees under the marriage settlement of their sister. The contention is that these trust shares must on a sound interpretation of the statute be excluded from the reckoning for the present purpose, because the directors in question have not the sole, or at least not a predominant, beneficial interest in them. It is agreed that if these shares be excluded, then the directors do not among them hold a majority of the ordinary shares and so do not have a controlling interest in the company.

In my opinion the Court of Appeal rightly rejected the contention of the Inland Revenue Commissioners. The question whether the directors of the respondent company have the control of it by their voting power as shareholders must in my view be determined by the memorandum and articles of the company and by the register of shareholders. By the constitution of the company, as I have already mentioned, the voting power is vested in the ordinary shareholders and the register shows that the directors hold a majority of these shares.

As was said by JESSEL, M.R., in *Pulbrook* v. *Richmond Consolidated Mining Company* (2), at p. 615:

> The company cannot look behind the register as to the beneficial interest but must take the register as conclusive and cannot inquire . . . into the trusts affecting the shares.

So far as the company is concerned the relation between such of its shareholders as happen to be trustees and their beneficiaries is *res inter alios*. It A may be that a trustee shareholder may, as between himself and his *cestuis que trust*, be under a duty to exercise his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way (*cf. Puddephatt* v. *Leith* (3)). But with such restrictions the company has nothing to do. It must accept and act upon the shareholder's vote notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere.

B Suppose that all the shares held by the directors in the present case were held by them as trustees, could it be said that they did not control the company? If so, then in whose hands was the control of the company?

The Solicitor-General, in maintaining that the statutory words "a company the directors whereof have a controlling interest therein" should be expanded by the addition of the words "by reason of their being the beneficial owners C in the aggregate of shares entitling them to a majority of votes," submitted that the reason for the legislation justified this implication. The extra two per cent., he said, was by way of compensation for the restriction imposed elsewhere in the Act on the diversion of profits by directors to their own remuneration, but as it would be improper for trustee shareholders to vote for an increase in their remuneration as directors, at least without the consent of their beneficiaries, there was not the same need for the restriction in their case. This D may be so, but I do not think that it is a sufficient justification for so extensive a qualification of the plain words of the statute. Your Lordships were also referred to other instances of the use of the phrase "controlling interest" elsewhere in the Act, and also in the Finance Act, 1937, as supporting the Crown's contention. But this proved rather double-edged, for in one instance in the 1939 Act there occurs the expression "the beneficial owner of . . . more than five per cent. of the ordinary share capital of the company" (Sched. VII, E Pt. I, para. 10 (2)), which at least suggests that when the Legislature means beneficial ownership it knows how to say so. I remain unconvinced by this line of argument.

It so happens that the three directors in question have a remote contingent beneficial interest in the trust for which they hold shares. In the view which I take this is immaterial, but if beneficial interest were necessary, then, unless F beneficial interest were taken to mean sole beneficial interest, I can conceive complicated questions arising as to the extent of the beneficial interest of the shareholder in particular cases, which would be unfortunate for the working of an emergency taxing measure.

I would only add that I have not overlooked the fact that this legislation applies to Scotland as well as to England, and that in Scotland trustee shareholders are registered as such. The Act should, if possible, receive an interpretation G which will be equally applicable on both sides of the border. In *Income Tax Commissioner for the City of London* v. *Gibbs* (4), VISCOUNT SIMON, L.C., said, at p. 414:

> . . . in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries.

H I find no reason in the circumstances to which I have alluded for thinking that it would lead to a different result in Scotland. The reason why in Scotland trustees as such are entered in the share register is very fully explained in *Muir* v. *City of Glasgow Bank* (5), by LORD PRESIDENT INGLIS in the Court of Session and EARL CAIRNS, L.C., in this House, at p. 360. It would be inappropriate to go into the matter here. Suffice it to say that so far as his position *vis-a-vis* the company is concerned the trustee-shareholder whose name appears as such in the register is as regards his rights and liabilities in exactly the same position as a shareholder who is not a trustee.

I am accordingly in agreement with your Lordships that this appeal should be dismissed.

Lord Porter: My Lords, I have had an opportunity of reading and agree with the opinions of Lord Russell of Killowen and Lord Simonds. I cannot doubt that by the expression " a company the directors whereof have a controlling interest therein " is meant a company in which the directors by means of their shareholding are able to direct the affairs of the company according to their will. This is, in my view, the natural meaning of these words. It was however argued that if one looked at the object of the Act and searched its phraseology one would find that they bore the narrower meaning contended for on the part of the Crown and that to have a controlling interest necessitated the existence of a beneficial interest in those who exercised control.

My Lords, speaking for myself, I do not find any object apparent in the Act inconsistent with that expressed in the words themselves and like Lord Greene, M.R., I am unable to believe that the construction of the vital expression is to be ascertained by means of a meticulous search through obscurely worded portions of the Act in order to find a meaning which is not naturally apparent.

It was however urged that the use of the words " controlling interest " showed that there must be both control and an interest and that a person who was merely a trustee might control but could not be said to have an interest.

This contention to my mind lays far too great emphasis on the word " interest " I do not think one is entitled to split up the phrase and press the meaning of each portion in this way. The phrase is a composite one and the combination means no more than that the directors must have an interest such as enables them to control the activities of the company: it does not require some personal financial interest on their part which control enables them to exploit. It may be that trustees can ultimately be brought to book for activities which would not lay a beneficial owner open to attack or complaint. Nevertheless for good or ill the trustee like the beneficial owner controls, though if his powers be wrongly exercised they may in some way or other be capable of being challenged.

The Court of Appeal qualify the meaning of the phrase by excepting " bare trustee " from those having a controlling interest. As to this qualification I desire to reserve my decision. In a case such as the present however where the shares giving control are held by the directors not merely as trustees but also with some personal interest as well I cannot doubt that the holders have a controlling interest.

I would dismiss the appeal.

Lord Simonds: My Lords, the question for your Lordships' decision is whether in the case of the respondent company the statutory percentage in respect of the increase in the average amount of its capital which is allowed under the Finance (No. 2) Act, 1939, s. 13 (3) and (9), for the purpose of assessing excess profits tax should be 10 per cent. or 8 per cent. This depends on the answer to the further question whether the respondent company is " a company the directors whereof have a controlling interest therein." If yea, the percentage is 10 per cent.; if nay, it is 8 per cent. only.

The material facts can be stated very shortly. The respondent company has a capital of preference and ordinary shares. The preference shares can upon a question of control be disregarded. There have been issued 500,000 ordinary shares of £1 each, all of them fully paid, and carrying the usual voting powers. There are eight directors who beneficially own, and are registered as the holders of, 209,332 ordinary shares. In addition three of them are registered as the holders of 57,500 ordinary shares, which they hold as trustees of a certain marriage settlement. Under this settlement they have a contingent reversionary interest in the settled funds. The question is whether these 57,500 shares ought to be added to the 209,332 shares for the purpose of determining whether the directors have a controlling interest in the company.

What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company.

From this result the Crown seeks an escape by the contention that shares held by a director as trustee should not be included for the purpose of computing the controlling interest. In the appellants' argument in this House and in their formal reasons this absolute veto is qualified by the suggestion that, if the director has not only the legal ownership of shares but also a predominating beneficial interest in them, they may be brought into the count.

My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be. It is for this reason that, while respectfully concurring in every other line of the judgment of LORD GREENE, M.R., I would reserve further consideration of that part of it which deals with the case of the so-called bare trustee. His case is not yet before your Lordships and perhaps never will be. If and when it is, the validity of the distinction made by LORD GREENE, M.R., will have to be considered and I should myself require a more satisfactory explanation than has yet been given of a term which, though it has statutory sanction, has never, I believe, received statutory definition.

That the meaning which I have given to the words " controlling interest " is their natural and proper meaning I have no doubt. But the great part of the argument on behalf of the Crown has been directed to showing that to some extent in regard to this very provision, but more particularly in regard to other provisions of the same Act relating to excess profits tax, the purpose of the Act will be defeated unless the beneficial interest alone is regarded and the fiduciary interest disregarded. This is a cogent argument, if two conditions are satisfied, first, that the words in dispute fairly admit an alternative construction, and, second, that the purpose of the Act can be so clearly seen that one construction will serve it and the other defeat it. Neither of these conditions is in my opinion satisfied. I cannot ascribe to the words " controlling interest " a meaning which would impose alike on the tax-payer and the tax-collector the duty of searching out the beneficial interest behind the veil of legal forms. For it is to be observed that, if this argument is to be effective, it is not sufficient to say that the controlling interest lies not with the legal owner, but with the beneficial owner; the next step is to determine who, amidst all the complexities of successive interests, discretionary interests, mortgage and other interests, is for this purpose to be regarded as the beneficial owner. I must decline to admit an alternative construction which, departing from the plain and simple meaning of familiar words, requires such an unravelling. Nor is it so clear to me that, at least in respect of the provision now under review, the construction that I adopt is not consonant with what appears to be the purpose of the Act. But however this may be, and whatever may be the difficulties if this same construction is to be applied to the words in question where they occur in other parts of the Act, and particularly in para. 10 of Sched. VII (a matter upon which I express no opinion), I cannot allow myself to be deflected by such considerations from the plain and unambiguous meaning of the provision now under review.

I agree that this appeal should be dismissed.

Appeal dismissed with costs to be taxed as between solicitor and client.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Layton & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law*].

Overruled. RUSSELL *v.* SCOTT.
[1948] 2 All E.R. 1.

MOSLEY *v.* GEORGE WIMPEY & CO., LTD.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Uthwatt, J.), **May 3, 1945.**]

Income Tax—Licence to take surface gravel—Income tax deducted from money due under licence—Whether gravel pit a " concern " within Income Tax Act, 1918, (*c.* 40), *Sched. A, No. III, rr.* 1, 2, 3—*Income Tax Act,* 1918 (*c.* 40), *s.* 237, *Sched. D, Case I, All Schedules Rules, r.* 19—*Finance Act,* 1926 (*c.* 22), *s.* 28 —*Finance Act,* 1934 (*c.* 32), *s.* 21.

The appellants are contractors and, in 1941, needed gravel for concrete runways of an aerodrome they were constructing. Instead of buying the gravel from suppliers, the appellants made an agreement with the respondent, who was tenant for life of certain gravel-bearing land, which gave them the right of extraction on payment of tonnage rents for the gravel extracted, the appellants themselves undertaking to carry out the various operations of and connected with the use of the respondent's land for the purpose of extraction. On making payments to the respondent, the appellants deducted income tax at the standard rate of 10*s.* in the pound, claiming both the right and the duty to do so under the Finance Act, 1934, s. 21. The respondent brought the action to recover from the appellants the amount of tax so deducted. On appeal, the questions for the determination of the court were (i) whether the payments made to the respondent amounted to a " rent " within the meaning of sect. 21 (1) ; and if so whether the rent was payable in respect of an " easement " as defined by the section ; (ii) whether the easement was used, occupied or enjoyed " in connection with a concern " specified in Sched. A, No. III, rr. 1, 2, 3 :—

HELD : (i) the sums payable by the appellants to the respondent for the gravel was a " rent," and the licence granted to the appellants to extract gravel amounted to an " easement " within the meaning of the Finance Act, 1934, s. 21.

Stratford (*Inspector of Taxes*) v. *Mole & Lea* (1), and *Fitzwilliam* (*Earl*) *Collieries Co.* v. *Phillips* (2) *applied.*

(ii) the extraction, by the appellants, of gravel from the respondent's land was a " concern " within the meaning of Sched. A, No. III, rr. 1, 2, 3, and the appellants were carrying on that concern for the economic utilisation of their easement and, therefore, " in connection with " the concern. The tax was, therefore, rightly deducted from the rent.

Decision of MACNAGHTEN, J. ([1944] 2 All E.R. 135) *reversed as to* (ii).

[**EDITORIAL NOTE.** The question here is whether a contractor taking gravel by agreement with the tenant for life of gravel-bearing land, and making payment therefor, is paying rent in respect of an easement used, occupied or enjoyed in connection with a concern specified in Sched. A, No. III, of the Income Tax Act, 1918. The Court of Appeal reverse the decision of MACNAGHTEN, J., arriving at a unanimous conclusion by different lines of reasoning.

SCOTT, L.J., reviews the history of the income tax in relation to Sched. A, No. III, and holds that it has always been the intention of Parliament to include every form of real property in its tax on annual value. The common characteristic of all these properties is a " concern " extracting profit from land by a special form of user, different from the " normal " user of land for agriculture or constructional development, and this includes the extraction of gravel. SCOTT, L.J., finds it unnecessary to decide whether open-cast working of gravel can be considered " mining," but he disagrees with the view of MACNAGHTEN, J., that " mine " must be limited to underground workings only. It may be noted that in *Glasgow Corpn.* v. *Farie* (1888) 13 App. Cas. 657, LORD MACNAGHTEN said that in its primary signification it means underground excavations.

DU PARCQ, L.J., agrees with MACNAGHTEN, J., that a gravel pit is not a mine, but he disagrees with SCOTT, L.J., in his wide interpretation of Sched. A, No. III, as embracing all user of land by concerns, outside the so-called normal user for building, agriculture and amenities. He holds it to be wrong to interpret a taxing statute on the principle which has been applied to 43 Eliz., c. 4, but he finds each of the concerns expressly mentioned to be typical of a class, and agrees that a gravel pit is within r. 3.

UTHWATT, J., looks at the matter from the commercial point of view, and holds that there is a concern for the purpose of the Act if there is carried on at the gravel pit a commercial undertaking, however the produce is disposed of. Although the gravel undertaking is not a trade as defined in the Income Tax Act, 1918, s. 237, it is nevertheless an adventure or concern in the nature of a trade.

On the question of the payments being rent in respect of an easement UTHWATT, J., points out that the definition of an easement in the Finance Act, 1934, s. 21, is in sweeping terms, embracing many things not having the normal attributes of easements and he finds that the right to take gravel here considered is an easement for this purpose. On this branch of the case SCOTT and DU PARCQ, L.JJ., are in agreement with UTHWATT, J.

AS TO CONCERNS WITHIN INCOME TAX ACT, 1918, SCHED. A, NO. III, see HALSBURY, Hailsham Edn., Vol. 17, pp. 138-149, paras. 279-308; and FOR CASES, see DIGEST, A Vol. 28, pp. 8, 9, Nos. 28-43.]

Cases referred to:

*(1) *Stratford* (*Inspector of Taxes*) v. *Mole and Lea* (1941), 165 L.T. 378; 24 Tax Cas. 20.

*(2) *Fitzwilliam* (*Earl*) *Collieries Co.* v. *Phillips*, [1943] A.C. 570; [1943] 2 All E.R. 346; 112 L.J.K.B. 554; 169 L.T. 242.

*(3) *Edinburgh Southern Cemetery Co.* v. *Kinmount* (*Surveyor of Taxes*) (1889), 2 Tax Cas. 516; 28 Digest 10, *d*.

B *(4) *Waring* v. *Foden, Waring* v. *Booth Crushed Gravel Co., Ltd.*, [1932] 1 Ch. 276; Digest Supp.; 101 L.J.Ch. 33; 146 L.T. 107.

*(5) *Duke of Fife's Trustees* v. *George Wimpey & Co., Ltd.*, [1944] S.L.T. 41.

(6) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.* S.C. *Salisbury House Estate, Ltd.* v. *Fry*, [1930] 1 K.B. 304.

(7) *Croft* v. *Sywell Aerodrome, Ltd.*, [1942] 1 K.B. 317; [1942] 1 All E.R. 110; C 111 L.J.K.B. 215; 24 Tax Cas. 216.

(8) *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*, [1907] A.C. 264; 28 Digest 7, *15*; 76 L.J.K.B. 876; 97 L.T. 141; 5 Tax Cas. 230.

APPEAL by the defendant company from a decision of MACNAGHTEN, J., dated Apr. 26, 1944, and reported [1944] 2 All E.R. 135, where the facts are fully set out.

Frederick Grant, K.C., and *Heyworth Talbot* for the appellants, defendants D in the court below.

Cyril King, K.C., and *J. S. Scrimgeour* for the respondent, plaintiff in the court below.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell*, K.C.) and *Reginald P. Hills* as *amici curiae* for the Crown.

SCOTT, L.J.: The appellants are contractors and in 1941, for the purpose E of an aerodrome which they were constructing for the Air Ministry, needed gravel for concrete runways. Instead of buying it from suppliers who had themselves extracted it from land occupied or owned by them, the appellants made an agreement with the respondent, who owned gravel-bearing land, which gave them the right of extraction on payment of tonnage rents for the gravel extracted, the appellants themselves undertaking to carry out the various operations of and connected with the use of the respondent's land for the pur-F pose of extraction. There is no English verb appropriate in practical usage to that specific process; but "quarrying" and "mining" are generally similar. On making payment to the respondent, the appellants deducted property tax at the standard rate of 10*s.* in the £, claiming both the right and the duty to do so under the Finance Act, 1934, s. 21. The respondent in the action sues for the money deducted, contending that the terms of that section have no application to the payments of rent due to her from the appellants under the contract.

G The provisions of that section so far as relevant to the present case are as follows:

> (1) Where rent is payable . . . in respect of any easement, and—(*a*) the . . . easement is used, occupied or enjoyed in connection with any of the concerns specified in rules 1, 2 and 3 of No. III of Sched. A . . . the rent shall be charged with tax under Sched. D and shall, subject to the provisions of this section, be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of H the user of a patent as if it were such a royalty . . .
>
> (4) For the purposes of this section—(*a*) the expression "land" means lands, tenements, hereditaments and heritages; (*b*) the expression "easement" includes any right privilege or benefit in, over or derived from land; (*c*) the expression "rent" includes a rent service, rent charge, fee farm rent, feu duty or other rent, toll, duty, royalty or annual or periodical payment in the nature of rent, whether payable in money or money's worth or otherwise, but does not include any of the payments enumerated in rr. 1 to 6 of No. III of Sched. A. (5) Rule 5 of No. III of Sched. A (which provides for the computation of the annual value of the produce of any such concern as aforesaid) shall cease to have effect.

The questions of law raised by the appeal are these : (1) Was the payment a " rent " as there defined ? (2) Was the rent payable in respect of an " easement," as there defined ? (3) Was the easement used, occupied, or enjoyed in connection with a " concern " specified in the first three rules of No. III, of Sched. A of the Income Tax Act, 1918 ? If these three questions are answered affirmatively, the appellants are entitled to judgment. The judge decided questions (1) and (2) in favour of the appellants, relying upon the decisions in *Stratford* v. *Mole & Lea* (1), and *Earl Fitzwilliam's Collieries, Ltd.* v. *Phillips* (2). I agree with him on both points and need say no more on them. The real dispute turns on two issues raised by the third question which I will call (*a*) and (*b*) ; *viz.*, (*a*) whether there was any " concern " carried on by the appellants within the meaning of No. III, and (*b*) whether their enjoyment of the easement was " in connection with it." I will discuss (*a*) first, but the discussion of (*a*) will in effect cover nearly all the ground to be covered in regard to (*b*). (*a*) The case for the appellants was that they did in fact carry on a " concern " falling within the meaning of each one of the three first rules of No. III of Sched. A of the Income Tax Act, 1918, in connection with which they could and did use, occupy and enjoy these easements. Those three rules (omitting the proviso to r. 2) are as follows :

> 1. In the case of quarries of stone, slate, limestone, or chalk, the annual value shall be understood to be the profits of the preceding year. 2. In the case of mines of coal, tin, lead, copper, mundic, iron and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years . . . 3. In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, the annual value shall be understood to be the profits of the preceding year.

In their present form the three rules are practically identical with the three rules of Sched. A, No. III, contained in the Income Tax Act, 1842, [5 and 6 Vict., c. 35], s. 60. The only material differences are that all three rules now begin with the words " in the case " which were not present in those rules in 1842, and that the list of concerns is in each case now followed by the words " the annual value shall be understood to be " in substitution for the word " on " ; but that difference is apparent rather than real, as in 1842 the set of rules was preceded by these enacting words :

> The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited.

In the 1918 Act the omission of the words " properties " and the transfer by the Finance Act, 1926, s. 28, of the No. III properties of Sched. A, for purposes of charge, to Sched. D have together tended to obscure the essential characteristic of income tax on all real property, *viz.*, that it is and always has been a tax on the annual value of the land. It never was anything else. The device of splitting up the tax under separate schedules was invented in 1803 in order to remove the grievance previously felt by many at being compelled to disclose in the one return the whole of their income, as is stated in every edition of Dowell on Income Tax from 1902 onwards :

> No general return of income from all sources was required. The obligation to make such a return, involving, as it did, a disclosure of the taxpayer's circumstances in life, had been regarded as the chief objection to the tax. In lieu of a general return, particular returns of income from particular sources were now substituted.

See Dowell, The Act relating to the Income Tax, Ninth Edn., at p. 119, and Dowell's History of Taxation (1884), Vol. II, p. 220. The tax on the annual value of real property as a tax on income was introduced by the first Income Tax Act—that of 1799 [39 Geo. III, c. 13). It was continued by the more elaborate Act of 1803 [43 Geo. III, c. 122] in which the tax was split up and classified in the five schedules A to E ; and it is not unimportant to observe that in that Act all the various types of real property are grouped together in one long paragraph in sect. 31 under the title of Sched. A. It first imposes the duty on " lands," adds " and the said duty shall be construed to extend to all manors and messuages," and then gives a list of properties covering *inter* *alia* the contents of the present No. III of Sched. A (other than gasworks and railways); and concludes with these general words:

> . . . all other profits arising out of lands or tenements, and all hereditaments or heritages throughout Great Britain, of what nature or kind soever they be, belonging to any person or persons, bodies politic or corporate, guilds, fraternities, companies, or societies, whether corporate or not corporate, except in cases where other duties are charged thereon, as contained in Sched. D.

It is there plain beyond doubt that the intention of Parliament was to include every form of real property in its tax on annual value. From that intention, in my opinion, there has never been any departure by Parliament in subsequent income tax legislation. The 1806 Act [46 Geo. III, c. 65] split up Sched. A into "Numbers"—I, II and III; but I can see no ground for thinking that by the redistribution of the provisions of 1803 Parliament intended to restrict the ambit of taxation; nor do I think that the minor alterations of phraseology justify any such narrower construction. Rules 4, 5 and 8 of No. III of the 1806 Act represent what became rr. 1, 2 and 3 of the Acts of 1842 and 1918. The list in sect. 31 of 1803 was repeated in the 1806 Act, and precisely the same list appears again in the Sched. A of sect. 60 of the 1942 Act except that the words "gasworks" and "railways" are there added—presumably because by then they had become of obvious importance. Gas lighting was not a commercial reality in 1806. The first street lighting by gas was done in 1807 when a German, F. A. Winsor, lit Pall Mall. In 1812 he succeeded in founding the predecessor of the London Gas Light & Coke Co. Horse railways were used long before 1806, but the Stockton and Darlington Railway, the first constructed, was not accomplished till 1825. By 1840, however, 1,331 miles of English steam railways had been built; and the railway boom followed immediately; see ENCYCLOPAEDIA BRITANNICA, 11th Edn., for both the above.

It was contended before us for the respondent that the general words in No. III, r. 3, should be construed, as it were, distributively and so as restricted to a meaning generically similar to one or other of the specific concerns enumerated; but that idea seems to me foreign to the whole course of the legislation about Sched. A tax. The generic words should, for the reasons I have already stated, be interpreted widely, and as disclosing an express intention of Parliament to sweep into the net every concern of the general character I have endeavoured to describe above.

In sect. 74 of the 1806 Act (the Sched. A section) the duty in each of the three first present rules of No. III was made chargeable on the "persons, etc., carrying on the concern"; and that provision was revived by the Act of 1842, after 36 years of freedom from Income Tax. From 1806 onwards each of the properties contained in No. III of Sched. A was treated as being also the subject matter of "a concern carried on" in respect of it, because it was the concern which made the profits affording the measure of its annual value. Rule 4 of the 1918 Act merely repeats this treatment; and r. 5 repeats the effect of what in the 1842 Act was the general charging paragraph, following next after the lists of concerns contained in the first three rules, and requiring the owner, when he distributed his profits, to allow "out of the produce or value" of the properties the tax appropriate to that part of his profits which came out of the property in question.

The relevance for present purposes of this retrospect of legislative history is that it establishes or at least illustrates four propositions. (1) The tax chargeable under No. III of Sched. A is, just as much as the tax under No. I, a tax put on the owner of land in respect of the profits coming, directly or indirectly, out of the land, although in the normal types of land user the enquiry, as to whether there are any and what profits made out of it, is treated as superfluous, the rental value being taken as the measure of the yield. (2) All the various properties, described in rr. 1, 2 and 3 of Sched. A of the 1918 Act, and all referred to as "concerns" in rr. 4 and 5, came into the earlier versions of Sched. A solely because they were "properties" (*i.e.*, land), and, therefore, to be taxed on their annual value. (3) The main function or purpose of "Number" III (as of No. II of Sched. A with its list of incorporeal hereditaments) was to throw a wide net around a variety of properties the nature of which made rack rent an impracticable measure of annual value. The common characteristic of them is that a "concern" is extracting profits from particular land by some special form of user—a user other than what may be regarded as the normal user of land, which may perhaps be defined as user for purposes of natural production by means of agricultural or forestry, or merely as the site for housing or industry, or other constructional development which necessitates land as its foundation—all of such other types of user fall within No. I. (4) The generic conception which made it possible to segregate all the very diverse species of profit-making properties or concerns listed in No. III, as a class by themselves seems to me to have been on the one hand their common feature of a variable economic yield which makes the rack-rent an untrue or impracticable measure of annual value, and on the other hand, their dissimilarity to what I have called, for want of a better word, the "normal" use of land. It is that feature which made it impossible to include them in No. I of Sched. A, as it has been in the Acts of 1806, 1842, 1918.

I think it follows from these considerations that each descriptive word contained in the three lists should be given as wide a construction as is compatible with its English sense, in order to give effect to what appears to have been the dominant thought in the mind of Parliament when it decided to separate them from No. I and make a separate class of them in No. III. And this conclusion applies to generic as well as to specific words of description. The *Edinburgh Cemetry* case (3) is a good illustration for demonstrating what seems to me the intention of Parliament in regard to the proper interpretation of No. III.

It is not necessary for the decision of this appeal to express any final view as to whether the working of gravel beds, by mechanical grabs, is either "quarrying of stone" or "mining of gravel"; but I deprecate dependence upon judicial decisions on the meaning of words used in other statutes or instruments dealing with essentially different subject matters. For the purpose of the appeal I will assume that gravel excavation is not quarrying of stone within the meaning of r. 1, or mining of gravel within the meaning of r. 2. But I think it right to add that I do not accept the view of Macnaghten, J., that open-cast working of a mineral, whether coal, ironstone or gravel, cannot be mining, because, as he said, the word "mine" must in r. 2 be construed as limited to undertakings where the system of extraction is carried out by underground workings only. The word "mine" is, in every day knowledge, at any rate in Lancashire, with whose coal-mining I have been familiar since 1892, habitually used throughout the coal-mining industry of that county as a mere synonym of "bed," "seam" or "stratum" of coal (or of fireclay for that matter); and so used by colliers, mine managers, engineers, land agents and solicitors in daily parlance and in mining leases. In the second place when coal-mining began in England four or five centuries ago, it was by open-cast extraction at the outcrop, and that method of extraction has been revived and extended by many coal-mining concerns during the war, in order to increase the national output. It is thus again to-day an ordinary method of coal-mining, though of course the total yield is very much smaller than that from underground working. Thirdly, there are many coal mines in the world where the seam is immensely thick and the whole mining is done by open-cast method. Finally, mining of stratified iron has always in this country been done mostly, though not exclusively, by open-cast working. The great iron-works, for instance, at Corby are fed by stratified iron ore thus extracted from the surface of large areas of Northamptonshire by removal of some twenty odd feet of overburden; and there are other wide tracts of country where this is being done, the ironstone, gotten by a kind of powerful grab, being transported to the smelting works often many miles away. One difference between an "iron mine" in r. 2 and an "iron works" in r. 3 may be that the former was thought of rather as an undertaking carried on by a person or company concerned in extraction, and the latter by a person or company concerned in manufacture of the raw material supplied by the former. The latter meaning of "ironworks" is rather emphasised by the verbal additions to the word "ironworks" of particular engines of manufacture in sect. 31, Sched. A of the 1803 Act, but open-cast working of iron was plainly within that Act. I, therefore, should be inclined to hold (though I do not decide) that open-cast workings of any mineral falling within the scope of r. 2 (which is not limited to metallic ores) would be a mine; but it is not necessary to decide in this appeal whether for the purpose of that rule and the general context of all three rules, gravel is or is not such a mineral. In any event, I do not think that the case of *Waring* v. *Foden, Waring* v. *Booth Crushed Gravel Co.* (4), which was decided on a dispute as to whether gravel was an excepted mineral in a particular building lease, concludes that question.

It is, however, necessary to decide whether the appellants were, within the meaning of r. 3, carrying on a " concern " by this gravel extraction upon the respondent's land, and by the utilisation of it for their construction of the aerodromes for which they needed concrete, otherwise the easement could not be enjoyed in connection with it. I am clearly of opinion that they were. What they were doing was, in my opinion, plainly within the generic characteristics indicated by the terms of No. III of Sched. A, which I have already endeavoured to expound, and also within the heterogeneous list of more specific concerns contained in r. 3. I am unable to understand the basis of the argument addressed to the judge and to us, for the supposed identity between the " concern " and the " easement," upon which the judge decided against the appellants. Nor can I see any other argument in favour of that view. The case of the *Duke of Fife's Trustees* v. *George Wimpey & Co., Ltd.* (5) is no authority for that view, for it was decided on the pleading point of the absence of any averments that there was in fact a concern carried on by the beneficiaries of the easement in connection with which the easement was enjoyed, and the Dean of Faculty mistakenly considered that he could not argue the point even if the court allowed amendment. The idea of identification of the concern with the easement is in the light of the facts of the present case, and of the terms of the Finance Act, 1934, s. 21 (1), and of No. III of Sched. A, in my view misconceived. In the present case it appears to me obvious that there was an existing " concern " carried on by the appellants for the purpose of profit, based on their commercial need to obtain and utilise the supplies of gravel from the respondent's land under their contract with her. The only legislative object of Parliament in the relevant provisions passed in the Finance Act, 1934, s. 21, was to ensure that the true measure of the annual value of land of the description covered by No. III of Sched. A should enure to the benefit of the Revenue, instead of being lost through the accident of the primary recipient of that value having at the end of his year no profits to distribute. The substitution of the actual rent for the appropriate share of a problematical profit as the basis of charge and the deduction of the tax on payment of the rent effected the purpose of Parliament.

(*b*) The second question raised by the terms of the Finance Act, 1934, s. 21, —whether the enjoyment of the easement was in connection with the appellants concern, is almost a mere matter of words. If they were, as I have held, carrying on a concern for the economic utilisation of their easement, there was necessarily the " connection " predicated by the statute. I need say no more.

At the conclusion of the clear and convincing argument of counsel for the appellants, we realised that the question at issue was of such widespread importance to the Inland Revenue that we thought it right to ask the assistance of the Attorney-General as *amicus curiae*. We thank him and Mr. Hills for their attendance and help and are glad to know that the Inland Revenue Commissioners have recognised their fiscal interest in the issue by a generous attitude in regard to the costs of the parties to the litigation. The tax was rightly deducted from the rent. Since writing this judgment I have had the advantage of reading the judgments of my brethren. I recognise the force of the criticism of du Parcq, L.J., of what I say upon the interpretation of r. 3. I had in mind the principles of statute construction upon which he rightly insists and I do not think that I have transgressed them; but it is a difficult case, and is essentially one where a decision of the House of Lords would make it plain whether legislation is necessary. That taxing Acts should be quite clear is of fundamental importance. The appeal is allowed with costs here and below.

du Parcq, L.J.: I have had the advantage of studying the judgment of Scott, L.J., as well as that which Uthwatt, J., is about to deliver. I do not dissent from the conclusion at which they have arrived, but I will not pretend that I have arrived at my decision without difficulty and doubt.

My Lord has set out the three questions of law which we have to answer, and it will be convenient to deal with them briefly in their order. As to the first two I feel no difficulty. I agree that the payment made by the appellants to the respondent falls within the definition of "rent" in the statute, and that the benefit enjoyed by the appellants is within the definition of "easement." I agree with the judgment of UTHWATT, J., on these points, and will add nothing of my own. So far there is no difference of opinion between MACNAGHTEN, J., and myself. I now come to the third question, which is a composite question, involving more than one difficult point. I have not been persuaded that MACNAGHTEN, J., was wrong in refusing to hold that the gravel pit with which we are concerned was a "quarry of stone." Whether or not it is a quarry of stone is not, in my opinion, a question for experts, whether they be geologists, mineralogists or industrialists. I think that the words must be read according to their ordinary meaning, the meaning, that is, which they would convey to a reasonable and reasonably well educated man. I can only say that if anyone, indicating this gravel pit, had told me that it was a stone quarry I should have thought that he was describing it inaccurately. For the same reason, I do not think that this gravel pit is a mine within the next rule. It may be that some people in some parts of the country would call it a mine, but I believe that most people would be surprised to hear it so described. So far, then, I agree with the judge.

I now come to r. 3, and I agree with MACNAGHTEN, J., to this extent that I think, with him, that it is "indeed a perplexing one." The draftsman (or I suppose I should say the legislature, which must bear the responsibility for the draftsman's ingenuity) has made a list of a number of so-called "concerns" which have "profits from or arising out of any lands." They appear at first sight to be as heterogeneous as that collection of suitable subjects for varied conversation which began with "shoes and ships and sealing-wax." It is a depressing parallel, because the quotation is from a work which was designedly nonsensical, whereas we must assume that the draftsman of the rule was aiming at clarity, precision and perhaps even simplicity. I have been very willing, therefore, to revise my first impression, and I have done my best to make sense of the rule, as others have done, perhaps more successfully, before me. It is manifest that it was not the intention of Parliament to present us with a list of wholly unrelated sources of profit to a land-owner, since the catalogue is followed by the words "and other concerns of the like nature having profits from or arising out of lands," etc. What then is this common "nature"? Certainly not merely the quality of bringing profit to the land-owner, since in order to bring a profit-making concern within the rule it must be shown that it is "of the like nature" with the named profit-making concerns, and it is, of course, elementary that there are many concerns having profits arising out of land which do not come within the rule—*e.g.*, the business carried on by the companies in *Fry* v. *Salisbury House, Jones* v. *City of London Real Property Company* (6), and such sources of profits as are mentioned by LORD GREENE, M.R., in his judgment in *Croft* v. *Sywell Aerodrome* (7). It was submitted by the Attorney-General as *amicus curiae* that the genus to which all the named concerns belong consists of:

> . . . cases where land or its exploitation is the substance of the business but the user is abnormal in the sense that it is outside the normal use of land for the erection of buildings or for agriculture or for pleasure or amenities.

With all respect, I must confess that I do not find this definition of the genus wholly satisfactory. It is surely arbitrary to define the "normal" use of land as restricted to building, agriculture and enjoyment of amenities. From the earliest times it has been a normal use of land to drink from streams flowing through it and to catch fish in them, and it is not easy to see on what principle those who make an income out of letting flats or tilling the land should be liable only in respect of the annual value of the land while those who, for profit, grant fishing rights or sell their water are taxed on their profits under Sched. D. I must add that, with all respect to my Lords, I cannot bring myself to concur in his view that, in the light of the history of the legislation, such a wide meaning as he suggests must be given to this amorphous rule. If it was intended to cover every profit-making exploitation of land except those which admittedly are franked by payment of tax under Sched. A, r. 1, it would not have been difficult for the legislature to say so. It is not, I think, legitimate to construe a taxing Act on the principle which has been applied to the construction of the preamble to 43 Eliz. c.4, and to regard the rule as applying to all things "which by analogies are deemed within its spirit and intendment." I cannot think that the Tudor model can have been deliberately followed by Parliament in modern taxing Acts. If it has, the object must have been to achieve, not certainty, but uncertainty and obscurity. The argument of counsel for the respondent was not, however, directed, or at any rate not mainly directed, to this aspect of the case, and perhaps those whose familiarity with tax legislation is greater than mine are less perturbed than I confess myself to be by the melancholy obscurity of a rule which can only bewilder any taxpayer who is so audacious as to try to understand it. Indeed, the judgment of my brother Uthwatt, J., proceeds on the footing that counsel for the respondent conceded the point. I was not myself under the impression that counsel for the respondent intended to go so far, but if he did I am not, I think, absolved from considering the point and reviewing the observations of Macnaghten, J., upon it. I do not say that I am completely satisfied with my final solution of the puzzle. I have, however, come to the conclusion that each of the concerns mentioned in the rule must be supposed to have been intended to be typical of a class. This is the only way in which I can give a meaning to the words "of a like nature" for I cannot see any way of fitting all the concerns into one class. On this view I find an indication in the inclusion of salt works and alum mines in the rule that profits made by commercially dealing with mineral deposits on or under the land are brought within it, and I am prepared to agree that this gravel pit is within r. 3. I have already sufficiently emphasized the fact that I am not able to give the rule the extended meaning which commends itself to my Lord, and I would add that I am by no means satisfied that the *Edinburgh Cemetery* case (3) was rightly decided.

I must now deal with the submission of counsel for the respondent that the "easement" was not occupied in connection with any of the concerns in r. 3, since this contention found favour with Macnaghten, J., and derives support from the judgment of the Lord President (Normand) in *Duke of Fife's Trustees* v. *Geo. Wimpey & Co., Ltd.* (5). Notwithstanding my great respect for the opinion of the Lord President and the judge I cannot myself see any difficulty in holding that if the getting of gravel from this gravel pit is a "concern," the "easement" or benefit enjoyed by the defendants is enjoyed in connection with it. That it is legitimate to describe the getting of the gravel for commercial purposes as a concern seems to me to be reasonably plain. In *Duke of Fife's Trustees* v. *George Wimpey & Co., Ltd.* (5) Lord Moncrieff, dealing with the grant of a right to fish said, at p. 46:

> . . . if the proprietor authorises a commercial fishing company to fish, the "rent" he receives may quite properly be regarded as the measure of his interest in a trade which is associated with his land, but is at the same time an asset entirely independent of it.

In my opinion it would be immaterial in the case supposed by Lord Moncrieff to consider whether the company sold the fish to a fishmonger or to customers of its own by retail, or made it into fish paste or glue, or whether the concern of fishing for profit (which is a different thing from the benefit consisting in the right to fish) was, or was not, an integral part of a larger "concern." If I am right as to this, the contention of counsel for the respondent cannot prevail.

On the whole, therefore, I agree, although the doubt which I have sought to express has not been entirely dispelled that the appeal should be allowed.

Uthwatt, J.: I agree that this appeal should be allowed.

The first question is whether the activity carried on by the company at the gravel pit is one of "the concerns specified in rr. 1, 2 or 3 of No. III of Sched. A" as that phrase is used in the Finance Act, 1934, s. 21.

It was, as I understood the argument, conceded by the respondent that the gravel pit in question falls either within the description contained in r. 1 of No. III or within the description contained in r. 3 of No. III, but it was said that there is no "concern." The authorities establish that the mere use of land for a purpose specified in rr. 1, 2 or 3 does not of itself bring the undertaking involved in that use within the category of "concerns." To be a concern there must be in some real sense an undertaking carried on with a view to profit. (See *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (8), *Fry* v. *Salisbury House Estates, Ltd.* and *Jones* v. *City of London Real Property Co., Ltd.*

(6).) There is no "concern" unless there is a business enterprise involved in the particular use of the land, that use falling within one or other of the first three rules. On the facts of this case, there is no doubt that the company was here carrying on such a business enterprise. It was, however, argued that something more than the existence of a business enterprise was necessary. In substance the argument came to this that a business enterprise was not a concern unless it were a rounded off trading unit. In this case the company appropriated all the gravel won for the purposes of its contracting business. Trading involves commercial dispositions to third parties. No such disposition was here made as part of the gravel pit undertaking. There being no trade involved in that undertaking, there was, it was said, no "concern." In support of this argument, reliance was placed upon the Finance Act, 1926, s. 28. By that section the taxation of property of the classes specified in No. III of Sched. A is transferred to Sched. D, Case I, and there tax is charged under the head "Tax in respect of any trade not contained in any other Schedule." The reference to "trade" in that section, it was said, clinched the matter, and made it clear that there must be a trade.

In my opinion, the argument is not correct. Looked at apart from the Finance Act, 1926, the question whether an undertaking constitutes a "concern" does not depend on the particular way in which the produce is disposed of, but upon the character of the undertaking viewed as a whole. Just as occasional and disconnected sales of gravel won at a gravel pit by a landowner would not result in that being a concern, so in my view the absence of any sales would not deprive the gravel pit of the character of a "concern" if taken as a whole there is carried on at the gravel pit a commercial undertaking. Here there was such an undertaking. The estimation of the commercial results and of any consequent profits from the operation of that undertaking, presents no unusual feature.

Nor do I see that the argument is advanced by a consideration of the effect of the Finance Act, 1926, s. 28. In the first place, the meaning proper to be attributed to "concerns" in No. III of Sched. A is not, I think, altered by the transfer of the charge from Sched. A to Sched. D, Case I, where tax is assessable only in respect of a trade. The subject matter of the charge—a concern—remains the same. And assuming it to be the case that some undertakings of a class formerly assessable under No. III of Sched. A are not now assessable under Sched. D, Case I, by reason that they were not "trades"—I do not say that there is any such case—and assuming that the company's gravel pit undertaking falls within that class, the fact remains that under the Finance Act, 1934, s. 21, the question at issue is not whether the company is assessable in respect of the gravel pit undertaking under Sched. D, Case I, but whether its undertaking falls within No. III of Sched. A.

Second, "trade" is defined in the Income Tax Act, 1918, s. 237, as "including every trade, manufacture, adventure or concern in the nature of trade." The quarry undertaking of the company here may perhaps not be a "trade" as that word is used in the phrase "trade, manufacture," etc., but it is in my view an adventure or concern in the nature of trade, and therefore of a class assessable under Sched. D, Case I.

In my opinion, therefore, the gravel pit of the company was one of the concerns specified in rr. 1, 2 and 3 of No. III of Sched. A.

The next question is whether the rights granted to the company by the respondent are an easement within the definition contained in the Finance Act, 1934, s. 21. The right given to the company was a right to enter upon certain land and to quarry and take away gravel up to a specified amount, the sums payable being measured by the quality and amount of gravel taken, the company being under an obligation to replace the overburden removed by them in their operations.

"Easement" is defined as including "any right privilege or benefit in over or derived from land." So defined, it no doubt includes easements in the technical sense of that word, but the sweeping terms of the definition embrace many things which have not the attributes of easements as known to the law. There need not be a dominant tenement; the right may exist in gross. The privilege or benefit need not be a *jus in rem*; it may be a *jus in personam*. Profits *a prendre* are not excluded. The ordinary connotation of easement had indeed to be entirely discarded. The question to my mind is whether the substance of the transaction fairly looked at is accurately described as a right, privilege, or benefit in over or derived from land. The title of the respondent, who was tenant for life of the land, to enter into the transaction, was not questioned and the limited nature of her estate appears to me to be irrelevant in determining the nature of the arrangement which was in fact made. It is not, in my view, accurate to regard the arrangement as being in substance A a sale of gravel and the rights in respect of the land as mere incidents to that sale. The substance of the arrangements is, I think, that the company by contract with the respondent obtained a privilege over the land and a benefit derived from the land. That is, I think, its accurate general description.

I should add that the argument that there was not a " benefit derived from land " because payment had to be made on a commercial scale does not appear to me to be worth serious consideration. Most benefits can only be got by payment B and those to be derived from land are, unfortunately, no exception to the rule. In my view, therefore, there was an easement within the meaning of the section.

It was conceded that, if the company's gravel pit undertaking was a " concern " and the contract with the respondent resulted in the existence of an " easement," the " easement " was enjoyed in connection with the " concern " and that the sums payable were rent as defined by the Finance Act, 1934, s. 21. C On the basis of the views I have expressed, income tax was properly deducted on payment of that rent.

An alternative argument based on the All Schedules Rules, r. 19, was put forward by the company. That argument was suggested for consideration only if the company were right as to the existence of a " concern " and an " easement " and were wrong in its contention that the easement was enjoyed D in connection with a concern. The respondent's admission with respect to this last contention renders it unnecessary to deal with this argument.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Kenneth Brown, Baker and Baker* (for the appellants); *Maude and Tunnicliffe*, agents for *Taylor, Simpson and Mosley*, Derby (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

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GREEN *v.* SAMUEL WOODHOUSE & SONS.

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), **April 13, 1945.**]

F *Workmen's Compensation—Industrial disease—Cataract—Compensation only payable for* 4 *months from date of disablement unless workman has undergone operation—Proviso enabling arbitrator to continue payments if satisfied on advice of medical referee that operation within* 4 *months of disablement inadvisable—Power to continue payments only exercisable on advice of medical referee—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 43, *Sched. I, s.* 11— G *Workmen's Compensation* (*Industrial Diseases*) *Consolidation Order,* 1929 (*S.R. & O.,* 1929, *No.* 2)—*Workmen's Compensation* (*Cataract*) *Order,* 1932 (*S.R. & O.,* 1932, *No.* 424).

While employed as a chainmaker, the workman contracted a cataract owing to the nature of his work. His employers paid him full compensation for 4 months from Apr. 4, 1944, which was certified as the date of disablement, and stopped payments from Aug. 4, 1944, under the provisions of the H Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (as amended by the Workmen's Compensation (Cataract) Order, 1932), which provides that a person suffering from cataract shall not be entitled to compensation under the provisions of the Workmen's Compensation Act, 1925, s. 43, for more than 4 months unless he has undergone an operation for cataract. The workman claimed that the compensation should be continued under proviso (*a*) to para. 3 of the Order, which empowers the judge to continue payments where he is satisfied on the advice of the medical referee that an operation could not, for medical reasons, be performed within 4 months from the date of disablement. Upon the hearing before the county court judge medical evidence was called on behalf of the workman. The employers contended that the evidence was not admissible, and that the only medical evidence upon which the judge was to form his conclusion under the proviso was that of the medical referee. The judge, however, decided to take the evidence *de bene esse* without deciding whether it was admissible. The effect of the evidence was that it was not advisable to perform the operation within 4 months from the date of disablement, and that the cataract was not even yet ripe for operation. No medical evidence was called by the appellants. Upon the judge referring to the medical referee for advice, the latter flatly disagreed with the medical evidence given for the workman and stated that the operation could have been performed at any time after the disability arose. The judge, however, made an award in the workman's favour. On appeal, the employers contended that under proviso (*a*) to para. 3 of the Order the judge could exercise his power within the proviso in favour of the workman only if he were satisfied on the advice of the medical referee, and, since the advice of the medical referee was to the contrary, there was no evidence on which the judge could arrive at the conclusion that he did. For the workman it was contended that the proviso to para. 3 of the Order must be read in conjunction with all the other provisions to the Workmen's Compensation Act, 1925, including Sched. I, s. 11, and that a reference to a medical referee under Sched. I, s. 11 was not conclusive of the matter, but merely for the assistance of the judge :—

Held : (i) under the provisions of the Workmen's Compensation Act, 1943, s. 43 (3), the Order contained a special modification of the general provisions of the Act in regard to the assistance afforded to a judge having to decide a medical question by the calling in of the advice of medical referees.

(ii) the judge could exercise his power to continue compensation under proviso (*a*) to para. 3 of the Order only if he were satisfied on the advice of a medical referee that an operation could not, for medical reasons, be performed within 4 months of the date of disablement.

(iii) there was no evidence upon which the judge could find in favour of the workman that the conditions of the proviso had been satisfied and that he was satisfied on the advice of the medical referee, because the advice of the medical referee was directly contrary to the judge's conclusion.

[**EDITORIAL NOTE.** Compensation in respect of cataract is limited to 4 months unless the workman has undergone an operation for cataract. It is provided, however, that compensation may be continued for a further period if the arbitrator is satisfied " on the advice of the medical referee " that an operation could not for medical reasons be performed within 4 months from the date of disablement. Here medical evidence was led for the workman to the effect that the cataract was not ripe for operation within the 4 months. The medical referee completely disagreed, and it is held that his advice alone must be considered by the arbitrator. This may be contrary to the policy of the workmen's compensation legislation, as suggested by MacKinnon, L.J., but the court has no alternative but to construe the words of the Order.

For the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, see HALSBURY'S STATUTES, Vol. XI, p. 598. See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., p. 712.]

Case referred to :

(1) *Leonard* v. *Redbrook Tinplate Co., Ltd.*, [1931] A.C. 205 ; Digest Supp. ; 100 L.J.K.B. 225 ; 144 L.T. 346.

Appeal by the employers from an award of His Honour Judge Caporn, made at the Dudley County Court, and dated Jan. 19, 1945. On Apr. 13, 1944, the workman was certified as suffering, as from Apr. 4, 1944, from cataract due to exposure to rays from molten metal. The employers paid him full compensation under the Workmen's Compensation Act for 4 months from Apr. 4, 1944, and stopped payments from Aug. 4, 1944. The workman claimed compensation under the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, s. 3, proviso (*a*) (as amended by the Workmen's Compensation (Cataract) Order, 1932). The facts are set out in the judgment of MacKinnon, L.J.

Montague Berryman for the appellants.
S. R. Edgedale for the respondent.

MacKinnon, L.J.: The workman made a claim in respect of his inability to work as a result of his having contracted a cataract through the nature of his work for his employers as a chainmaker, in the course of which rays from the molten metal were cast into his eyes. *Prima facie* that was not an accident under the earlier provisions of the Workmen's Compensation Act, but was a ground for claiming compensation under that Act by virtue of some later provisions. By sect. 43 of the Act of 1925, the Act is applied to certain industrial diseases specified in the schedule. Cataract is not one of those, but by sect. 43 (3) it is provided :

> The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order.

By the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (as amended by the Workmen's Compensation (Cataract) Order, 1932), the Secretary of State declared that cataract should be treated as an industrial disease pursuant to that power conferred upon him under sect. 43 (3). The material parts of that Order with which we are concerned arise in para. (3) :

> A person suffering from cataract shall not be entitled to compensation under the provisions of the said section [*i.e.*, sect. 43] on account of that disease for more than 6 months in all, or for more than 4 months unless he has undergone an operation for cataract.

That introduces cataract as an industrial disease in respect of which a workman may claim compensation for injury, but to that claim there is a very stringent modification ; it is limited to either 6 months or 4 months, and the fact that there is that limitation of the ordinary right of a workman to recover compensation in respect of an industrial disease has been pointed out by Viscount Dunedin in *Leonard* v. *Redbrook Tinplate Co.* (1), at p. 210. That limitation of the workman's right is subject to two provisos in his favour : we are concerned with the first of them, which is this :

> Provided (*a*) that where the judge, committee or arbitrator is satisfied on the advice of the medical referee that an operation could not for medical reasons be performed within 4 months from the date of disablement, compensation may be continued for such further period and subject to such conditions as the judge, committee or arbitrator may direct.

In this case, when it was heard by the county court judge, evidence was called on behalf of the workman of a medical nature. He called an ophthalmic surgeon and objection was taken by counsel for the employers that that evidence was not admissible because the proviso to para. (3) of the Order indicated the sort of medical evidence upon which the judge was to form his conclusion under that proviso, and, it was argued, indicated as the only admissible evidence. That submission was made, and the judge said that he would take the evidence *de bene esse* without settling the question aye or no, was it admissible. The effect of that evidence was that, in the view of that surgeon, it was not desirable to perform this operation within the 4 months, or, indeed, up to the date of the hearing, because, in his view, the cataract was not ripe for operation and that it was desirable to postpone any operation until it was ripe—which I suppose means until the film over the eye had arrived at a sufficient degree of thickness to make its removal more practicable. There was no evidence called on the part of the employers, which was logical having regard to the submission of their counsel that no such evidence was admissible. They did read a medical report, which does not deal with this matter, but deals only with the question as to the fact of the man having cataract. The judge then made an order referring to the medical referee for advice :

> (*a*) Whether it is true that an operation could not for medical reasons have been performed within 4 months from the date of disablement, namely, Apr. 4, 1944, and (*b*) Whether in the view of the medical referee an operation should have been performed prior to Aug. 4, last, and if yes, when ?

In answer to that reference to him, Mr. Harrison Butler, the medical referee, wrote a letter to the judge on Nov. 3, 1944, which produced a further hearing. Quite shortly, the result of it is that Mr. Butler flatly disagrees with the view put forward by the gentleman who was called at the earlier hearing, says that this notion about waiting until the cataract is mature or ripe is an old-fashioned notion which everybody now has abandoned, that he personally disagrees with it entirely, and, finally, says :

> The answer to your first question is that an operation could have been performed within 4 months from the date of disablement, namely, Apr. 4, 1944. With regard to your second question, it could have been performed before Aug. 4, and at any time after the time when the cataract causes disability.

The judge came to a conclusion in favour of the workman. The only note of that is at the end of the judge's note of the evidence where he says :

> Award compensation at 30s.—supplementary as from Aug. 4, 1944, and costs B.

I do not think we have been provided with any note of the reasons which led to that conclusion. That must mean that, considering the medical evidence which has been heard *de bene esse* and considering the careful report of the medical referee he had come to the conclusion that he preferred the evidence that he had heard in court and for that reason came to the conclusion that for medical reasons an operation could not have been performed within 4 months from the date of disablement.

The employers appeal upon the ground that under proviso (*a*) to para. 3 of the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (as amended), the judge, if he is to exercise his power within this proviso in favour of the workman, must be satisfied on the advice of the medical referee ; that, reading it as a finding of fact by the county court judge, there was in this case no evidence upon which he could properly, or possibly, arrive at that conclusion seeing that the advice of the medical referee was flatly to the contrary. We have had a very interesting and able argument by counsel for the workman. The effect of his argument is that this proviso to para. 3 of the Order made by the Secretary of State must be read in conjunction with all the other provisions of the Act pursuant to which it is issued, and that reference to a medical referee must be a submission pursuant to sect. 11 of Sched. I to the Act, which provides :

> Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration.

He submitted that a number of questions have arisen as to the effect of such submissions made pursuant to that part of the Schedule to a medical referee, and it has been held that the report of the medical referee is not conclusive of the matter, that it is only a matter for the assistance of the judge or the arbitrator, and that he must make up his own mind upon the question taking into account the medical evidence which he has heard and the report of the referee to whom he has referred the matter. In other words, the effect of that is a suggestion that we ought to read this proviso not as saying " Where the . . . arbitrator is satisfied on the evidence of the medical referee that an operation could not . . . be performed within four months," but that we ought to read it as though it were " Where the arbitrator is satisfied on medical evidence including the report of the medical referee to whom he thinks fit to submit the question under sect. 11 of Sched. I."

The difficulty I feel about that, and to my mind it is an insuperable difficulty, is that the reading of that proviso cannot be enlarged in that way. Moreover, it is, I think, very material in this case to recollect that under sect. 43 (3) the Secretary of State when making an order extending the provisions of the section to other diseases (as he did in this case to cataract) may do so :

> . . . subject to such modifications as may be contained in the order.

It has been argued with great force that there is here a modification of the general provisions of the Act which, in the case of a reference to a medical referee pursuant to sect. 11 of Sched. I, has been held to mean that that is merely part of the medical evidence which the judge is to consider, including the medical evidence in the report, and upon which medical question the decision has to be his. The wording here in a proviso to the express enactment that compensation shall not last for more than 6 months or more than 4 months, a proviso in favour of the workman, is that he shall have something more than that in a case where the judge or arbitrator is satisfied on the advice of the medical referee. I see no escape from the conclusion that the judge must be satisfied upon that advice, and upon that advice only, that there is a special modification of the general provisions of the Act in regard to the assistance afforded to a judge having to decide a medical question by the calling in of the advice of medical referees.

In the result it seems to me that upon the clear wording of this proviso it is open to the employers to say, and that they are right in saying, that in this case there was no evidence upon which the judge could find in favour of the workman that the conditions of the proviso had been satisfied, and that he was satisfied upon the advice of the medical referee. He could not have been satisfied upon that advice because the advice of the medical referee was directly to the contrary of that which he concluded. It may be that this result would not have been contemplated or would not have been desired by the Secretary of State, or whoever drafted this Order for him, if he had foreseen the particular question that now arises in this case. As I ventured to say earlier, I have always thought it is rather a misfortune that a court has to construe an Act of Parliament, or what is equivalent to an Act of Parliament, according to the precise language used in the enactment in question and is not allowed to deal more generally with the question of the result of the Act, having regard to the whole policy of the Act, and to correct what it may well think was an accidental oversight in the precise language used which would bring about a result inconsistent with that general policy ; but unfortunately one cannot adopt that line of reasoning. One has to construe the words which the legislature or the enactment equivalent to legislation has used. In this case I think upon the language used that the employers are right in their submission, and that this appeal succeeds and must be allowed.

LAWRENCE, L.J. : I agree, and have nothing to add.

MORTON, L.J. : I agree. It seems to me that two conditions must be fulfilled before the arbitrator can exercise his power under para. (3) of the Order, of continuing compensation for a further period : one condition is that the arbitrator must be satisfied that an operation could not, for medical reasons, be performed within 4 months from the date of disablement, and the other condition is that he must be so satisfied on the advice of the medical referee. In the present case I think it is impossible to say that the second condition is fulfilled because the advice of the medical referee was exactly to the opposite effect. I agree with the order proposed.

Appeal allowed with costs.

Solicitors : *Berrymans*, agents for *T. Haynes Duffell & Son*, Birmingham (for the appellants) ; *Caporn & Campbell*, agents for *T. H. Ekins & Son*, Birmingham (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BURSTON *v.* INLAND REVENUE COMMISSIONERS (No. 2).

[KING'S BENCH DIVISION (Macnaghten, J.), **April 19, 1945.**]

Income Tax—Sur-tax—Investment company—Directions and apportionments—Whole income apportioned to member—No appeal by company against either directions or apportionments—Appeal by member—"Aggrieved" person—Right of appeal confined to company only—Finance Act, 1922 (c. 17), *s.* 21, *First Schedule, paras.* 1, 2, 3, 10—*Finance Act*, 1936 (c. 34), *s.* 19 (5)—*Finance Act*, 1939 (c. 41), *ss.* 14, 15.

The appellant was assessed to sur-tax for the years ended Apr. 5, 1940, 1941 and 1942. The assessment followed directions made on the Burlah Trust, Ltd., an investment company, which had no estate or trading income within the meaning of the Finance Act, 1939, s. 14. The actual income of the company for the years in question was apportioned wholly to the appellant, notices of such apportionment having been given to the company. No appeal was made by the company against either the directions or the apportionments. The appellant appealed to the Special Commissioners on the ground that the amounts apportioned to him were excessive. The Special Commissioners disallowed the appeal holding that, in the absence of an appeal by the company, the apportionments were final and conclusive and could not be disturbed by a member of the company in an appeal against the consequential sur-tax assessments. On appeal, it was contended on behalf of the appellant, that a right to appeal, which by the Finance Act, 1922, s. 21, was given only to an "aggrieved" person, could be maintained under the Finance Act, 1936, s. 19 (5) which provided that where a notice of charge was served on the company under the Finance Act, 1922, s. 21 (3) and the company did not pay the tax within the prescribed time limit, the tax might be recovered from the member on whom the tax was assessed; where, therefore, an excessive amount of the company's income had been apportioned to a member, such member must, by inference, have, as an "aggrieved" person, a right to appeal:—

Held: (i) under the Finance Act, 1922, s. 21, a member to whom part of the income of a company had been apportioned, had no right of appeal against the assessment made upon him in the name of the company, because he was under no obligation to pay tax.

(ii) the provisions of the Finance Act, 1936, s. 19 (5) could not be construed as inferentially giving a right to appeal which, apart from that provision, would not exist.

(iii) an appeal by the company against the apportionments would, under the Finance Act, 1939, s. 15 (5), and the Finance Act, 1922, First Sched., paras. 1-3, carry the right to appeal from the decision of the Special Commissioners to the Board of Referees, whereas a member, were he given a right to appeal, could then require the Special Commissioners to state a case for the opinion of the High Court, with the result that the two tribunals might arrive at different and inconsistent decisions. It followed, therefore, that the right to appeal against the apportionments was confined to the company, and, failing such appeal, could not be disturbed by a member of the company in an appeal against the consequential sur-tax assessments.

[**EDITORIAL NOTE.** It is held here that a member of an investment company had no right of appeal against an appointment of the income of the company made to him by the Special Commissioners under the Finance Act, 1922, s. 21, as amended and extended by the Finance Act, 1939, s. 15. Finance Act, 1922, s. 21, gives a right of appeal to an aggrieved person, but the court refuses to find that a right of appeal is given inferentially to a member under the Finance Act, 1936, s. 19, because by the operation of that section the member may in certain circumstances be "aggrieved."

As to Direction and Apportionments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 295, 197-299, paras. 583, 584, 589-595; and for Cases, see DIGEST, Supp., Income Tax, 674s-674bb.

For the Finance Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 180.]

Case Stated under the Finance Act, 1927, s. 42 (7), and Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

On an appeal by the taxpayer against three assessments to sur-tax in the sums of £399, £15,800 and £1,933, made upon him respectively for the years ended Apr. 5, 1940, 1941 and 1942, the following facts were found by the commissioners:

The said assessments were consequential upon directions made on the Burlah Trust Limited (hereinafter referred to as "the company") under the provisions of the Finance Act, 1922, s. 21, and the Finance Act, 1939, s. 14. The company is an investment company within the meaning of the Finance Act, 1936, s. 20. It had no estate or trading income within the meaning of the Finance Act, 1939, s. 14. The actual income of this company for the said years was apportioned wholly to the appellant under the provisions of the Finance Act, 1939, s. 15; and pursuant to the provisions of para. 10 of the First Sched. to the Finance Act, 1922, notices of such apportionments were given to the company.

No appeal was made by the company against either the said directions or the said apportionments.

The grounds of the appellant's appeal against the said sur-tax assessments were that the amounts apportioned to him as aforesaid (on which apportioned amount the assessments were based) were excessive.

It was contended on behalf of the appellant:

(i) that by virtue of the provisions of the Finance Act, 1927, s. 42 (7), he was entitled, on an appeal against the sur-tax assessment made upon him, to raise any matters affecting the amounts of such assessments other than the matters specifically mentioned in the said subsection; and accordingly;

(ii) that he was entitled to challenge the amounts of the said apportionments.

These contentions were resisted on behalf of the respondents.

The decision of the commissioners was as follows :

> The appeals in this case are against assessments to sur-tax, for the years 1939-1940 to 1941-1942 inclusive ; consequential upon directions made on Burlah Trust Limited and apportionments of its income under the provisions of the Finance Act, 1939, s. 15. No appeal was lodged by Burlah Trust Limited against either the directions or apportionments. In those circumstances we hold that the apportionments are final and conclusive and cannot be disturbed by a member of the company in appeals against the consequential sur-tax assessments. In so far as these assessments contain sums so apportioned we are unable to entertain an appeal, and in principle, therefore, the assessments stand.

J. Millard Tucker, K.C., and *Heyworth Talbot* (for the appellant).

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

MACNAGHTEN, J. : Under the provisions of the Finance Act, 1922, s. 21, and the Finance Act, 1939, s. 15, the whole of the actual income of an investment company called the Burlah Trust, Ltd. for the years ended Apr. 5, 1940, 1941 and 1942, was apportioned to the appellant, Burston, and he was accordingly assessed to sur-tax in respect of the income so apportioned to him. Thereupon he appealed to the Special Commissioners, on the ground that the amounts apportioned to him were excessive. The Special Commissioners held that the apportionments were final and conclusive and that they could not entertain any appeal based on the ground that they were excessive. The only question at issue on the present appeal is whether that decision of the Special Commissioners was correct.

It is necessary, therefore, to consider carefully the provisions of the Finance Act, 1922, s. 21, and the Finance Act, 1939, s. 15. The Finance Act, 1922, s. 21 (1), provides that in the case of companies to which that section applies, the Special Commissioners shall apportion the whole or part of its income, as the case may be, among its members, and subsect. (2) provides as follows :

> Any super-tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company, shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company . . .

There is no provision in the Income Tax Acts which makes super-tax or sur-tax, which is chargeable under the 1922 Act, s. 21, payable by the member of the company to whom the income of the company has been apportioned, except in the case I will mention later. Nor is there any provision in the Income Tax Acts which enables a company, which has paid super-tax or sur-tax under the Finance Act, 1922, s. 21, to recover from its members the amount so paid. Therefore, as matters stood in 1922, it seems to me to be clear that the member to whom the part of the income of a company had been apportioned under the Finance Act, 1922, s. 21, could have no right of appeal against the assessment made upon him in the name of the company, because he was under no obligation to pay it : and the right of appeal is only given to a person who is " aggrieved."

It is said, however, that, by reason of the provisions of the Finance Act, 1936, s. 19 (5), the appellant may be an aggrieved person. That subsection provides that where a notice of charge is served on a company or the liquidator of a company under the Finance Act, 1922, s. 21 (3), and the tax is not paid by the company before the expiration of three months from the date of service or before the second day of January following the year of assessment (whichever is the later), the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed. It was urged that if the company made default and the Crown recovered the amount from the member, he would indeed be aggrieved, if an excessive amount of the income of the company had been apportioned to him. It is common knowledge that the Acts in question were passed for the purpose of putting a stop to what the legislature regarded as improper attempts to avoid liability for sur-tax. The preamble to the Finance Act, 1922, s. 21, says as much. It may be that one of the contrivances, which had been tried and had been successful, was that the company had dissolved itself before the time came for it to pay and had got rid of its assets.

The Finance Act, 1939, s. 15, only applies to investment companies, and it cannot be supposed that such a company, having no earned income—that is one of the necessary qualifications to bring a company within the class dealt with in sect. 15 would be unable to pay the amount of the tax charged upon it; nor is it likely that the Inland Revenue Commissioners, having a right to recover the tax from a solvent company, would take proceedings against the person to whom the income had been apportioned when, by a very simple process, they could recover payment from the company. But in any case I do not think that the provisions of the Finance Act, 1936, s. 19 (5), can be construed as inferentially giving a right of appeal which, apart from that provision, would not exist.

There is one further consideration which supports the view taken by the Special Commissioners. The company might be aggrieved by the apportionment because the amount which the company has to pay depends upon the income of the persons to whom the income of the company is apportioned. There might be a case where a company could establish that the part of the income of the company had been apportioned to a person who had a larger income assessable to sur-tax than the person to whom such part ought to have been apportioned. In that case the company would be chargeable to an amount in excess of the amount which would be chargeable if the apportionment had been made correctly. Accordingly, the Finance Act, 1922, by para. 10 of the First Sched., gives to the company a right of appeal against the apportionment of its income. Cl. 10 runs thus:

> Notice of any apportionment made by the Special Commissioners shall be given by serving on the company a statement showing the amount of the actual income from all sources adopted by them for the purposes of section twenty-one of this Act, and either the amount apportioned to each member or the amount apportioned to each class of shares, as they think fit. A company which is aggrieved by any notice of apportionment shall be entitled to appeal to the Special Commissioners on giving notice to their clerk within twenty-one days after the date of the notice, and those Commissioners shall hear and determine the appeal and all the provisions of the Income Tax Acts and any regulations made thereunder relating to appeals against assessments and to cases to be stated for the opinion of the High Court shall, with any necessary modification, apply for the purposes of any such appeal.

In fact, by the Finance Act, 1939, s. 15, that clause does not apply to apportionments made under that section because it is provided by sect. 15 (5):

> The provisions of paras. 1 to 3 of the First Sched. to the Finance Act, 1922, . . . shall apply in relation to an apportionment made by the Special Commissioners under the provisions of this section as they apply in relation to a direction given by those Commissioners under section twenty-one of the said Act, and so much of para. 10 of the First Sched. to the said Act as relates to appeals shall not apply.

Therefore, if the Burlah Trust, Ltd. had appealed against the apportionment of which the appellant desires to complain, the appeal would have been made under the provisions of paras. 1, 2 and 3 of the First Sched. to the 1922 Act. Those provisions enable a company to appeal to the Special Commissioners, and if the company or the Inland Revenue Commissioners are dissatisfied with the determination of the Special Commissioners [by cl. 2]:

> . . . they may, on giving notice to the clerk to the Special Commissioners within twenty-one days after the determination, require the appeal to be reheard by the Board of Referees and the Special Commissioners shall transmit to the Board any document in their possession which was delivered to them for the purposes of the appeal.

Then the Board of Referees are required to " re-hear and determine the appeal," and their determination is " final and conclusive."

The result of holding that the appellant in this case could maintain an appeal against the apportionment would be that he could appeal in the ordinary way and require the Special Commissioners to state a case for the opinion of the High Court on any question of law, whereas, if the company appealed against the apportionment and required the appeal to be heard by the Board of Referees, these two tribunals might arrive at different and inconsistent decisions.

I think this appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Hyman Isaacs, Lewis & Mills* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

BOUCHER (TREASURER OF WALLASEY COUNTY BOROUGH) *v.* HOOD (INSPECTOR OF TAXES).

[King's Bench Division (Macnaghten, J.), **April 11, 1945.**]

Income Tax—Sched. D—Corporation—Loan to electricity undertaking of corporation—Electricity undertaking separate entity—Loan used by undertaking for financing sale of electrical appliances and installations—Proportion of loan, recovered from consumers, repaid by undertaking to corporation—Annual profits of undertaking assessable to income tax—Annual profits available in aid of local rate—Amount so applied limited to " one and a half per cent. of the outstanding debt of the undertaking "—Whether difference between original amount of loan and sums already recovered " outstanding debt of the undertaking " at end of financial year—Electric Lighting (Clauses) Act, 1899 (c. 19), *s.* 7—*Income Tax Act,* 1918 (c. 40), *Sched. D, Miscellaneous Rules, r.* 6—*Electricity (Supply) Act,* 1926 (c. 51), *5th Sched.*

The Wallasey corporation were the undertakers in respect of the supply of electricity in the county borough, and they operated a scheme for assisting persons to have their premises wired for electric lighting. They also supplied electrical appliances on simple hire and on hire-purchase terms. When paying interest on loans raised on the security of the general rate fund the corporation made a deduction of tax and, in so far as the interest was paid otherwise than out of profits or gains brought into charge to tax, accounted for the amount of the deduction to the Inland Revenue Commissioners. The corporation were entitled to set off in computing this liability any tax suffered on profits of its trading concerns in so far as such profits were legally available for the relief of rates. By the Electric Lighting (Clauses) Act, 1899, s. 7, as amended by the Electricity (Supply) Act, 1926, 5th Sched., the corporation were empowered to apply the annual profits of the electricity undertaking in aid of the local rate to the extent of 1½ per cent. " of the outstanding debt of the undertaking," and that was, therefore, the maximum amount which could be set off against the interest paid by the general rate fund. In the year ending Mar. 31, 1937, the corporation raised loans amounting to £64,294 for the purpose of financing the sale of electrical appliances to consumers on hire-purchase terms and the installation of electric wiring on deferred terms of payment. During that year £14,446 was recovered by the electricity undertaking in respect of those sales and installations, and was repaid to the corporation. The difference between £64,294 and £14,446, namely, £49,848, repayable at future dates by persons who had bought electrical appliances or for whom wiring had been installed, was treated by the corporation as " an outstanding debt " of the electricity undertaking. Accordingly, in the set-off computation for the year 1936-1937, the sum of £49,848 was not deducted from the total outstanding debt of the electricity undertaking. While it was agreed that " the outstanding debt of the undertaking " meant the debt of the undertaking outstanding on Mar. 31, 1937, it was contended for the Crown that the corporation had no debt on the relevant dates since the sum of £49,848 was to be regarded as having been already recovered :—

Held : the electricity undertaking of the corporation must be regarded as a separate entity from the other activities of the corporation. Therefore the debt incurred by the electricity undertaking, although ultimately recoverable, was still an " outstanding debt of the undertaking " within the meaning of the Electric Lighting (Clauses) Act, 1899, s. 7, as amended by the Electricity (Supply) Act, 1926, 5th Sched.

[**EDITORIAL NOTE.** It is here decided that where an electricity undertaking is carried on by a local authority, it is, for the purpose of assessment under Sched. D, to be regarded as a separate entity. Where the local authority have raised loans for the purpose of financing the sale of electrical appliances to consumers on hire purchase, therefore, sums unpaid by such consumers are to be regarded in calculating the " outstanding debt " of the undertaking within the meaning of the Electric Lighting (Clauses) Act, 1899, as amended.

On the question of taxation of undertakings of local authorities, reference may be made to *Allchin* v. *Coulthard* ([1943] 2 All E.R. 352).

As to Application of Receipts of Local Authorities, see HALSBURY, Hailsham Edn., Vol. 12, pp. 618-620, para. 1203 ; and for Cases, see DIGEST, Vol. 20, pp. 213, 214, Nos. 85-88.)

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Wirral in the county of Chester, for the opinion of the High Court of Justice.

The following facts were found by the commissioners :

The Wallasey Corporation (hereinafter called " the corporation ") were the undertakers in respect of the supply of electricity in the county borough of Wallasey and had in operation a scheme for assisting persons to have their premises wired for electric lighting. That was carried out under agreements known as " assisted wiring agreements." They also supplied electrical appliances on simple hire and on hire purchase terms.

When paying interest on loans raised on the security of the general rate fund the corporation made a deduction of tax and, in so far as the interest was paid otherwise than out of profits or gains brought into charge to tax, accounted for the amount of the reduction to the Inland Revenue Commissioners.

The corporation is entitled to set off in computing this liability any tax suffered on profits of its trading concerns in so far as such profits are legally available for the relief of rates. In regard to the electricity undertaking the maximum amount of the profits of the undertaking which could be transferred to the general rate fund was fixed under the Electric Lighting (Clauses) Act, 1899, as amended by the Electricity (Supply) Act, 1926, 5th Sched., at $1\frac{1}{2}$ per cent. of the outstanding debt of the undertaking, and that was, therefore, the maximum amount which could be set off against the interest paid by the general rate fund.

The appeal related only to the amount transferable as aforesaid and to the construction of the expression " outstanding debt " in the Electricity (Supply) Act, 1926, 5th Sched.

In the year ending Mar. 31, 1937, the corporation raised loans amounting to £64,294 which were secured indifferently upon all the revenues of the corporation for the purpose of financing the sale of electrical appliances to consumers on hire purchase terms, and the installation of electric wiring on deferred terms of payment. Prior to that year such sales and installations were financed out of revenue. In the balance sheet of the electricity undertaking . . . the advances outstanding from the consolidated loans fund were shown as £439,457, as at Mar. 31, 1937, which included £49,848, the balance remaining of the above mentioned £64,294 after repaying to the lenders the amount of £14,446 recovered during the year, and on the other side appeared an item of £49,848 being as to part the amount still owing at Mar. 31, 1937, by hire purchasers, such amount falling due for payment over varying periods, mostly six years, and as to the balance the amount owing.

The corporation is entitled to set off in computing for the installation of electric wiring recoverable over an indefinite period by means of an additional charge for electricity consumed. The aforesaid sum of £439,457 formed part of the outstanding liability of the corporation in respect of moneys borrowed for its general activities, the whole of the loans being secured indifferently upon all the revenues of the corporation. By virtue of the Wallasey Consolidated Loans Fund Scheme, 1936, all loans raised by the corporation are carried to that fund and utilised to finance the capital expenditure of each undertaking including the electricity undertaking . . . the moneys so borrowed by the corporation are repayable at various dates.

Similar transactions took place and similar entries appear in the corporation's accounts for the years ending Mar. 31, 1938, and Mar. 31, 1939.

In sending the set-off computation for the year 1936-37 to the respondent [Inspector of Taxes], the appellant [Boucher] stated the outstanding debt of the electricity undertaking, as £440,097, made up as follows :

	£
Loans outstanding	439,457
Sundry creditors	177
Bank overdraft	463

No deduction was made for the sum of £49,848 recoverable from hire purchasers. By " set-off computation " is meant the computation of the amount of profits and gains of the corporation brought into charge to tax and lawfully available for the payment of interest.

The agreements entered into by consumers who took appliances provided that the appliances remained the property of the corporation unless and until the hirer exercised his option to purchase the same. The corporation affixed a plate on each appliance to indicate that it was their property, and the plate was not to be removed until the last instalment was paid, when the appliance became the property of the purchaser. The agreements for the Assisted Wiring Scheme also provided that the installation remained the property of the corporation until it had been paid for.

> . . . The amount of £49,848 . . . is the total of the amounts payable over a period of years under such agreements at Mar. 31, 1937.

The Hire Purchase Act, 1938, provides, *inter alia*, that a person acquiring on hire purchase terms an appliance may surrender his rights of purchase when he has paid one half of the hire purchase price. If that took place, the appliance went back into stock, and, unless another consumer could be found to take it over, the corporation remained liable for the interest and sinking fund charges without any right to recover that from the hire purchaser. If a hire purchaser disappeared and took away an appliance which had not been paid for as was stated to be not infrequently the case, the corporation were unable to recover the sum due, and the liability for the repayment of the debt rested on the general body of consumers.

The appellant contended:

(*a*) that the expression "outstanding debt of the undertaking" in the 5th Sched. to the Electricity (Supply) Act, 1926, meant, in relation to moneys borrowed and debts incurred for the purpose of such undertaking, the whole of such moneys and such debts as far as not repaid or discharged at the date relevant to the inquiry.

(*b*) that there was no statutory warrant for deducting from the amounts so ascertained, a sum which was neither payable nor demandable at such date from certain customers of the corporation, namely, hire purchasers and persons who had entered into assisted wiring agreements.

(*c*) that, if it were relevant, there was no distinction between moneys borrowed for the purpose of financing hire purchase and assisting wiring transactions, and moneys borrowed for any other purpose of the electricity undertaking, all such moneys being borrowed under the same statutory authority, on the same terms, and upon the same security.

(*d*) that, if it were relevant, the property the subject of the said hire purchase agreement remained the property of the corporation until the final payment had been made by the hire purchaser, who might, however, surrender his right of purchase after payment of one-half of the price, with the result that the appliance remained the property of the corporation free from the hire purchase agreement.

(*e*) that if any deduction were permissible from the outstanding debt of the undertaking . . . in respect of debts owing to the corporation in respect of such undertaking, such debts must be debts due and payable at the time, and not debts which were payable if at all, in the future only, and which might never in fact become payable.

(*f*) that the outstanding debt of the corporation electricity undertaking as at Mar. 31, 1937, was, therefore, the sum of £440,097.

The respondent contended:

(*a*) that the outstanding debt of the electricity undertaking was the difference between the total of:

- (i) the outstanding loan debt;
- (ii) sundry creditors on capital account;
- (iii) bank overdraft on capital account, if any;

and the total of:

- (i) sinking funds not applied to redemption of debt;
- (ii) sundry debtors on capital account;
- (iii) credit bank balance on capital account, if any.

(*b*) that to arrive at the amount of the outstanding debt a balance must be struck between amounts owing by the corporation and amounts owing to the corporation and that if accounts not immediately payable by the corporation were to be taken into account, accounts not immediately payable to the corporation must be taken into account in arriving at such balance.

(*c*) that "outstanding debt of the undertaking" meant outstanding debt as shown by the corporation's accounts of its electricity undertaking, and that accordingly sundry debtors under hire purchase and assisted wiring agreements, which appeared in the capital account of such undertaking on the assets side, must be deducted.

(*d*) that it was the practice of accountants in dealing with hire purchase balance sheets to include all instalments outstanding as an asset (possibly with a reserve deducted for future profits) but they never treated such outstanding debts as nil.

The decision of the Commissioners was as follows:

> . . . in arriving at the outstanding debt of the electricity undertaking of the corporation there should be deducted the amount of the sundry debtors on capital account, including debts not then actually due, but ultimately recoverable under the hire purchase and assisted wiring agreements.

T. N. Donovan for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondent.

MACNAGHTEN, J.: This is an appeal by James Boucher, the treasurer of the Wallasey county borough, from a decision of the General Commissioners for the Wirral Division of Cheshire, with regard to assessments to income tax for the years 1936-37, 1937-38 and 1938-39, made under the Income Tax Act, 1918, Sched. D, Miscellaneous Rules, r. 6. That rule provides :

> Where any creditor on any rates or assessments not chargeable as profits is entitled to any interest of money, the proper officer having the management of the accounts may be charged with the tax payable thereon, and shall be answerable for all matters necessary to enable the tax to be duly charged and for payment thereof, as if the rates or assessments were profits chargeable to tax, and shall be, in like manner, indemnified in respect of all such matters as if the said rates or assessments were chargeable.

The Wallasey Corporation are the undertakers in respect of the supply of electricity in the county borough. By the Electric Lighting (Clauses) Act, 1899, s. 7, as amended by the Electricity (Supply) Act, 1926, 5th Sched., the corporation are empowered to apply the annual profits of the undertaking in aid of the local rate, but the amount so applied must not exceed " 1½ per cent. of the outstanding debt of the undertaking." Since the annual profits of the undertaking are assessed to income tax, the Miscellaneous rule 6 does not apply to so much of the interest payable to the " creditors on rates " of the corporation as is paid out of the profits of the " undertaking " applied in aid of the local rate.

The annual accounts of the undertaking were made up to Mar. 31 of each year, and it is agreed that the " outstanding debt of the undertaking " means the debt of the undertaking which was outstanding on that date. The respondent contends that the corporation had no debt on the relevant dates, and the only question at issue on this appeal is as to the meaning of the word " debt " in the amended sect. 7 of the Electric Lighting (Clauses) Act, 1899.

The facts which have given rise to the present dispute are as follows. In the year ending Mar. 31, 1937, the corporation raised loans amounting to £64,294 for the purpose of financing the sale of electrical appliances to consumers on hire purchase terms, and the installation of electric wiring on deferred terms of payment. During that year £14,446 was recovered by the " undertaking " in respect of those sales and installations. It would seem, therefore, to be plain that on Mar. 31, 1937, " the outstanding debt of the undertaking," treating it as a separate entity from the other activities of the corporation, was the difference between £64,294 and £14,446, namely, £49,848. In due course this sum of £49,848 will be recovered by the undertaking from persons to whom electrical appliances have been sold or for whom wiring has been installed.

The contention put forward on behalf of the Crown is that this sum is to be regarded as having been already recovered by Mar. 31, 1937, with the result that " the outstanding debt of the undertaking " on that date was nil. This contention found favour with the General Commissioners ; but, in my opinion, it is baseless. It ignores the fact that, for present purposes, the electrical undertaking of the corporation must be regarded as a separate entity from the other activities of the corporation. If the electrical undertaking had been conducted by the corporation through a subsidiary company, I do not think that the General Commissioners would have fallen into the error into which, as it seems to me, they have fallen in this case. The case deals merely with the figures for the year 1936-37, but the same principle applies in the two subsequent years.

The appeal will, therefore, be allowed with costs.

Appeal allowed with costs.

Solicitors : *Chamberlain & Co.*, agents for *Emrys Evans*, town clerk, Wallasey (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

SMITH BARRY *v.* CORDY (INSPECTOR OF TAXES).

[King's Bench Division (Macnaghten, J.), **April 20, 1945.**]

Income Tax—Sched. D—Purchase of endowment policies on other people's lives—Purchase made with intention of providing ascertained annual sums—No intention to sell policies—Realisation of policies—Whether transactions represented " adventure or concern in the nature of trade "—Income Tax Act, 1918 (*c.* 40), *s.* 237, *Sched. D, Case I.*

The appellant bought between July, 1937, and February, 1939, at a cost of about £100,000, a large number of endowment policies on the lives of other people, and also one life policy. The scheme represented by these purchases was carefully worked out by the appellant, who calculated that he would require a clear £7,000 per annum to spend, and that, at such a rate of expenditure, taking accumulation of insurance moneys at about 4 per cent., he could make his capital last till 1960 when he would reach the age of 74. In 1942 the appellant contemplated a complete change in the manner of his life, and, in the same year, he transferred policies to the value of £35,700 as a present to two persons and sold all the remainder in his possession. It was found by the commissioners that the sale of the policies represented a complete change of intention, there having been no original intention to sell. On appeal, it was contended by the appellant that the transactions in question were not in the nature of a trade, but were investments and the realisation of investments, and that the accretions, *i.e.*, the difference between the purchase price and the sales price, were accretions of capital and not income. It was contended on behalf of the respondent that the accretions represented profits from " an adventure or concern in the nature of trade " within the meaning of Sched. D, Case I :—

Held : since it was established that the purchases of the endowment policies were not made with the intention of re-sale, the transactions involved did not represent " an adventure or concern in the nature of trade " and the profits made were not income which was assessable to tax.

[**EDITORIAL NOTE.** This ingenious scheme to provide a tax-free income by the investment of capital in endowment policies was abandoned by the taxpayer, and the policies sold by auction. The claim of the Crown that this constituted an adventure or concern in the nature of a trade fails on the ground that it would be an unwarrantable extension of the meaning of the word " trade " so to hold here.

As to what constitutes Trading, see HALSBURY, Hailsham Edn., Vol. 17, pp. 95-100, paras. 190-193 ; and for Cases, see DIGEST, Vol. 28, pp. 17-22, Nos. 87-116 ; DIGEST, Supp., Income Tax, Nos. 95a, 95b.]

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division at the High Court of Justice.

On an appeal by the taxpayer against assessments to income tax made upon him under the Income Tax Act, 1918, Sched. D, Case I, for the years 1938-1943 the following facts were found by the commissioners :

The appellant now resides in India and is unlikely to return to this country . . .

The appellant was married but had no children, and, his wife having ample means of her own, he decided to spend the whole of his capital during his lifetime. With this object in view he instructed his solicitor, Mr. J. Venning . . . to buy endowment policies for him on other people's lives. These instructions were carried out, a large number of policies being purchased at various dates between July, 1937, and February, 1939 . . .

The scheme represented by these purchases was carefully worked out by the appellant himself, who brought to it a mind trained in mathematics. He calculated that he would want from the scheme a clear £7,000 per annum to spend, and that, at such a rate of expenditure, taking accumulation of insurance moneys at about 4 per cent., he could make his capital last until 1960 when he would reach the age of 74 . . . The purpose of the scheme, therefore, was that policies were to be selected for purchase with such dates of maturity as would give him approximately £7,000 each year.

. . . in all £84,843 was laid out in purchase money, and . . . the total outlay including premiums paid £9,872, and charges and commission £3,081, was £97,796.

. . . The policies were all endowment policies maturing on the endowment date or on the earlier death of the assured. In calculating the purchase price no account was taken of the possibility of an earlier death, and . . . in no case while the policies were in the appellant's possession did earlier death occur. Some of the endowment policies were " with profits " and some "without profits " policies . . . The total cost of policies held by the appellant until maturity or sold by him, is shown as £63,883, and the amount realised from these policies as £72,150. The difference between these figures, £8,267, is divided so as to show the accretions arising during each of the years from 1938-39 to 1942-43. It is these accretions which were brought into assessment to income tax for the several years.

On the outbreak of war the appellant, who had served in the R.F.C. in the last war, and had afterwards been engaged in research work in mathematics, joined the R.A.F. as a ferry pilot. In 1940 he suffered injuries in an aeroplane crash, and the effect on his health was such that in 1942 he was advised by his doctor to live in a warmer climate. His wife had died in 1941. In 1942 he was posted to India in the course of his duties. He found that India suited him and in view of the medical advice he had received he decided to take up permanent residence there and sever all his connections with the United Kingdom. In pursuance of this intention in June, 1942, he gave instructions to his solicitor to transfer some £33,000 worth of his policies as a present to Major Bell and some £2,700 worth as a present to Mlle. Berger, and to sell all the remainder still in his possession. Shortly after these instructions had been given the appellant resigned from the service.

Evidence, which we accepted, was given by Mr. Venning, the solicitor to whom . . . the appellant had given instruction for the purchase of policies. Mr. Venning was a personal friend of the appellant and has been closely connected with all his business affairs. The witness stated that at the beginning of 1937 the appellant's fortune, which at that time was probably worth some £150,000 was mostly in Stock Exchange securities. He had lost money on the Stock Exchange, and was looking for some way to invest his capital so that there would be no risk of loss and the capital would last out for his lifetime . . . The scheme actually adopted was devised by the appellant who, with his mathematical mind, worked it out to a nicety. The witness approved the scheme because it insured that the appellant's capital would last for the necessary period. The procedure adopted was as follows : The witness's firm received a list of fortnightly auctions of life policies from Messrs. Foster and Cranfield. The witness looked through the lists carefully and, when he found an endowment policy with a good insurance company, he considered whether the date of maturity, etc., would fit in with the scheme. If it appeared to do so, he got an actuarial figure on the 4 per cent. basis assumed by the scheme, attended the auction and bid up to the resulting figure, sometimes being successful and sometimes not. In 1939, when the last of the policies had been purchased, the witness prepared a statement for the appellant showing the position at that time. The appellant thereupon prepared a draft to show exactly how matters would stand in connection with the scheme at the end of each year. This draft showed that by 1960 on the basis of the scheme there would be a deficiency of £12,000, but this did not trouble the appellant, as he had other property to fall back on. The total expenditure on policies still left a considerable sum in the appellant's hands. There was no suggestion of a sale of policies until 1942, when . . . the appellant contemplated an entire change in the manner of his life. In June, 1942, the appellant decided to get rid of the policies remaining in his possession, by sale and by gift. He came to see the witness in London, and the whole matter of the sales was settled . . . The policies were sold by auction. The sale of the policies represented a complete change of intention, there having been no original intention to sell . . .

It was contended on behalf of the appellant :

(*a*) that the transactions in question were in the nature of investments and realisations of investments, and that the accretions, whether on maturity or on sale, were accretions of capital and not income.

(*b*) that the appellant had not engaged in an adventure or concern in the nature of trade ;

(*c*) that the assessments under Case I of Sched. D should therefore be discharged.

It was contended on behalf of the Crown that the accretions, alike on maturity and on sale, represented profits from an adventure or concern in the nature of trade, and that the assessments had been properly made and should be confirmed.

The decision of the commissioners was as follows :

On consideration of the particular facts of this case and the evidence before us, having in mind especially the number of purchase transactions over a period of about 18 months together with the manner in which the policies were selected and purchased in pursuance of an organised scheme, we hold that the appellant engaged in a concern in the nature of trade, resulting in profits—the fruit of the capital laid out—which are assessable to income tax under Case I of Sched. D . . .

Heyworth Talbot for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondent.

MACNAGHTEN, J. : This is an appeal by R. Smith Barry from a decision of the Special Commissioners confirming five assessments to income tax made upon him for the five years commencing Apr. 6, 1938, and terminating on

Apr. 5, 1943, under Sched. D, Case I. The subject of the assessments was described in the notices served on the appellant as "profits from dealings in life insurance policies."

The appellant attained the age of 51 in the year 1937. His fortune, which amounted to about £150,000, was at that time invested in Stock Exchange securities. His transactions on the Stock Exchange in the past had not been fortunate, and he accordingly decided to deal with his capital in a different way. He was married, but he had no children, and his wife had ample means of her own. In those circumstances he decided to spend his capital during his lifetime. With that object in view, between July, 1937, and Feb., 1939, he bought, at a cost of about £100,000, no less than 63 endowment policies on the lives of other people, and also one policy which was not an endowment policy but a life policy.

Para. 6 of the case states :

> The scheme represented by these purchases was carefully worked out by the appellant himself, who brought to it a mind trained in mathematics. He calculated that he would want from the scheme a clear £7,000 per annum to spend, and that, at such a rate of expenditure, taking accumulation of insurance moneys at about 4 per cent., he could make his capital last until 1960 when he would reach the age of 74. To cover the possibility of a longer life, he bought a deferred annuity, as to which no question arises. The purpose of the scheme, therefore, was that policies were to be selected for purchase with such dates of maturity as would give him approximately £7,000 each year.

Para. 8 of the case states :

> On the outbreak of war the appellant, who had served in the Royal Flying Corps in the last war, and had afterwards been engaged in research work in mathematics, joined the R.A.F. as a ferry pilot. In 1940 he suffered injuries in an aeroplane crash, and the effect on his health was such that in 1942 he was advised by his doctor to live in a warmer climate. His wife had died in 1941. In 1942 he was posted to India in the course of his duties. He found that India suited him, and, in view of the medical advice he had received, he decided to take up permanent residence there and sever all his connections with the United Kingdom. In pursuance of this intention. in June, 1942, he gave instructions to his solicitor to transfer some £33,000 worth of his policies as a present to Major Bell, and some £2,700 worth as a present to Mlle. Berger, and to sell all the remainder still in his possession. Shortly after these instructions had been given the appellant resigned from the service.

Mr. Venning, his solicitor, carried out the appellant's instructions ; and, giving evidence before the commissioners, stated that the appellant intended to remain in India and was living there pursuing his research work in mathematics.

The assessments were described, as I have already said, as "profits from dealings in life insurance policies."

The Crown did not seek to support the assessments on that ground. The facts, as found by the commissioners, negative any suggestion that the appellant was engaged in the business of dealing in life insurance policies. He bought the policies with the intention of keeping them. But for the fact that he had engaged in the dangerous work of a ferry pilot and had suffered injury in the course of that work, he would, as far as is known, have carried out his original intention. The amount that has been assessed as profits arising out of these transactions is the difference between the sum which the appellant paid for the policies and the amount he received when they fell due or were sold.

The case for the Crown was put on the ground that what are called the accretions—by which is meant the difference between what he paid and what he received for the policies—represented profits from "an adventure or concern in the nature of trade." It was contended on behalf of the appellant that the transactions in question were not in the nature of a trade, but were in the nature of investments and the realisation of investments, and that the accretions were accretions of capital and not income. The question, therefore, is whether a person who buys endowment policies with no intention of selling them is engaged in a concern in the nature of trade. It is conceded that a single purchase would not be a concern in the nature of trade, but it is suggested, if there are many purchases, then it would form a trade, even though there was no intention whatever of re-selling the policies.

What the commissioners have found is this :

> On consideration of the particular facts of this case and the evidence before us,

having in mind especially the number of purchase transactions over a period of about eighteen months together with the manner in which the policies were selected and purchased in pursuance of an organised scheme, we hold that the appellant engaged in a concern in the nature of trade, resulting in profits—the fruit of the capital laid out —which are assessable to income-tax under Case I of Sched. D.

That decision involves the question, what is the nature of trade ? The first observation to be made is that the word " trade " must, I think, be construed in the Income Tax Acts in its ordinary and accepted sense. It is a word that is used in contradistinction to " profession " or " vocation." Case I of Sched. D provides for " Tax in respect of any trade not contained in any other schedule," and Case II for " tax in respect of any profession, employment, or vocation not contained in any other schedule." The cases cited by the Solicitor-General were cases where a purchase had been made with the intention of re-sale, and the profits of the trade assessed to income tax were the profits that arose from the re-sale. If profits are so made, those profits are " income " within the meaning of the Income Tax Acts and are assessable to tax. But no case was cited to me in which a person was held assessable to income tax who had bought something with the intention of keeping it, and subsequently owing to a change in his circumstances changed his mind and sold what he had bought. The view I take is that it would be an unwarrantable extension of the meaning of the word " trade " to hold that the transactions in this case were transactions representing " an adventure or concern in the nature of trade."

Therefore, the appeal must succeed, and the assessments must be discharged.

Appeal allowed with costs.

Solicitors: *Bird & Bird* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **April 12, 1945.**]

Income Tax—Disposition in settlement—Settlement comprising several deeds—Covenant to pay annual sum to son—Covenant irrevocable for period of less than six years—Extension of period of restriction on power of revocation for full six years by subsequent deed—Extension of period made while original covenant still irrevocable—Payments made under covenant irrevocable for period of less than six years to be treated as settlor's income—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 23 (2)*—Finance Act,* 1938 (*c.* 46), *s.* 38, *Schedule* 3, *part II, para.* 1 (*c*).

In 1936 the appellant wished to provide his son, who was then of full age, with a net income of £400 a year, aiming at the same time at a reduction of the amount of his own income for the purpose of sur-tax. Consequently by a deed dated Sept. 10, 1936, the appellant covenanted to pay to his son during their joint lives the monthly sum of £33 6*s.* 8*d.* " clear of all deductions, including income tax." Since the appellant had reserved to himself a power of revocation, the income so payable to his son had to be treated, under the provisions of the Finance Act, 1938, s. 38 (1) (*a*) as the appellant's own income. The appellant, therefore, revoked the deed and, by a second deed dated Sept. 9, 1938, he covenanted to pay to trustees for the benefit of his son the same monthly amount " clear of all deductions, including income tax," the first of such payments to be made on Sept. 30, 1938. This deed contained a power of revocation which could not be exercised within the period of six years from Sept. 11, 1936, with the result that by virtue of the Finance Act, 1938, Sched. 3, Part II, para. 1 (*c*) the income so payable could not be treated as the appellant's income so long as the power of revocation could not be exercised. By a third deed, dated Mar. 6, 1939, the monthly payments were reduced to £22 13*s.* 4*d.*, amounting to £272 a year. The provision for the payment of an annual sum " clear of deduction of income tax " was, however, void under the Income Tax Act, 1918, All Schedules Rules, r. 23 (2). Accordingly, the appellant executed a fourth deed, dated Dec. 30, 1939, whereby it was agreed that as from

Mar. 31, 1939 the second deed, as amended by the third deed, should be read as if the appellant had covenanted to pay to the trustees "such monthly sum as after deduction of income tax for the time being in force would amount to £22 13*s*. 4*d*. clear of all deductions." The effect of the fourth deed was that, so long as the standard rate of tax remained 10*s*., the appellant's covenant was a covenant to pay £544, instead of £272, per annum. But this covenant to pay an additional sum became, under the provisions of the second deed, revocable after the lapse of six years from Sept. 11, 1936, *i.e.*, within the period of six years from Dec. 30, 1939, and was, therefore, not within the proviso to the Finance Act, 1938, s. 38 (1). With a view to bringing the covenant for the payment of the additional sum within the proviso, the appellant executed a fifth deed, dated Apr. 1, 1940, extending the period of restriction on the power of revocation from Sept. 11, 1942, to Apr. 7, 1946. The question for the determination of the court was whether a covenant which was irrevocable for a period of less than six years, but subsequently made irrevocable for the full period of six years, the extension of the period being made while the original covenant was still irrevocable, was within the proviso of the Finance Act, 1938, s. 38 (1) ;—

HELD : the first additional payment arose under the fourth deed, dated Dec. 30, 1939. At that date the deed could have been revoked within six years, namely, at any time after Sept. 11, 1942. The additional payments in question were, therefore, not within the proviso of the Finance Act, 1938, s. 38 (1), and must be treated as the income of the appellant.

[**EDITORIAL NOTE.** It is held here that a covenant which is irrevocable for a period of less than six years but subsequently, while the covenant is still irrevocable, is extended so as to make it irrevocable for the full period of six years, is not within the proviso to the Finance Act, 1938, s. 38 (1) (*a*).

AS TO REVOCABLE AND OTHER DISPOSITIONS OF INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 267-270, paras. 537-539 ; and FOR CASES, see DIGEST SUPP., Income Tax, 575b-576g.

FOR THE FINANCE ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 329.]

CASE STATED under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice.

On an appeal by the taxpayer against an assessment to sur-tax for the year ending Apr. 5, 1942, in the sum of £15,328, the following facts were found by the commissioners :

By a deed dated Sept. 10, 1936, the appellant covenanted to pay to his son . . . (who was then above the age of 21) during their joint lives the monthly sum of £33 6*s*. 8*d*. clear of all deductions (including income tax but not sur-tax). The deed reserved the power of revocation to the appellant exercisable by writing after the end of one month from the date of the said deed with the consent of any one of a number of specified persons.

The said deed became subject to the provisions of sect. 38 (1) of the Finance Act, 1938, and, with a view to obtaining the benefit of para. 1 (*c*), Pt. II, of the 3rd Sched. to the said Act the appellant duly exercised the power of revocation reserved therein and wholly revoked the said deed on Sept. 8, 1938.

By a further deed dated Sept. 9, 1938, the appellant covenanted to pay to himself and Edward Gibson as trustees for the benefit of his son during his, the appellant's life, the monthly sum of £33 6*s*. 8*d*. clear of all deductions (including income tax but not sur-tax) the first of such payments to be made on Sept. 30, 1938. This deed also reserved a power of revocation to the appellant exercisable at any time after the lapse of six years from Sept. 11, 1936, with the consent of any one of a number of specified persons . . .

By a deed dated Mar. 6, 1939, reciting (*inter alia*) the said deed of Sept. 9, 1938, and a further deed of that same date whereby the appellant covenanted to pay to the same trustees for the benefit of his son during the joint life of himself and his son, the monthly sum of £8 6*s*. 8*d*. . . . and also reciting that the appellant had made other provisions for his son who had accordingly directed the trustees to agree to the modification of such recited deeds, it was agreed that the said monthly sum of £33 6*s*. 8*d*. should on and from Mar. 31, 1939, be reduced to £22 13*s*. 4*d*., and that the appellant should be released from all liability under the therein recited further deed securing the said monthly sum of £8 6*s*. 8*d*. . . .

It having been discovered that the provision for the payment of an annual sum clear of deduction of income tax was void under [the Income Tax Act, 1918, All Schedules

Rules, r. 23] the appellant executed a further deed dated Dec. 30, 1939.

By the said deed dated Dec. 30, 1939, it was agreed that as from Mar. 31, 1939, the first mentioned deed of Sept. 9, 1938, as amended by the said deed of Mar. 6, 1939, should be read as though the appellant had bound himself to pay to the trustees such monthly sum as after deduction of income tax at the rate for the time being in force would amount to £22 13*s.* 4*d.* clear of all deductions . . .

By a deed dated Apr. 1, 1940, expressed to be supplemental to the foregoing deeds, it was agreed that the power of revocation reserved to the settlor by the first mentioned deed of Sept. 9, 1938, should be read and have effect as if the same were expressed to be exerciseable at any time after the lapse of six years from Apr. 6, 1940, instead of after a lapse of six years from Sept. 11, 1936, but subject to the same consents . . .

The appellant paid to his son in the year 1941-1942 twelve monthly payments of such a sum as after deduction of income tax amounted to £22 13*s.* 4*d.* . . .

It was contended on behalf of the appellant :—

(*a*) that the additional sum (representing the difference between a gross amount of £22 13*s.* 4*d.* and a gross sum subject to income tax and leaving a net sum of £22 13*s.* 4*d.*) covenanted to be paid by the appellant arose under the provisions of the deed of Dec. 30, 1939.

(*b*) that the deed of Apr. 1, 1940, did not provide for any new or additional payment but merely modified the period within which the appellant's power of revocation could not be exercised under the first deed of Sept. 9, 1938, as amended by the deeds of Mar. 6, 1939, and Dec. 30, 1939.

(*c*) that when the payments in question were made the appellant could not revoke his covenant within the period of six years from Dec. 31, 1939.

(*d*) that the terms of the proviso to sect. 38 (1) of the Finance Act, 1938, were satisfied.

It was contended on behalf of the Inland Revenue Commissioners :

(*a*) that there was in effect, one settlement, comprising all the above mentioned relevant deeds including the deed dated Apr. 1, 1940, and that this settlement did not come into existence until Apr. 1, 1940.

(*b*) that under this settlement the first payment was due on Apr. 30, 1940, and within the period of six years from that date, *i.e.*, after Apr. 6, 1946, the settlor could exercise his power to revoke the settlement. . .

(*c*) that, therefore, the additional payments under the said settlement provided for by the said deed dated Dec. 30, 1939, must be treated as the income of the . . . appellant for the year in question by virtue of the Finance Act, 1938, s. 38 (1).

(*d*) alternatively, that the deed of Apr. 1, 1940, could have no retrospective effect, that admittedly the additional payments made by virtue of the deed of Dec. 30, 1939, up to and including the payment made on Mar. 31, 1940, were caught by the Finance Act, 1938, ss. 38 (1), and that regard had to be had to the additional payments commencing on Apr. 30, 1940, to see whether they were similarly caught, that the period of six years from Apr. 30, 1940, expires on Apr. 30, 1946, and the settlor can exercise his power to revoke the settlement at any time after Apr. 6, 1946, and that accordingly the additional sum paid under the deed of Dec. 30, 1939, during the year in question must be treated as the income of the settlor.

The decision of the commissioners was as follows :

. . . the deed of Apr. 1, 1940, could not relate back but only forward and . . . the first additional payment arose under the deed of Dec. 30, 1939, and was made under a covenant which could be revoked at any time after Sept. 11, 1942 . . . The payment made on Apr. 30, 1940, and the subsequent payments were made under a settlement which was revocable within a period of less than six years . . . At the date of the first payment under the deed of Dec. 30, 1939, which was the crucial date, there was no provision for a period of irrevocability of more than six years . . . The additional payments in question fell within s. 38 (1) of the Finance Act, 1938, and must be treated as the income of the appellant.

G. G. Honeyman for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

Macnaghten, J. : This is an appeal by Colonel Taylor from a decision of the Special Commissioners. In the autumn of 1936 Colonel Taylor was minded to provide his son Thomas Ian Taylor, who was then of full age, with a net income of £400 a year, and at the same time to reduce the amount of his own total income for the purpose of sur-tax. He accordingly by deed dated Sept. 10, 1936, covenanted to pay to his son during the joint lives of himself and his son the monthly sum of £33 6*s.* 8*d.* "clear of all deductions, including income tax." The deed, however, reserved to the appellant the power of revocation, which brought it within the provisions of the Finance Act, 1938, s. 38 (1) (*a*), with the result that the income thereby payable to his son had to be treated as his own income. Accordingly, in order to take advantage of the provisions contained in the Finance Act, 1938, 3rd Sched., Part II, para. 1 (*c*), the appellant revoked the deed dated Sept. 10, 1936, and by a deed dated Sept. 9, 1938, he covenanted to pay to trustees for the benefit of his son the same monthly sum of £33 6*s*. 8*d*. clear of all deductions, including income tax, the first of such payments to be made on Sept. 30, 1938. This deed contained a power of revocation which could not be exercised within the period of 6 years from Sept. 11, 1936, with the result that the provisions of the Finance Act, 1938, s. 38 (1) (*a*), did not apply to it so long as the power could not be exercised.

By a further deed dated Mar. 6, 1939, the monthly payments of £33 6*s*. 8*d*. were reduced to £22 13*s*. 4*d*. amounting to £272 per annum.

The deed dated Sept. 9, 1938, did not carry out the appellant's intention that the sums payable for the benefit of his son should be net, since the provision that the payments should be " clear of income tax " is void. Accordingly, to remedy the mistake, he executed a deed dated Dec. 30, 1939, whereby it was agreed that as from Mar. 31, 1939, the deed of Sept. 9, 1938, as amended by the deed of Mar. 8, 1939, should be read as if the appellant had covenanted to pay to the trustee :

> . . . such monthly sum as after deduction of income tax for the time being in force would amount to £22 13*s*. 4*d*. clear of all deductions.

The effect of this deed is that, so long as the standard rate of tax is 10*s*. in the pound, the appellant's covenant is a covenant to pay £544 instead of £272 per annum. But this covenant to pay an additional sum will, under the provisions of the deed of Sept. 9, 1938, become revocable after the lapse of 6 years from Sept. 11, 1936 ; that is to say, within the period of 6 years from Dec. 30, 1939 ; and it is, therefore, not within the proviso to sect. 38 (1) (*a*) of the Finance Act, 1938, which reads as follows :

> Provided that, where any such power as is referred to in paragraph (*a*) of this subsection [that is the power of revocation] cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable, and the like annual payments are payable in each year throughout that period, the said paragraph (*a*) shall not apply so long as the said power cannot be exercised.

In these circumstances, with a view to bringing the covenant for the payment of the additional sum within the proviso, the appellant executed a deed dated Apr. 1, 1940, extending the period of the restriction on the power of revocation from Sept. 11, 1942, to Apr. 7, 1946. The question at issue is whether this deed has effected the desired object.

The Special Commissioners have held that it has failed to do so, and, in my opinion, they were right.

It is conceded by the Crown that the covenant to pay the gross sum of £272 per annum contained in the deed of Sept. 10, 1938, as amended by the deed of Mar. 8, 1939, is within the proviso to sect. 38 (1) (*a*) of the Finance Act, 1938. On the other hand, counsel for the appellant conceded, as I think he was bound to do, that the covenant for the payment of the additional sum contained in the deed of Dec. 30, 1939, was revocable after the lapse of 6 years from Sept. 11, 1936, from the date of that deed, until the execution of the deed of Apr. 1, 1940.

The question is whether a covenant which is irrevocable for a period of less than 6 years, but subsequently is made irrevocable for the full period of 6 years (such extension of the period being made while the covenant is still irrevocable) is within the proviso to sect. 38 (1) (*a*). The words of the proviso are :

> . . . where any such power . . . cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable.

The first payment under the deed of Dec. 30, 1939, became payable on that date. At that date, it is conceded (as it must be conceded) that the deed could have been revoked within 6 years, namely, at any time after Sept. 11, 1942, and it, therefore, was not, as it seems to me, within the proviso. In my opinion the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Hyde, Mahon & Pascall*, agents for *Clayton & Gibson*, Newcastle-upon-Tyne (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

Re HARRIS, COPE AND ANOTHER *v.* EVANS AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), **April 19, 1945.**]

Wills—Condition—Forfeiture—If the annuitant shall commit, permit or suffer any act, default or process whereby the annuity would become payable to another person—Annuity payable to Custodian of Enemy Property by operation of law—Whether annuity forfeited—"Process"—Trading with the Enemy Act, 1939 (*c.* 89)—*Trading with the Enemy* (*Custodian*) *Order,* 1939 (*S.R. & O.,* 1939, *No.* 1198).

By her will the testatrix bequeathed an annuity for life to G.E., and directed that if she should commit, permit or suffer any act, default or process whereby the annuity would or might have become vested in or payable to any other person the annuity should thereupon absolutely cease and determine as if the annuitant were dead. The testatrix died in 1937. The annuitant was at all material times resident in France. The Trading with the Enemy Act, 1939, constituted the annuitant an enemy for the purposes of the Act and the annuity, if not forfeited, would be payable to the Custodian of Enemy Property, under the provisions of the Trading with the Enemy (Custodian) Order, 1939. The question to be determined was whether the annuity had been forfeited :—

HELD : on the true construction of the will and in the events which had happened, the annuity had not ceased or determined but was still payable. Although the annuity had become payable to the Custodian of Enemy Property, the annuitant could not be said to have committed any act and she had not committed, permitted or suffered any default ; nor had there been any process which resulted in the annuity becoming payable to the Custodian, because the word " process " in the will meant a legal process of a limited kind.

Re Hall, Public Trustee v. *Montgomery* (4) *followed.*

[**EDITORIAL NOTE.** The question here is whether a defeasance clause in a will operated to cause a forfeiture of an annuity which had become vested in the Custodian of Enemy Property. A similar question was decided in favour of the annuitant in *Re Hall* (4), but the matter peculiar to the case here reported is whether the vesting in the Custodian can be said to be suffering a " process " whereby the annuity becomes payable to someone else. It is held that the word " process " is to be given, in this context, its strict meaning of the doing of something in a proceeding in a civil or criminal court, and there is accordingly no forfeiture.

AS TO CONDITIONS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 103-105, paras. 138-140 ; and FOR CASES, see DIGEST, Vol. 44, pp. 434-439, Nos. 2608-2656.

FOR THE TRADING WITH THE ENEMY ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1092.

Cases referred to :

(1) *Sifton* v. *Sifton,* [1938] A.C. 656 ; [1938] 3 All E.R. 435 ; Digest Supp. ; 107 L.J.P.C. 97 ; 159 L.T. 289.

*(2) *Re Sartoris's Estate, Sartoris* v. *Sartoris,* [1892] 1 Ch. 11 ; 4 Digest 168, *1568* ; 61 L.J.Ch. 1 ; 65 L.T. 544.

*(3) *Re Gourju, Starling* v. *Custodian of Enemy Property,* [1943] Ch. 24 ; [1942] 2 All E.R. 605 ; 112 L.J.Ch. 75 ; 168 L.T. 1.

*(4) *Re Hall, Public Trustee* v. *Montgomery,* [1944] Ch. 46 ; [1943] 2 All E.R. 753 ; 113 L.J.Ch. 76 ; 169 L.T. 387.

ADJOURNED SUMMONS to determine a question of construction arising under the will of the testatrix who died in 1937. The facts are set out in the judgment.

H. E. Salt for the plaintiffs.

Wilfrid Hunt for the first defendant, the annuitant.

G. G. Solomon for the second defendant, an executor of the residuary legatee.

H. O. Danckwerts for the third defendant, the Custodian of Enemy Property.

VAISEY, J. : The question which I have now to decide is whether an annuity of £52 bequeathed by cl. 4 of the will of the testatrix, Elizabeth Anne Harris, to the first defendant, Gertrude Frances Evans, has been forfeited by reason of a provision in the will to which I will in a moment refer. The annuity is bequeathed in plain terms, £52 a year during the life of the annuitant. The provision upon which the present question arises is in effect a provision that if the annuitant shall commit, permit or suffer any act, default or process whereby but for this present provision the annuity or some part thereof would or might have become vested in or payable to any other person or persons then such annuity shall immediately thereupon absolutely cease and determine as if the annuitant were dead. It is admitted that the annuity in question has in fact now become payable to the Custodian of Enemy Property because the annuitant was at the date of the will, has at all material times thereafter been, and is now, resident in France, and because, as a consequence of that, the provisions of the Trading with the Enemy Act, 1939, constitute her in the eye of the law and for the purposes of that Act, an enemy, and because, under the provisions of the Trading with the Enemy (Custodian) Order, 1939, and the giving of certain directions thereunder (which I need not particularly specify) periodical sums due in respect of the annuity are payable or will be payable, if the annuity has not been forfeited, to the Custodian.

This is a case of a defeasance clause in the form of a condition subsequent and it is very well settled by a long chain of authority, of which *Sifton* v. *Sifton* (1) is a good example, that such a defeasance clause must be clear and unambiguous in its terms and must be construed strictly in favour of the persons against whose interests it is alleged to operate. This case, in my judgment, must be carefully distinguished from such cases as *Re Sartoris* (2), and *Re Gourju's Will Trusts* (3), in both of which the relevant words were not found in a defeasance clause but in the actual limitation of the period during which the payment was to continue. In *Re Gourju's Will Trusts* (3) a similar question arose under the Trustee Act, 1925, s. 33, but the words there were very different because they included the happening of any event whereby the destination of the income was altered. Very near indeed to the present case is the recent decision of UTHWATT, J., in *Re Hall* (4), where the provision was to the effect that if the annuitant should alienate or charge his or her annuity or become bankrupt or do or suffer any act or thing whereby the annuity or some part thereof would or might but for that provision become vested in or payable to any other person the annuity should cease to be payable. UTHWATT, J., after pointing out that the fact that the annuitant was living in France resulted in a direction for the actual payment of the annuity to the Custodian, propounded the question as being whether it could be said in that case that the annuitant had done or suffered anything whereby the annuity had become forfeited with the result that it would not be payable to the Custodian. In giving his decision, UTHWATT, J., said, at p. 48 ([1943] 2 All E.R., at p. 754) :

> The condition is a condition subsequent, and the rule is that a condition subsequent must be construed strictly. Reading the clause as a whole, it seems to me that it is directed to the forfeiture of the annuity in the event of the annuitant personally doing certain classes of things, such as alienating or charging it, or permitting an act to be done whereby she is deprived of her annuity. It appears not to be directed to a case where the annuity is subject to an alienation which is not the result of the countess's own act. In my view, it cannot be said that she has done an act, as a result of which the annuity has become payable to the custodian. She was in France, the normal place for a French national, when her property became subject to the provisions of the Act, and I fail to see how the fact that she was there and remained there can be said to amount to the doing of an act of the kind which is contemplated by the clause. The question whether she has " suffered " anything is, perhaps, more open. The word " suffer " is capable of more meanings than one. I have come to the conclusion that it is proper to attribute to the word in this clause the meaning " permit." It is clear that the annuitant has not permitted anything to be done. Nothing has happened therefore, to bring this condition subsequent as to forfeiture into operation and the annuity is payable to the Custodian.

Turning now to the words of the present will, it will be remembered that in order to bring about a forfeiture the annuitant must have committed, permitted or suffered some act, default or process whereby the annuity is payable to someone else. It is not disputed that the annuity has become payable to the Custodian ; the problem seems to be to discover whether there is any act or any default or any process which has been committed or permitted or suffered by the annuitant. I am satisfied that she cannot be said to have committed any act : I am satisfied that she has not committed or permitted any default and that she has not suffered any default. My only hesitation was as to whether it could be said that she had suffered a process. The word " process " may or may not be a word of art and at one time I thought that the successive stages of the passing of the Act and the making of the order to which I have referred and the subsequent direction given under the order were a sequence of events which could properly be called a " process " and that the annuitant here could be said to have suffered a process in the sense that the process was one which affected her and which she had been obliged to endure. But, in my judgment, that is not the right meaning to attribute to the word "process." In STROUD'S JUDICIAL DICTIONARY, Vol. 3, p. 1564, under the heading "Process" there are quotations from various authorities and other references which satisfy me that the word "process" ought to be given a judicial meaning in a context such as we find here.

> "Process" is the doing of something in a proceeding in a civil or criminal court; and that which may be done without the aid of a court is not a "process." Therefore, a distraint . . . is not a "process," nor is it "an execution or other legal process" . . .

In my judgment, the word "process" here means a legal process of a rather limited kind. Nobody can suggest that there has been any process which resulted in the annuity becoming payable to the Custodian in the present case and, therefore, the question as to whether the annuitant suffered a process does not arise. I think that although the words are not the same as those in *Re Hall* (4) they are so very near to them that I should be very reluctant to distinguish this case from that and that it would be merely conducive to uncertainty and doubt if I were to draw so fine a distinction as would be necessary if I were not to follow in this case the decision of UTHWATT, J., in *Re Hall* (4). That case really seems to me to cover this one and the differences of language are, in my view, not significant.

I will, therefore, under cl. 1 of the originating summons declare that, on the true construction of the will and in the events which have happened, the annuity in question has not ceased or determined but is still payable, regard being had to the variations in amount brought about by the Finance Act, 1941, s. 25.

Declaration accordingly.

Solicitors: *R. J. Twyford & Co.* (for the plaintiffs and the second defendant, an executor of the residuary legatee); *A. & G. Tooth* (for the first defendant, the annuitant); *Treasury Solicitor* (for the third defendant, the custodian of Enemy Property).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

BEARD *v.* BEARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.). **April 17, 1945.**]

Divorce—Adultery—Condonation of adultery—Subsequent desertion but not for statutory period—"Matrimonial offence"—Duration of desertion insufficient to revive adultery.

The parties were married in 1929. In 1940 the petitioner husband, while serving abroad as a soldier, was taken prisoner. In 1943 the petitioner was repatriated and lived with his wife until Apr., 1944, so far as his army service permitted. His wife then sent him a letter enclosing a letter from the co-respondent which made it plain that she had committed adultery while the petitioner was a prisoner of war. Subsequently they met and she admitted the truth of the matters stated in the co-respondent's letter but the petitioner persuaded her to live with him again. The period of renewed cohabitation lasted for three weeks in Apr., 1944, at the end of which the wife refused to live with the petitioner any more and the parties had never lived together since. On Aug. 2, 1944, the petitioner filed a petition for divorce on the ground of his wife's adultery. The question for the determination of the court was whether the desertion subsisting for three months before the presentation of the petition was sufficient to revive the condoned adultery:—

HELD: a subsequent matrimonial offence did not revive a condoned matrimonial offence unless its existence constituted in itself a ground for a decree of divorce or judicial separation.

Ainley v. *Ainley* (2) *followed.*

Higgins v. *Higgins and Bannister* (1) *not followed.*

[**EDITORIAL NOTE.** It is again held, following the decision of BARNARD, J., in *Ainley* v. *Ainley* (2) that condoned adultery cannot be revived by desertion for a period insufficient to obtain a decree in the High Court. Although desertion is a matrimonial offence *per se*, HODSON, J., refuses to accept the deduction drawn by PILCHER, J., in *Higgins* v. *Higgins* (1) that on this matter the length of the desertion is immaterial.

It is argued that a court of summary jurisdiction can make an order tantamount to judicial separation on proof of desertion for any period, and that such desertion should be sufficient to revive condoned adultery in the High Court, but the argument from the Summary Jurisdiction Acts is rejected, chiefly on the ground that the summary jurisdiction is discretionary, while the duty of the High Court to pronounce a decree of separation or divorce on proof of desertion for 3 years is absolute.

As to Condonation and Revival of Offence, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679, 680, paras. 1004-1006; and for Cases, see DIGEST, Vol. 27, pp. A 345, 346, Nos. 3266-3276.]

Cases referred to:

*(1) *Higgins* v. *Higgins and Bannister*, [1943] P. 58; [1943] 2 All E.R. 86; 112 L.J.P. 55; 169 L.T. 45.

*(2) *Ainley* v. *Ainley*, [1945] 1 All E.R. 265; 172 L.T. 185.

(3) *Harrison* v. *Harrison*, unreported.

*(4) *Henderson* v. *Henderson*, [1944] A.C. 49; [1944] 1 All E.R. 44; 113 L.J.P. 1; B 170 L.T. 84.

(5) *Bertram* v. *Bertram*, [1944] P. 59; 113 L.J.P. 52; 171 L.T. 167.

(6) *Ridgway* v. *Ridgway* (1881), 29 W.R. 612; 27 Digest 338, *3174*.

(7) *Collins* v. *Collins* (1884), 9 App. Cas. 205; 27 Digest 346, *3272*.

(8) *Harriman* v. *Harriman*, [1909] P. 123; 27 Digest 321, *2995*; 78 L.J.P. 62; 100 L.T. 557.

(9) *Mackenzie* v. *Mackenzie*, [1940] P. 81; [1940] 1 All E.R. 256; Digest Supp.; 109 L.J.P. 9; 162 L.T. 228.

C *(10) *Jordan* v. *Jordan*, [1939] P. 239; [1939] 2 All E.R. 29; Digest Supp.; 108 L.J.P. 104; 160 L.T. 368.

(11) *Cohen* v. *Cohen*, [1940] A.C. 631; [1940] 2 All E.R. 331; Digest Supp.; 109 L.J.P. 53; 163 L.T. 183.

Petition by the husband for the dissolution of his marriage on the ground of his wife's adultery. The facts are fully set out in the judgment.

R. T. Barnard for the petitioner.

D *The Attorney-General* (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *E. Holroyd Pearce* for the King's Proctor.

Hodson, J.: The parties were married in 1929 and had three children. They lived together happily until the war when the husband, who was a territorial, joined his unit. He went abroad and in 1940 was taken prisoner. He remained in captivity until Oct., 1943, when he was repatriated and rejoined E his wife. Thereafter he lived with her so far as his army service permitted until Apr. 1944. He then got a letter from her enclosing a letter from the co-respondent. These two letters made it plain to him that she had been unfaithful while he was a prisoner of war. When the parties met, the wife admitted the truth of the matters stated in the co-respondent's letter but the petitioner persuaded her to live with him again, thereby condoning her adultery. This period of renewed cohabitation lasted for three weeks in Apr., 1944, at the end F of which the wife refused to live with the husband any more. Since that date the parties have never lived together and on Aug. 2, 1944, the husband presented a petition for divorce based on the adultery which his wife had confessed to him. In order to anticipate the defence of condonation, a plea of desertion as from the end of Apr., 1944, was included in the petition.

On these facts, having regard to the circumstances in which the admission G was made, I found that the wife had committed adultery. I further found that the adultery had been condoned and that the wife had deserted her husband as from the date pleaded. The question arises whether the desertion which had subsisted for three months before the presentation of the petition is sufficient to revive the condoned adultery. The identical question has arisen in other cases. In the first case, namely, *Higgins* v. *Higgins* (1), a decision of Pilcher, J., the question was answered in the affirmative. In the case of *Ainley* v. *Ainley* (2), H Barnard, J., answered the same question in the negative; and in the unreported case of *Harrison* v. *Harrison* (3), heard at the Birmingham Assizes, in Jan. and Feb., 1945, Wallington, J., followed the decision of Barnard, J.

In view of the importance of the question involved I invited the King's Proctor to argue and I have now had the advantage of hearing argument addressed to the court on behalf of the King's Proctor by the Attorney-General.

By the Matrimonial Causes Act, 1937, s. 4, it is provided, *inter alia*, that if the court is satisfied that the petitioner's case is proved and where the ground is adultery, that the petitioner has not condoned the adultery, the court shall pronounce a decree of divorce. As Viscount Simon, L.C., said in *Henderson* v. *Henderson* (4), at p. 54:

> . . . condonation is subject to one implied condition, . . . that, if the spouse who had been forgiven past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for divorce.

It is true that the Lord Chancellor was not purporting to give an exhaustive definition of matrimonial offences which would effect a revival of a condoned offence and it can hardly be affirmed that he laid down as a proposition of law that the reviving offence must itself be a ground for dissolution.

The view taken by Barnard, J., was, that the reviving offence must be at least a ground for judicial separation, thus giving judicial authority to the statement in Rayden on Divorce, 4th Edn., at p. 135, where it is stated that:

> . . . if a subsequent matrimonial offence which might itself have been the ground for a sentence of divorce or judicial separation be committed, the forgiveness is cancelled and the old cause of complaint is revived.

The jurisdiction in divorce is statutory and revival is not mentioned in the Matrimonial Causes Acts but operates by virtue of the Judicature Act, 1925, ss. 21, 32, by which it is provided in effect that where no special provision is contained in the Act or Rules, jurisdiction is to be exercised by the High Court as nearly as may be in the same manner as that in which it might have been exercised by the Ecclesiastical Courts.

Desertion was not one of the offences remedied by a decree of divorce *a mensa et thoro* in the Ecclesiastical Courts but was corrected by a decree of restitution of conjugal rights. It is only by assuming that the power of granting a divorce *a mensa et thoro* had been given to the High Court on the ground of desertion for three years or other defined period and that the Ecclesiastical Courts would have made use of the doctrine of revival on proof of the named offence that the High Court can apply the doctrine in desertion cases.

It is contended, nevertheless, that something less than a matrimonial offence as above defined may be sufficient. It is true that there are passages in some of the older authorities which suggest this but many are cases in which cruelty was the ground upon which relief was sought. To these cases different considerations apply, for without recourse to the doctrine of revival, it may be said that cruelty is usually cumulative in its effect and the last overt act may be of slight significance taken apart from the preceding history. As Scott, L.J., said in *Bertram* v. *Bertram* (5), at p. 60, "very slight fresh evidence is needed to show a resumption of the cruelty . . ."

There are cases where conduct short of adultery has been held to revive condoned adultery, such as *Ridgway* v. *Ridgway* (6), where solicitation of chastity was held to revive condoned adultery; but these cases have not been followed since the decision of the House of Lords in *Collins* v. *Collins* (7). This last decision, which established that the doctrine of revival formed no part of the law of Scotland, was given on the hearing of a Scottish appeal and, therefore, did not directly overrule any English decision. A number of English cases were, however, cited to the House and the opinions delivered in that case have undoubtedly influenced subsequent English decisions on the subject of revival.

The main argument before me was based partly on the effect of the Summary Jurisdiction (Married Women) Act, 1895, and other legislation following thereon and partly on the reasoning of Pilcher, J., in *Higgins* v. *Higgins* (1). I propose to deal first with the argument based on the Summary Jurisdiction (Married Women) Act, 1895. By sect. 4 of that Act a married women (but not a married man) who has been deserted can apply to a court of summary jurisdiction for various orders in her favour. Upon such an application the court may in its discretion make, amongst other orders, a provision that the applicant be no longer bound to cohabit with her husband; and here follow, in sect. 5 (*a*), the significant words, "which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty." No period of desertion is fixed by this statute and it is said that if the court of summary jurisdiction can make an order which is tantamount to a judicial separation on the ground of desertion, such desertion if proved in the High Court ought to revive condoned adultery. For the purpose of dealing with this argument I assume that an offence which is a ground for judicial separation in the High Court is sufficient to revive another condoned matrimonial offence even though not itself a ground for divorce.

It is to be observed first that a husband cannot obtain such relief in a court of summary jurisdiction whereas a wife can, so that the petitioner in this case has no ground for obtaining an order tantamount to a judicial separation in such a court. Secondly, the Summary Jurisdiction (Married Women) Act, 1895, contains no provisions corresponding to the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 21, 32, retaining the practice and procedure of the Ecclesiastical Courts. In the third place, if the argument based on the Summary Jurisdiction Acts were accepted as to desertion, it would be difficult to resist the same argument in respect of other matters which now enable a married woman to obtain a similar order. For example, under the Licensing Act, 1902, a married woman or married man can obtain an order tantamount to a judicial separation because of habitual drunkenness and under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a like order can be obtained because of cruelty to children. Neither of these are grounds for judicial separation or divorce in the High Court. For my part, if the offence of desertion for less than the statutory period were regarded as sufficient to revive a condoned offence, I should find it difficult to resist the argument that the other grounds in the various Acts mentioned were also sufficient.

In my opinion, however, the most important consideration is that whereas on proof of desertion for three years the High Court is bound to pronounce a decree either of judicial separation or divorce, provided certain conditions are fulfilled, yet the court of summary jurisdiction has a discretion in the matter. Indeed, the Court of Appeal has expressed the opinion in the case of *Harriman* v. *Harriman* (8), that where the ground of an application under the Summary Jurisdiction Act is desertion, a non-cohabitation clause, that is to say, an order amounting to a judicial separation, is an inappropriate remedy and should not be inserted in the order of the court.

This direction has been generally followed and strong language was used recently by MacKinnon, L.J., in the case of *MacKenzie* v. *MacKenzie* (9), when it was found that such an order had been made apparently *per incuriam*. It is true to say that the Lords Justices in the cases referred to were directing their minds to the injustice which a woman might suffer in being deprived of her right to divorce on the ground of desertion for the statutory period by the existence of an order which effectively prevented desertion running against her husband. But there is surely a fundamental objection to the granting of an application for such an order where the desertion is of short duration, for it prevents the husband from returning if he wishes, and so perpetuates a state of affairs which it is the policy of the law to avoid.

Thus this court is asked to say that it is bound to make a decree legally separating the spouses following on a short period of desertion, whereas the Court of Appeal has said that in the court of summary jurisdiction such an order is inappropriate.

The only difference in the two cases is that in the one there is presupposed an earlier condoned offence and in the other there is no other matrimonial offence.

If the argument addressed to me was acceded to, a deserter might have little or no opportunity for repentance, since an alert litigant might file a petition very promptly after having been deserted and it would be difficult, if the intention to desert were proved as, for example, in this case, to resist the finding of desertion as a fact, however short the absence of the spouses from one another. For these reasons I reject the argument based on the Summary Jurisdiction Acts.

The other argument is based on the decision in *Higgins* v. *Higgins* (1) of Pilcher, J., who based himself on some observations of Sir Boyd Merriman, P., in *Jordan* v. *Jordan* (10). In that case, in a passage which I have carefully read and with which I respectfully concur, the President enunciated the important proposition that desertion as a matrimonial offence can exist independently of its duration. I should say in passing that the difficulty with which the President was dealing arose by reason of a decision of the Court of Appeal by which he was constrained. That decision has now been expressly overruled by the House of Lords in *Cohen* v. *Cohen* (11), but nothing in the last-named decision weakens the authority of the passage in *Jordan* v. *Jordan* (10) to which I have referred. Pilcher, J., however, after adopting the view of the President, went on to say, at p. 60 :

> I am satisfied that desertion, independently of its duration, is such a matrimonial offence as will revive condoned adultery, although, in so far as divorce or judicial separation are concerned, no remedy lies unless the desertion has continued for the statutory period. A

It is with this step in the argument of the judge that I respectfully feel unable to concur, as I do not think it follows from the existence of a subsequent matrimonial offence that the effects of condonation can be destroyed unless that offence is a ground for a decree in the High Court. Condonation has been defined as the blotting out of the offence imputed so as to restore the offending party to the same position as he or she occupied before the offence was committed. B It appears to me to be consistent with principle and authority not to extend the grounds upon which the effect of condonation may be destroyed.

In my judgment this petition must be dismissed on the ground that the adultery has been condoned.

Petition dismissed.

Solicitors : *Mowll & Mowll* (for the petitioner) ; *The King's Proctor.*

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*] C

MANN *v.* MERRILL.

[Court of Appeal (MacKinnon, Lawrence and Morton, L.JJ.), **April 20, 1945.**]

Landlord and Tenant—Dwelling-house let together with land comprising less than D *2 acres—Additional adjoining land comprising over 3½ acres in extent let later—Original letting and subsequent letting to expire on the same date—Rateable value of house under £75—Claim for possession by landlord—" Land . . . let together with a dwelling-house "—Date of letting immaterial—Land comprising over 2 acres at time of action for possession—Extent of land let at time of claim for possession relevant—Rent and Mortgage Interest Restrictions Act,* 1939 (c. 71), *s.* 3 (1), (3). E

By a lease dated Feb. 1, 1938, the appellant let to the respondent for a term of seven years commencing on Dec. 25, 1937, a dwelling-house together with an orchard and some land, the whole comprising under 2 acres. Adjoining the land already let with the house was a field which the respondent required for the purpose of working a small holding. By an agreement, partly oral and partly in writing, this additional land, comprising over 3½ acres F in extent, was let by the appellant to the respondent on Mar. 25, 1939, for a term expiring on the same date as the lease on the house. In Sept., 1939, however, the Rent and Mortgage Interest Restrictions Act, 1939, came into operation and sect. 3 (1) of that Act extended the Rent Acts, 1920-1938, to a dwelling-house, the rateable value of which did not exceed £75 on Apr. 1, 1939. Sect. 3 (3) provided that : " . . . for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue G of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house . . . " On the expiry of the lease on Dec. 25, 1944, the respondent refused to quit and the appellant brought an action for possession. It was contended for the respondent that under the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and (3) he was protected because (i) the rateable value H of the house was under £75 ; (ii) the land let together with the house in 1938 was under 2 acres in extent. For the appellant it was contended that (i) the land let together with the house was agricultural land exceeding 2 acres in extent and, therefore, outside the 1939 Act ; (ii) that although the 3½ acres of land were let later, they were let together with the house :—

Held : the words " land . . . let together with a dwelling-house " as used in sect. 3 (3) of the 1939 Act did not refer to land let together with the dwelling-house at the same time and by the same instrument but to land let together with the dwelling-house at the time the claim for possession came before the court. Therefore, the dwelling-house was outside the scope of the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3).

[**EDITORIAL NOTE.** This is a new point arising out of the Rent Restriction Acts. The 1939 Act does not apply where land is let with a dwelling-house and, being agricultural land, exceeds 2 acres in extent. It is held that the material time is when the matter comes before the court, and the property is not within the protection of the Act if it then exceeds 2 acres, irrespective of the facts existing at the time of the original letting.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (1), (3), see HALSBURY'S STATUTES, Vol. 32, p. 973.]

APPEAL by the plaintiff from an order of His Honour JUDGE JENKINS, dated Mar. 7, 1945, and given at Swindon County Court. The facts are fully set out in the judgment of MACKINNON, L.J.

H. A. Hill for the appellant.

S. Cope Morgan for the respondent.

MACKINNON, L.J.: On Feb. 1, 1938, by a lease the plaintiff let to the defendant a little house called Calcutt, together with an orchard and other land, the whole comprising not quite two acres, for seven years from Dec. 25, 1937. In Mar., 1939, the defendant, who had apparently been working a small holding found that the holding was too small for his purpose, and he, therefore, arranged with the plaintiff that he should become tenant of a field adjoining the land already let to him, comprising a little over three and a half acres. At the time of the original letting, and at the time of the new letting, which took place on Mar. 25, 1939, there was no question arising out of the Rent Acts, for the whole premises were outside the then existing Acts. The arrangement for taking over the additional land was made informally, at first orally, and then by certain letters passing between the parties, but I am satisfied that the defendant became tenant of the additional land for a term expiring at the same date as that at which the lease of Calcutt expired. The result was that the defendant's interest in both lettings was to come to an end by lapse of time at Christmas, 1944, when the lease of Feb. 1, 1938, was to come to an end.

The plaintiff in this action seeks to recover possession on the ground that both lettings did come to an end at Christmas, 1944, and at common law she would be clearly entitled to have such possession. In Sept., 1939, however, the Rent and Mortgage Interest Restrictions Act, 1939, came into operation, and that Act, by sect. 3 (1) and (3), extended the Rent Acts to a dwelling-house where the rateable value of the house, elsewhere than in London, did not exceed £75 on the appropriate day, and when land was let together with it, unless (in effect) such land was agricultural land exceeding two acres in extent. As the rateable value of these premises is under £75, the defendant says that he need not quit, because he has the protection given to him by the Act of 1939. And he says that when the house was let to him in 1938, the land let together with it then was under two acres in extent.

The plaintiff answers this by relying on the latter part of sub-sect. (3) of sect. 3 of the Act. The relevant provisions of sub-sect. (3) are as follows:

> . . . and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house.

The plaintiff says that the land let together with the dwelling-house was agricultural land, (and that is not denied), and that that agricultural land exceeded two acres in extent, and, therefore, she comes within the saving part of the sub-section, with the result that the Rent Acts do not apply to the house. If the plaintiff is right, then she must be able to say that the three and a half acres of land which were let later than the date of letting of the house, were let together with the house.

The whole question is whether the words "land . . . let together with a dwelling-house" refer to land which was let with the dwelling-house at the same time and by the same instrument; or whether they refer, as is contended by the plaintiff, to land which is let together with the dwelling-house at the time the question comes before the court, with the result that the plaintiff can take advantage of the latter part of subsect. (3), and can validly claim that the Acts do not apply. The county court judge found that the first alternative was the correct one, and he, therefore, decided that the defendant was protected by the Rent Acts. I have come to a contrary conclusion. I do not think that the judge was right in reading into the words " let together with a dwelling-house " the meaning " let at the same time and by the same instrument together with a dwelling-house." What you have to do is to see what was the land let together with the dwelling-house at the time when the question comes before the court. Undoubtedly, at that time, by agreement between the parties, the dwelling-house was let to the defendant together with more than two acres of agricultural land. The result is that I think that the plaintiff is right, and that this appeal must be allowed.

Lawrence, L.J. : I agree with the conclusion arrived at by my Lord as to the construction to be placed on the relevant words of sect. 3 (3) of the Act of 1939. The county court judge took the view that the additional land, which was let later, could not be said to be let together with the house. In my opinion, he was wrong. He was also wrong in holding that the house was a protected house from the time of the first letting, and having erroneously found that, he approached the matter from the point of view that it could not have been intended by the Act that a landlord could get rid of the protection given by the Act merely by letting to the tenant additional agricultural land so as to make the total agricultural land, which had been let, more than two acres in extent. It is common ground that the house never was protected up to 1939.

Morton, L.J. : I agree. The county court judge was mistaken in thinking that the premises were protected by the Acts as from the time when the house was first let to the defendant. When the 1939 Act came into force the state of affairs was that the field of 3½ acres was held by the defendant as tenant together with the house. The state of affairs was exactly the same at the date when the landlord claimed possession. In considering whether land is or is not " let together with a dwelling-house " within sect. 3 (3) of the Act of 1939, I think the court must consider what is the state of affairs at the latter date, without regard to the question whether the original letting of the land was effected at the same time, or by the same document, as the original letting of the house.

Appeal allowed.

Solicitors : *Andrew, Purves, Sutton & Creery*, agents for *Elwell & Son*, Highworth, Wilts (for the appellant) ; *J. & P. J. F. Chapman Walker*, agents for *Lemon, Humphreys & Parker*, Swindon, Wilts.

[*Reported by* F. Guttman, Esq., *Barrister-at-law.*]

LEGON *v.* COUNT.

[Court of Appeal (MacKinnon, Lawrence and Morton, L.JJ.), **April 24, 1945.**]

County Courts—Jurisdiction—Action claiming unlimited damages—Request for leave to amend particulars of claim by adding " not exceeding £100 " *after claim for damages—Jurisdiction of judge to allow amendment—County Court Act,* 1934 (*c.* 53), *s.* 42 (1)—*Administration of Justice* (*Miscellaneous Provisions*) *Act,* 1938 (*c.* 63), *s.* 19 (1), *Sched. II—County Court Rules,* 1936-1941, *Ord.* 15, *r.* 6.

The plaintiff brought an action in the county court claiming damages or, alternatively, the protection of the Rent and Mortgage Interest Restriction Acts. The particulars of claim set out that the plaintiff was the tenant of a flat and that the defendant, the landlord, had ejected him ; but neither the plaint nor the particulars of claim specified the amount of damages claimed. The county court judge took the objection that he had no jurisdiction to hear the case because the amount of damages claimed had not been specified and might be beyond the jurisdiction of the county court. The plaintiff's solicitor asked for leave to amend the particulars of claim by adding after the claim for damages the words "not exceeding £100." The judge refused to allow the amendment on the ground that, as he had no jurisdiction to try a case claiming unlimited damages, he could not entertain the case at all and, therefore, he had no jurisdiction to order an amendment. The plaintiff was, therefore, non-suited. On appeal, the plaintiff contended that the amendment should have been allowed :—

Held : the county court judge had jurisdiction to allow the amendment and should, in the circumstances, have done so.

Upton v. *Farmer* (1) *followed.*

[**EDITORIAL NOTE.** This is a point of county court practice. Where neither the plaint nor the particulars of claim specified the amount of damages claimed the judge refused to allow an amendment containing the words "not exceeding £100." The Court of Appeal reverse this decision, following *Upton* v. *Farmer* (1). In that case the county court judge allowed the amendment, but it may be remarked that (*a*) the two judges of the Divisional court strongly disagreed as to whether there was power to amend and (*b*) the particulars there limited the claim to "not exceeding £100": it was the uncertainty of the amount on which the amendment was required. The court regards its decision here as supported by the provision in the County Courts Act, 1934, that where a claim exceeds £100 (now £200) the excess may be abandoned. Such abandonment, whenever it takes place, must be entered at the end of the particulars by the County Court Rules, Ord. 7, r. 1.

As to Power of County Court Judge to Amend, see HALSBURY, Hailsham Edn., Vol. 8, pp. 262-264, paras. 515-518 ; and for Cases, see DIGEST, Vol. 13, pp. 502, 503, Nos. 527-535, and Supplement, County Courts No. 534a.

As to Amendment of Excess, see HALSBURY, Hailsham Edn., Vol. 8, p. 202, para. 333 ; and for Cases, see DIGEST, Vol. 13, pp. 468, 469, Nos. 177-184.]

Case referred to :

*(1) *Upton* v. *Farmer* (1930), 142 L.T. 526 ; Digest Supp.

Appeal by the plaintiff from a decision of His Honour Judge Cave, K.C., given at Poole County Court, and dated Feb. 14, 1945. The facts are fully stated in the judgment of MacKinnon, L.J.

E. S. Fay for the appellant.

A. S. Diamond for the respondent.

MacKinnon, L.J. : This is an unfortunate case. It is an appeal from a decision of the judge sitting in the Poole County Court. The plaintiff entered his plaint, which said nothing more as to his cause of action than that his claim was for damages. He delivered particulars of claim, setting out that he was the tenant of a flat and that the defendant, the landlord, had ejected him and shut up the flat, and so forth. He claimed, alternatively, the protection of the Rent and Mortgage Interest Restrictions Acts. Again no amount of the damages he claimed was specified. When the case was called on, the judge took the objection to the plaintiff's solicitor that it was a claim for damages without specifying the amount, and might, therefore, be a claim for £1,000 damages, which would be beyond the jurisdiction of the county court. The solicitor asked for leave to put the particulars of his claim in order by the simple amendment of saying, after the claim for damages, "not exceeding £100." The judge refused to allow the amendment, holding that, as he had no jurisdiction to try a case claiming unlimited damages, he had no jurisdiction to entertain the case at all and, therefore, no jurisdiction to order an amendment. The plaintiff's solicitor then asked for an adjournment, which was also refused by the judge. It should be said that this action or statement by the judge was not taken or made on the invitation of the defendant's solicitor. We are told by the defendant's counsel here that the defendant would not have opposed the application for amendment and did not desire to do so. But the judge persisted in his refusal to entertain the case at all and nonsuited the plaintiff, with the result that the case was never heard at all. The plaintiff now appeals on the ground that the judge was wrong in refusing the simple amendment I have mentioned.

We have had a good deal of discussion as to the provisions of the County Courts Act, 1934, conferring jurisdiction on the court, and as to the County Court Rules. It is quite clear that it was technically an irregularity for the plaintiff to lodge his claim without specifying the amount : all the machinery of the county court contemplates that he should do so ; the fee for hearing and various other things are fixed upon the amount stated in the claim. The question is whether the judge was right in deciding that, no amount having been specified, he had no power to allow the amendment. I think he was wrong as to that. The matter has been discussed and decided in *Upton* v. *Farmer* (1). In that case the county court judge, in similar circumstances, had allowed an amendment, and on appeal it was heard by two Lords Justices sitting as a divisional court. They differed; Scrutton, L.J., held that there was power to amend; Slesser, L.J., thought there was not. According to the rule in such cases, the decision of the county court judge was affirmed. In my view, the opinion of Scrutton, L.J., in that case was the more correct one; and in this particular case I think the judge clearly had jurisdiction to allow this amendment and that, in the circumstances, he quite clearly ought to have done so. A

Incidentally, I may observe that the County Courts Act, 1934, s. 42 (1), (as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938), provides: B

> Where a plaintiff has a cause of action for more than two hundred pounds in which, if it were not for more than two hundred pounds, a county court would have jurisdiction, the plaintiff may abandon the excess, and thereupon a county court shall have jurisdiction to hear and determine the action.

By Ord. 15, r. 6, it is provided that abandonment may be made even during the opening of the case. That seems to show that an action which in appearance claims an amount beyond the jurisdiction of the county court is not necessarily or at all one which, merely on those facts, a judge must immediately dismiss without further consideration and without allowing any amendment or abandonment. I think the judge was wrong in this case and that the order of this court ought to be: C

> Appeal allowed; leave to amend the claim by adding the words "not exceeding £100" after the word "damages" [that is what is asked in the notice of appeal]. Order for a new trial before the judge of the Southampton County Court; costs of the appeal to this court and of the first hearing to abide the result of the new trial. D

I suggest that last provision because it was not the fault of the defendant's advocate that this point was taken below; and we have been told that he no doubt would have been agreeable to the amendment being made and to the real issue between the parties being tried. E

Lawrence, L.J.: I agree and have nothing to add.

Morton, L.J.: I agree, and I wish only to add this. It was intimated by counsel for the appellant that it might be open to him to contend that no specifying of the amount of damages claimed was necessary, by reason of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17 (2). However, he did not pursue that line of argument because he desired that leave to amend should be given. For my part, I have not considered that argument at all and I do not think it has been considered by any member of this court. F

MacKinnon, L.J.: Yes, I agree.

Appeal allowed.

Solicitors: *Peacock & Goddard*, agents for *Trevanion, Curtis & Ridley*, Bournemouth (for the appellant); *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the respondent). G

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

END OF VOLUME 1.